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REPORTERS

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Shri Brij Mohan Khanna, Advocate]

Rajasthan

Shri Manakmal Singhvi, Advocate.

Tripura

Shri Monoranjan Chaudhury, M.A., B.L.,
Advocate.

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of the State of Mysore — Mys. Gaz. 30-10-1969, Pt. IV-2 c (ii), p. 5132
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AIR 1970 Guj 1 A (FB)

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AIR 1970 All 51 A (FB)

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AIR 1970 Mad 25

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—S. 21 as amended by U. P. Civil Laws (Reforms and Amendment) Act, 1954 — U. P. Civil Laws (Reforms and Amendment) Act (24 of 1954), S. 3 — Suit instituted in 1934 and valued at less than Rs. 10,000 but more than Rs 5,000 — Decree and execution after commencement of Amending Act — Appeal against order in execution lies to District Judge and not to High Court — Civil P. C. (1908), S. 96 All 15 (C N 2) (FB)

Bengal Municipal Act (15 of 1932)

See under Municipalities

Bombay General Clauses Act (1 of 1904)

—S. 3(6) — Baroda not being part of Maharashtra, is not part of Maharashtra area — See Maharashtra Medical Practitioners Act (28 of 1961), S. 18 (2) (b) (ii) Bom 10 A (C N 3)

—S. 11 — When certain time is allowed for doing an act last day of time is included for performing that act — See Panchayats — Bombay Village Panchayats Act (3 of 1959), S. 15(1)

Bom 1 B (C N 1)

Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947)

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Bombay Sales Tax Act (3 of 1953)

See under Sales Tax

Bombay Tenancy and Agricultural Lands Act (67 of 1948)

See under Tenancy Laws

Bombay Tenancy and Agricultural Lands Rules (1956)

See under Tenancy Laws

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Bombay Village Panchayats Election Rules (1959)

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Cattle Trespass Act (1 of 1871)

—Ss. 10 and 20 — Mistake as to one's right to land or crop — Seizure of cattle trespassing — Seizure not theft — Owner of cattle has no right to use force to rescue cattle — His remedy is only under S. 20 — AIR 1963 Orissa 52, held to be no longer good law in view of AIR 1965 SC 926 Orissa 10 B (C N 5)

—S. 20 — Mistake as to one's right to land or crop — Seizure of cattle trespassing — Seizure not theft — Owner of cattle has no right to use force to rescue cattle — His remedy is only under S. 20 — AIR 1963 Orissa 52 held no longer good law in view of AIR 1965 SC 926 — See Cattle Trespass Act (1871), S. 10 Orissa 10 B (C N 5)

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—Pre — Interpretation of Statutes — Harmonious construction — Representation of the People Act (1951), S. 116-B — Section to be so construed as to harmonise with Ss. 90(2), 92(e) of the Act and O. 9, R. 9 of Civil P. C. — See Representation of the People Act (1951), S. 116-B All 1 D (C N 1) (FB)

—Pre. — Interpretation of Statutes — Principles of public policy or consideration of consequences of taking particular view — When may affect interpretation of statutes — See Evidence Act (1872), S. 105 All 51 A (C N 8) (FB)

—Pre. — Interpretation of Statutes — Provisions of Act clear and unambiguous — No recourse to extrinsic matter, even sources of codification, permissible — In interpreting S. 105 Evidence Act, such recourse may be had — See Evidence Act (1872), S. 105 All 51 A (C N 8) (FB)

—Preamble — Interpretation of Statutes and S. 9 — Dispute already pending before Civil Court — Court is not divested by S. 56(1) of Andhra Pradesh Act (26 of 1948) — See Tenancy Laws — Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 56(1)

Andh Pra 1 A (C N 1) (FB)

—Pre. — Interpretation of Statutes — Sub-section and proviso — Ambiguity in clause and proviso — Reference to rules under Act is permissible for ascertaining correct meaning — Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 88B(1)(b) and proviso — Word "trust" in Clause (b) and proviso is not confined to trust for educational purposes — It covers trusts for other purposes including one for public religious worship

Bom 23 A (C N 5)

—Pre. — Interpretation of Statutes — Two interpretations possible — That

Civil P. C. (contd.)

which helps in achieving object of regulation to be preferred — See Goa, Daman and Diu (Reconstruction of Banks) Regulation (2 of 1962), S. 5(1)

Goa 11 B (C N 3)

—Pre. — Interpretation of Statutes — English decisions, in pari materia with English Statutes — Value of — See Fatal Accidents Act (1855), S. 1-A

Mys 13 B (C N 6)

—Pre. — Interpretation of Statutes — Rule of construction — Words and Phrases — Words ejusdem generis — See Land Acquisition Act (1894), S. 17(2), Cl. (c) (Punj.) Punj 1 B (C N 1) (FB)

—Preamble — Maxims — Qui per alium facit per seipsum facere videtur. (He who does an act through another is deemed in law to do it himself) — See Criminal P. C. (1898), S. 417 (3)

SC 7 B (C N 3)

—Pre. — Maxims — Pro hac vice — See Tort — Master and Servant

Mys 13 G (C N 6)

—Pre. — Precedent — Privy Council decision — Reconsideration by Supreme Court — Stare decisis SC 42 B (C N 12)

—Pre. — Precedents — Decision of a three Judge Bench cannot be construed as overruling express opinion of a four Judge Bench of same Court — Per Satish Chandra, J. All 1 B (C N 1) (FB)

—Preamble — Precedents — Decision of Supreme Court — See Constitution of India, Art. 141 All 51 B (C N 8) (FB)

—Preamble — Precedents — Supreme Court decisions — Question neither raised nor discussed in Supreme Court judgment — Principle of binding nature cannot be deduced by implication — See Constitution of India Art. 141

Delhi 29 A (C N 6) (FB)

—S. 9 — Abolition of Estate — Issue of notification under S. 1 (4) of Andh. Pra. Act (26 of 1948) — Effect — Civil Court cannot be divested of its jurisdiction when it has already seized of jurisdiction to decide matters contemplated by S. 56 of the Act — See Tenancy Laws — Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (1948), S. 56(1) Andh Pra 1 B (C N 1) (FB)

—S. 9 — Suit to enforce right of specific performance obtained under terms of compromise decree — Maintainability — See Civil P. C. (1908), S. 47

Cal 34 (C N 5)

—S. 9 — Question as to whether person was in reality evacuee and that way his property evacuee property as contemplated under S. 2(d) and (f) of Administration of Evacuee Property Act cannot be agitated in Civil Court — See Administration of Evacuee Property Act (1950), S. 2 (d) and (f) Guj 12 A (C N 3)

—S. 9 — Jurisdiction of Civil Court — Implied exclusion not to be inferred — Question to be decided on allegations in

Civil P. C. (contd.)

plaint — Suit for two or more reliefs — One of them cognizable by Revenue Court — Jurisdiction of Civil Court not barred — AIR 1916 Lah 86 held impliedly overruled by AIR 1962 SC 547

J & K 2 (C N 2)

—S. 9 — Sovereign act of State — Postal service of Government of India is not a sovereign function of State — Union of India is liable for torts of servants of Postal Department — See Tort

Mys 13 A (C N 6)

—S. 9 — Opinion of State Government — Is justiciable if it can be shown that State Government never applied its mind to the matter or that its action is mala fide — See Land Acquisition Act (1894), S. 17(4) Punj 1 A (C N 1) (FB)

—S. 9 — See Land Acquisition Act (1894), S. 17(4) Punj 29 B (C N 6)

—Sec. 11 — Decree against manager — In order to operate as res judicata pleadings need not state that person is suing or being sued as a manager — It is sufficient if person is suing or being sued in the capacity as a manager — R. F. A. No. 164-C of 1963, D/- 17-12-1963 (Punj), Reversed SC 5 (C N 2)

—S. 11 — Res judicata — Suit under S. 183, U. P. Tenancy Act before the Assistant Collector decreed — Additional Commissioner in appeal holding that the revenue Court had no jurisdiction in the matter and dismissing suit — Suit filed before Civil Court — Civil Court returning plaint holding that it had no jurisdiction and the same was presented again before the Assistant Collector — Held, that the previous order by the Add. Commissioner that he had no jurisdiction in the matter could not bar the subsequent suit before the Assistant Collector — It was the latter decision of the Civil Court that operated as res judicata

All 26 C (C N 5) (FB)

—S. 11 and O. 21, Rr. 10 and 11 — Execution proceedings — Second application, for execution for recovery of amount accruing due after making of first application, is maintainable — Application filed earlier, not involving any dispute or any issue between decree-holder and judgment-debtor — Application summarily dismissed — Held subsequent application was not barred by res judicata

All 43 B (C N 7)

—S. 11 — Interlocutory orders — Correctness of, could be challenged in an appeal against whole case, inasmuch as the order affects the decision appealed against — See Civil P. C. (1908), S. 105

Cal 8 A (C N 2)

—S. 11 — Petition under Art. 32 of Constitution before Supreme Court — Petition dismissed in limine — Petitioner filing writ petition in High Court — Parties, subject-matter and ground of attack being same writ petition held barred

Civil P. C. (contd.)

by res judicata — See Constitution of India Art. 32 Cal 15 C (C N 4)

—S. 11 — Decisions on question of jurisdiction operate as res judicata, AIR 1941 Cal 493 & AIR 1929 All 132, Dissent. from Delhi 14 E (C N 3)

—Ss. 11 and 47 — Partition suit — Application for maintenance pending final decree — Order in — Principle of res judicata, held, would not apply — Order not one in execution proceedings

Orissa 4 B (C N 3)

—Ss. 13, 14 — Valid order of foreign Court granting custody of child — Order is to be respected by Indian Courts unless it is against interests of child

Ker 1 A (C N 1) (FB)

—S. 14 — Valid order of foreign Court is to be respected — See Civil P. C. (1908), S. 13

Ker 1 A (C N 1) (FB)

—S. 21 — Objection to jurisdiction on ground that defendant did not reside within court's jurisdiction nor did arise therein any part of cause of action — No prejudice shown — Truck in question seized by police from plaintiff's custody at D — Suit filed in Court at D — Held on facts pleaded and found, that the Court had jurisdiction to try it — Cause of action arose within its jurisdiction on the date when the truck was seized

Pat 7 B (C N 2)

—Ss. 47, 9, O. 23, R. 3, O. 21, R. 32 — Executability of decree — Right to specific performance obtained under terms of compromise decree — Suit to enforce right is maintainable and decrea passed therein valid — Court can, within period of limitation, convert suit into proceeding under Section 47

Cal 34 (C N 5)

—S. 47 — Executable decree — Decree entitling future maintenance of Rs. 20 per month with charge on property and also for recovery of arrears of maintenance — Execution — Decree is executable and plaintiff cannot be compelled to file another suit

Cal 37 (C N 6)

—S. 47 — Partition suit — Application for maintenance pending final decree — Order in — Order not one made under Section 47 — Decree-holder held not compelled to file appeal against it — See Civil P. C. (1908), S. 11

Orissa 4 B (C N 3)

—S. 80 — Suit against Government and others — Notice under Section 80 not given — Suit not maintainable against Government but can continue against others, AIR 1951 Nag 419 and AIR 1964 Pat 275 and AIR 1962 Raj 36, Ref.

Madh Pra 5 B (C N 2)

—S. 96 — Right of appeal — Nature of — Necessary conditions for exercise of appellate jurisdiction — See Constitution of India, Art. 226

SC 1 (C N 1)

—S. 96 — U. P. Civil Law (Reforms and Amendment) Act (24 of 1954), S. 3

Civil P. C. (contd.)

— Suit instituted in 1934 and valued at less than Rs. 10,000 but more than Rupees 5,000 — Decree and execution after commencement of Amending Act — Appeal against order in execution lies to District Judge and not to High Court — See Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 21 as amended by U. P. Civil Laws (Reforms and Amendment) Act, 1954

All 15 (C N 2)

—Ss. 100-101 — Second appeal — Competency — Appeal must involve substantial question of law — See Houses and Rents — Delhi Rent Control Act (59 of 1958), S. 39

Delhi 26 B (C N 5)

—Ss. 100-101 — Question of fact — Family arrangement — Pure question of fact — Lower Courts found that the family arrangement pleaded by plaintiff is not proved — No interference in second appeal

Mad 17 B (C N 8)

—Ss. 100, 101 — Question of law — Question whether disputed passage forms part of tenancy granted to a tenant, subject to right of other tenants or occupants of the premises — Question is one of law and open to review in second appeal

Mad 37 A (C N 13)

—Ss. 100-101 — Interpretation by appellate Court in assessment of damages by lower Court — See Tort — Damages

Mys 13 F (C N 6)

—Ss. 100 to 101 — Question of law — Vires of taxing provision — Not raised before Board of Revenue — Cannot be urged before High Court, as it does not arise out of judgment of Board — See Sales Tax — Rajasthan Sales Tax Act (1954), S. 15

Raj 1 B (C N 1)

—Ss. 105, 11 and O. 6, R. 17 — Interlocutory orders — Correctness of, could be challenged in an appeal against the whole cause

Cal 8 A (C N 2)

—S. 110 — Order of detention under Preventive Detention Act — Application under Section 491 of Criminal P. C. challenging order dismissed — Application for leave to appeal to Supreme Court on same points and further materials — Further materials, held, could not be considered for issue of a certificate of fitness under Art. 133 (1) (c) of the Constitution — See Constitution of India, Art. 133 (1) (c)

Cal 12 D (C N 3)

—S. 115 — Revisional jurisdiction is a part of the general appellate jurisdiction — Order under revision merges with order made in revision (1965) 67 Bom LR 690, Reversed; (1956) 58 Bom LR 344, Overruled — See Constitution of India, Article 226

SC 1 (C N 1)

—S. 115 — Rent Controller not being Civil Court subordinate to appellate jurisdiction of High Court, his decision is not open to revision

Mad 39 (C N 14)

—S. 115 — Interference in revision is to be made for advancing and not for

Civil P. C. (contd.)

defeating ends of justice—See Civil P. C. (1908), O. 9, R. 9

—S. 115 (c) — Lower Courts wrongly taking into consideration inadmissible document and rejecting unjustifiably relevant and admissible document — Courts, held, committed illegality and material irregularity in exercise of their jurisdiction — Revision petition, held, maintainable — Manipur 10 A (C N 3)

—S. 151 — If a statutory remedy is available for a particular relief, recourse cannot be had to the provisions of Section 151 — Manipur 7 C (C N 2)

—S. 152 — Correctional jurisdiction of Labour Court — See U. P. Industrial Disputes Act (28 of 1947), S. 6 (6)

—O. 1, R. 10 — Suit by co-owner for possession of property against trespasser — Other co-owners not impleaded — Suit is maintainable. AIR 1951 Pat 315, Overruled — SC 70 B (C N 17)

—O. 6, R. 2 —Averment in pleading that B discovered the wife and one N in room bolted from inside — Evidence of B that he opened the room's door locked from outside and discovered the wife and N in that room in embrace with one another, completely naked and committing sexual intercourse — Pleading silent about such evidence — Evidence must go down as cooked — Cal 38 G (C N 7)

—Order 6, Rules 4 and 5 and Order 10, Rule 2 — Recording of parties' statements for elucidation of doubtful points in pleadings contemplated by Indian Code not permissible under Portuguese Code — Defendant can clarify his defence only through pleading and in no other manner — Goa 11 D (C N 3)

—O. 6, R. 4 — Loss of pecuniary benefit due to death of deceased — To sustain action under Fatal Accidents Act plaintiff has to prove reasonable expectation of pecuniary advantage — Expectation of pecuniary advantage is mixed question of fact and law — See Fatal Accidents Act (1855), S. 1-A — Mys 13 C (C N 6)

—O. 6, R. 4 — Claims under Ss. 1-A and 2, Fatal Accidents Act 1855, are founded on distinct causes of action and must be separately averred in plaint — See Fatal Accidents Act (1855), S. 1-A — Mys 13 D (C N 6)

—O. 6, R. 5 — Elucidation of doubtful points in pleading — Defendant can clarify his defence only through pleading and in no other manner — See Civil P. C. (1908), O. 6, R. 4 — Goa 11 D (C N 3)

—O. 6, R. 17 — Litigation continuing for 22 years — Defendant applying in Supreme Court for amendment of written statement to raise a new contention — Held that amendment could not be allowed at such a late stage — SC 42 C (C N 12)

Civil P. C. (contd.)

—O. 6, R. 17 — Order refusing application for amendment on ground of limitation — Though the appeal could have been taken from that order, yet the correctness thereof could be challenged in appeal against the decree — See Civil P. C. (1908), S. 105

—O. 6, R. 17—Amendments in elucidation or amplification of plaint averments allowable. Original Decree in Suit No. 821 of 1960, D/- 7-2-1966 (Cal) Reversed — Cal 8 A (C N 2)

—O. 6, R. 17 — Object — Amendment of pleadings — Principles — Amendment of written statement introducing a plea that the plaint is defective for omission to sign it properly cannot be allowed — Manipur 1 (C N 1)

—O. 7, R. 11 (a) (d) — Memorandum of appeal against order rejecting plaint under Order 7, Rule 11 (a) and (d) — Court-fee payable is governed by Schedule 1, Article 1 of Court-fees Act. AIR 1968 AP 239 (FB), Dissented from — See Court-fees and Suits Valuations — Court-fees Act (1870), Sch. I, Art. 1 — Madh Pra 5 A (C N 2)

—O. 8-A, R. 1 (Madras) — Scope and applicability — Third party notice procedure applies even to suit on negotiable instruments. AIR 1956 Mad 155, Dissent. from — Mad 47 A (C N 17)

—O. 8-A, R. 1 (Madras) — Scope and object — Policy of rule is that defendant need not be driven to fresh suit to put indemnity into operation — Applicability of rule is not limited to claim of indemnity arising out of same transaction or simultaneous transaction — Mad 47 B (C N 17)

—O. 8-A, Rr. 1 and 3 (Madras) — Scope and applicability—Rule 3 does not limit scope of Rule 1 so as to make it applicable only to cases where suit claim is admitted — Mad 47 C (C N 17)

—O. 9 — Orders 9 and 17 of Civil P. C. are applicable to the trial of an election petition both under Section 90 (1) as well as Section 92 (e) of Representation of the People Act — AIR 1960 J & K 25, Dissented from; AIR 1964 All 181, Overruled — See Representation of the People Act (1951), S. 90 (1) & (3) — All 1 A (C N 1) (FB)

—O. 9, Rr. 9, 13, O. 17, Rr. 2, 3, S. 115 — Suit of P dismissed in default on 19-5-1961 under Order 17, Rule 3 — In appeal by P, appellate Court declared in its order dated 11-2-1963 that suit should be considered to have been dismissed under Order 17, Rule 2 and not under Order 17, Rule 3 and directed that P should be given opportunity to file application for setting aside that order — P filed application under Order 9, Rule 9 on 6-3-1963 before trial Court — Application was rejected as barred by limitation — Appeal before District Judge was

Civil P. C. (contd.)

however, allowed—On revision held that P's suit stood restored by order dated 11-2-1963 and must be decided on merits

Manipur 10 A (C N 3)

—O. 9, R. 13 — Dismissal of P's suit under O. 17, R. 3 — On appeal, P's suit was found to have been dismissed under O. 17, R. 2 and not under O. 17, R. 3 — Appellate Court directing that P should be given opportunity to file application for setting aside order — P's suit stood restored and must be decided on merits — See Civil P. C. (1908), O. 9, R. 9

Manipur 10 A (C N 3)

—O. 10, R. 2 — Recording of parties' statements for elucidation of doubtful points in pleading contemplated by Indian Code not permissible under Portuguese Code — See Civil P. C. (1908), O. 6, R. 4

Goa 11 D (C N 3)

—O. 12, R. 6 — Suit on basis of bills of exchange and promissory notes not in possession of plaintiff and deemed to be lost — Execution of instruments admitted by defendant — Non-production of instruments is of no consequence — Plaintiff can be granted relief — See Evidence Act (1872), S. 58

Goa 11 C (C N 3)

—O. 14, R. 1 — Framing of issues — Unsatisfactory nature of — Effect — Election petition — Charges of corrupt practice — Because of unsatisfactory nature of issues, whole trial held not vitiated

SC 61 C (C N 15)

—O. 16, R. 14 — Power under S. 21 (7), Maharashtra Municipalities Act (40 of 1965) is wider than that under O. 16, R. 14 — See Municipalities — Maharashtra Municipalities Act (40 of 1965), S. 21 (7)

SC 61 A (C N 15)

—O. 17 — Orders 9 and 17 are applicable to trial of election petition both under S. 90 (1) as well as S. 92 (e) of Representation of the People Act — AIR 1960 J & K 25, Diss. from; AIR 1964 All 181, Overruled — See Representation of the People Act (1951), S. 90 (1) & (3)

All 1 A (C N 1) (FB)

—O. 17, R. 2 — Dismissal of P's suit under O. 17, R. 3 — On appeal, P's suit was found to have been dismissed under O. 17, R. 2 and not under O. 17, R. 3 — P's suit stood restored and must be decided on merits — See Civil P. C. (1908), O. 9, R. 9

Manipur 10 A (C N 3)

—O. 17, R. 3 — Dismissal of P's suit under O. 17, R. 3 — On appeal, P's suit was found to have been dismissed under O. 17, R. 2 and not under O. 17, R. 3 — P's suit stood restored and must be decided on merits — See Civil P. C. (1908), O. 9, R. 9

Manipur 10 A (C N 3)

—O. 20, R. 4 — Decree for maintenance — Construction — Expression "date of partition" in appellate decree — Decree must be construed what partition means in Hindu Law

Orissa 4 A (C N 3)

Civil P. C. (contd.)

—O. 21, Rr. 10, 11 (2) and 89 (2) — Failure to claim interest accruing after filing of execution application — Decree-holder can file separate execution application for recovery of such interest — Original application need not be amended — Held on facts that decree-holder's right to claim further interest was not lost by waiver or relinquishment

All 43 A (C N 7)

—O. 21, R. 10 — Execution proceedings — Second application, for execution for recovery of amount accruing due after making of first application, is maintainable — See Civil P. C. (1908), S. 11

All 43 B (C N 7)

—O. 21, R. 11 — Execution proceedings — Second application, for execution for recovery of amount accruing due after making of first application, is maintainable — See Civil P. C. (1908), S. 11

All 43 B (C N 7)

—O. 21, R. 11 (2) — Failure to claim interest accruing after filing of execution application — Decree-holder can file separate execution application for recovery of such interest — Original application need not be amended — See Civil P. C. (1908), O. 21, R. 10

All 43 A (C N 7)

—O. 21, R. 29 — Expression "suit" — Means only suit and not appeal — AIR 1928 Cal 222, Dissented from

Manipur 14 A (C N 5)

—O. 21, R. 29 — Power to stay execution is only discretionary

Manipur 14 C (C N 5)

—O. 21, R. 32 — Right to specific performance obtained under terms of compromise decree — Suit to enforce right — Court can within period of limitation convert suit into proceeding under S. 47 — See Civil P. C. (1908), S. 47

Cal 34 (C N 5)

—O. 21, R. 58 — Banking Companies Act (1949), Ss. 45-B, 45-T — Objections to attachment of property — Executing Court is competent to investigate and decide upon objections — See Banking Companies Act (1949), S. 45-B

Raj 12 (C N 2)

—O. 21, R. 63 — Banking Companies Act (1949), Ss. 45-B, 45-T — Objections to attachment of property — Executing Court is competent to investigate and decide upon objections — See Banking Companies Act (1949), S. 45-B

Raj 12 (C N 2)

—O. 21, R. 89 (3) — Failure to claim interest accruing after filing of execution application — Decree-holder can file separate execution application for recovery of such interest — Original application need not be amended — See Civil P. C. (1908), O. 21, R. 10

All 43 A (C N 7)

—O. 22, Rr. 3, 4, 8, 11, 12; O. 43, Rr. 1, 2 — Applicability of O. 22, R. 12 to appeals against orders passed in execution

Civil P. C. (contd.)

proceedings — Death of party during pendency of such appeal — Substitution of heirs — Procedure under Rr. 3, 4 and 8 must be followed — AIR 1929 Pat 565 (FB), Dissented from

J & K 13 (C N 4)

—O. 22, R. 4 — Applicability of O. 22, R. 12 to appeals against orders passed in execution proceedings — Procedure under Rr. 3, 4 and 8 must be followed — AIR 1929 Pat 565 (FB), Dissented from — See Civil P. C. (1908), O. 22, R. 3

J & K 13 (C N 4)

—O. 22, R. 8 — Applicability of O. 22, R. 12 to appeals against orders passed in execution proceedings — Procedure under Rr. 3, 4 and 8 must be followed — AIR 1929 Pat 565 (FB), Dissented from — See Civil P. C. (1908), O. 22, R. 3

J & K 13 (C N 4)

—O. 22, R. 11 — Applicability of O. 22 to appeals against orders passed in execution proceedings — See Civil P. C. (1908), O. 22, R. 3 J & K 13 (C N 4)

—O. 22, R. 12 — Applicability to appeals against orders passed in execution proceedings — Procedure under Rr. 3, 4 and 8 must be followed — AIR 1929 Pat 565 (FB), Dissented from — See Civil P. C. (1908), O. 22, R. 3

J & K 13 (C N 4)

—O. 23, R. 3 — Right to specific performance obtained under terms of compromise decree — Suit to enforce right is maintainable and decree passed therein valid — See Civil P. C. (1908), S. 47

Cal 34 (C N 5)

—O. 37, R. 3 — Suit under O. 37 — Triable issues regarding jurisdiction and liability as partners — Issues raised not found to be sham — Unconditional leave to defend should be granted — See Ahmedabad Small Causes Court Rules, R. 39

Guj 32 A (C N 5)

—O. 37, R. 3 — Defence if bona fide — Court ought to decide judicially and not arbitrarily

Guj 32 B (C N 5)

—O. 37, R. 3 — Application for leave to defend — Nature of defence alone to be examined at that stage — Proof let in only when leave to defend is granted

Guj 32 C (C N 5)

—O. 39, R. 1 — Scope — Suit for specific performance of agreement to direct the vendor to apply for permission under Section 47 and then to execute a sale deed maintainable — Section 47 does not bar such a suit — See Tenancy Laws — A. P. (Telangana Area) Tenancy and Agricultural Lands Act (21 of 1961), Section 47

Andh Pra 19 A (C N 3)

—O. 39, R. 1 — Suit for permanent injunction restraining defendant from interfering with plaintiff's possession over certain land — Temporary injunction — Neither title of plaintiff to land nor its possession over land proved — Held, no

Civil P. C. (contd.)

case for issuing temporary injunction was made out

Manipur 7 D (C N 2)

—O. 41, R. 17 — Dismissal in default of appeal — Duty of Court — Duty of parties and their counsel stated — See Civil P. C. (1908), O. 41, R. 19

Delhi 26 A (C N 5)

—O. 41, Rr. 19 and 17 — Sufficient cause — Appeal put lower down on daily cause-list — Appellant seeing no possibility of his case being taken up on that date and leaving Court precincts — Dismissal in default — Duty of Court — Duty of parties and their counsel — Application for restoration — General principles stated

Delhi 26 A (C N 5)

—O. 43, R. 1 — Applicability of O. 22 to appeals against orders passed in execution proceedings — See Civil P. C. (1908), O. 22, R. 3

J & K 13 (C N 4)

—O. 43, R. 2 — Applicability of O. 22 to appeals against orders passed in execution proceedings — See Civil P. C. (1908), O. 22, R. 3

J & K 13 (C N 4)

CIVIL SERVICES

—Central Health Services Rules (1963)

—Rr. 7, 7-A (as amended in 1966 and 1967) — Provision for second selection under R. 7-A (1) (b) is not ultra vires the Constitution — Non-selection to post in selection grade is not removal or reduction in rank — Losing job on total abolition of post is also not removal from service

Delhi 1 (C N 1)

—R. 7-A (as amended in 1966 and 1967) — Provision for second selection under

R. 7-A (1) (b) is not ultra vires the Constitution — See Civil Services — Central Health Services Rules, 1963 (as amended in 1966 and 1967), R. 7

Delhi 1 (C N 1)

—Orissa Civil Services (Classification, Control and Appeal) Rules (1962)

—R. 15 (4) and (6) — Delinquent has right to know time and place of evidence to be led on behalf of employer — See Constitution of India, Art. 311 (2)

Orissa 1 (C N 1)

—Railway Establishment Code

—R. 2003 (6) — In absence of rule, period of probation cannot be extended — Petitioner, a probationer draftsman in clear vacancy for one year — On completion of his probation, he is deemed to have been confirmed — See Constitution of India, Art. 311 (2)

Assam 16 (C N 3)

—R. 2202, Cl. 13 — In absence of rule period of probation cannot be extended — Petitioner, a probationer — On completion of his probation he is deemed to have been confirmed — See Constitution of India, Art. 311 (2)

Assam 16 (C N 3)

—United Provinces Legislative Department Rules

—R. 7 — Recruitment to post of Superintendent by promotion — Considerations — "Grade" — Meaning of — Officials

Civil Services — U. P. Legislative Department Rules (contd.)

holding posts in same scale of pay as Upper Division Assistants are eligible — Appointment made after thorough scrutiny of representations — Court will not interfere SC 40 (C N 11)

Companies Act (1 of 1956)

—Ss 269 (1) and 637-A (as amended in 1960) — Permission under Section 637-A — Government has power to impose conditions Delhi 5 A (C N 2)

—S. 269 (1) — Order of Central Government upon application for permission to appoint a person as Managing Director imposing conditions under Section 269 (1) read with Section 637-A — Question of mala fide is not relevant — See Constitution of India, Article 226

Delhi 5 C (C N 2)

—Ss 269 (1) and 637-A — Company Law Board and Controller of Capital Issues — Questions arising for consideration by each are different

Delhi 5 D (C N 2)

—Ss. 269 (2) and 637-A — "Reappointment" of managing director means "re-appointment" for first time after Companies (Amendment) Act, 1960

Delhi 5 B (C N 2)

—S. 637-A — Permission under — Government has power to impose conditions — See Companies Act (1956), Section 269 (1)

Delhi 5 A (C N 2)

—S. 637-A — "Reappointment" of managing director means "reappointment" for first time after Companies (Amendment) Act, 1960 — See Companies Act (1956), Section 269 (2)

Delhi 5 B (C N 2)

—S. 637-A — Order of Central Government upon application for permission to appoint a person as Managing Director imposing conditions under Section 269 (1) read with S. 637-A — Question of mala fide is not relevant — See Constitution of India, Art. 226

Delhi 5 C (C N 2)

—S. 637-A — Company Law Board and controller of Capital Issues — Powers of — Distinction — See Companies Act (1956), S. 269 (1)

Delhi 5 D (C N 2)

Conflict of Laws

See Civil P. C. (1908), S. 13

Constitution of America, Sixth Amendment

—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of

Constitution of America, Sixth Amendment (contd.)

Counsel for his defence — See Evidence Act (1872), S. 133

USSC 15 B (C N 3)

Constitution of India

—Arts. 5 and 6 — 'Migration' can only be from a territory which is not India, into the territory of India — P's family originally residing in S now in East Pakistan — They came to N (India) in 1922 — Case held attracted Art. 5 and not Art. 6

Assam 14 (C N 2)

—Art. 6 — "Migration" can only be from a territory which is not India into the territory of India — See Constitution of India, Art. 5

Assam 14 (C N 2)

—Art. 13 (3) (a) — Executive instruction is law within Art. 13 (3) (a) — See Constitution of India, Art. 309

Assam 1 A (C N 1) (FB)

—Art. 14 — Scope — Plea of denial of equal treatment — Onus is on person setting up such plea

SC 21 B (C N 7)

—Arts. 14, 15 and 29 — Admission to Medical College — Reservation of seats — Categories (c) to (h) of R. 4 of College Prospectus — Reservations held were not violative of Articles SC 35 A (C N 10)

—Arts. 14 and 22 — American Case — Alien crewman with a temporary landing permit apprehending physical persecution on return to his country informing Immigration and Naturalisation Service that he would not return to his ship — District Director of Services revoking the permit and the District Court of Oregon holding that crewman was not entitled to a hearing before special inquiry Officer — Court of appeal holding that the ship having left, crewman was entitled to hearing before special inquiry Officer — On certiorari, U. S. Supreme Court reversed — Held, that an alien crewman whose temporary landing permit was properly revoked did not become entitled to a hearing before a special inquiry Officer merely because his deportation was not finally arranged or effected when his vessel left — Under these circumstances the Attorney General may provide for the crewman's request for political asylum to be heard by a District Director of the Immigration and Naturalization Service

USSC 1 (C N 1)

—Art. 14 — Government order under F. R. 56 prescribing compulsory retirement before age of superannuation and after specified period of service but without assigning any reason — It offends Art. 14 but not Art. 311 (2) — See Constitution of India Art. 311 (2)

Assam 1 B (C N 1) (FB)

—Art. 14 — Pleasure of Governor cannot be exercised so as to abridge funda-

Constitution of India (contd.)

mental right of employee — See Constitution of India Art. 310

Assam 1 C (C N 1) (FB)

—Art. 14 — Bombay Village Panchayat Election Rules (1959), R. 34 — Rule is not unreasonable — See Panchayats—Bombay Village Panchayats (Election) Rules (1959), R. 34 Bom 1 A (C N 1)

—Art. 14—Maharashtra Medical Practitioners Act (28 of 1961), Ss. 18 (2) (b) (ii) and 33—Both provisions violate Art. 14—See Maharashtra Medical Practitioners Act (28 of 1961), S. 18 (2) (b) (ii)

Bom 10 B (C N 3)

—Art. 14 — Income-tax Act (1922), S. 34 (3) 2nd proviso — Proviso is ultra vires as violative of Art. 14 of Constitution only so far as strangers who are not parties to the proceeding are concerned — As regards parties intimately connected with assessment proceedings provisions are not ultra vires

Bom 30 A (C N 6)

—Art. 14 — Central Health Services Rules (1963) (as amended in 1966 and 1967), R. 7-A (1) (b) — Rule is not ultra vires the Constitution — See Civil Services — Central Health Services Rules 1963 (as amended in 1966 and 1967) R. 7

Delhi 1 (C N 1)

—Art. 14 — Divorce Act (1869), Ss. 17, 18—Validity — No violation of Art. 14 on ground that it provides for reference to High Court to be heard by Bench of three judges, for confirmation of decree nisi for dissolution of marriage granted by District Court, whereas with regard to such cases arising under original civil jurisdiction of High Court, High Court itself exercises that jurisdiction as High Court — It is not an unreasonable differentiation — Further, if a particular petitioner requires a trial on original side of High Court, in a suitable case, he can approach to High Court by invoking provisions of S. 8, Divorce Act

Mad 12 B (C N 6) (SB)

—Art. 14 — S. 96 (2) of Mysore Village Panchayats and Local Boards Act (10 of 1959) is not discriminatory — See Panchayats — Mysore Village Panchayats and Local Boards Act (10 of 1959), S. 96 (2)

Mys 7 (C N 3)

—Arts. 14 and 16 — Expression "matters relating to employment or appointment to any office" in Art. 16 includes matter of promotion.

Pat 25 B (C N 6)

—Arts. 14, 16, 309 — Tripura Employees' (Revision of Pay and Allowances) Rules, 1963 Sch. I, Serial No. 7 — Selection of Assistants on seniority-cum-merit basis to selection grade, after qualifying examination — Rules not laying down principles of selection — Selection made on basis of executive instructions — Not violative of Arts. 14 and 16 — (Tripura

Constitution of India (contd.)

Employees' (Revision of Pay and Allowances) Rules, 1963, Sch. I, Serial No. 7) Tripura 10 A (C N 2)

—Art. 15 — Admission to Medical College — Reservation of seats — Reservations held were not violative of Article — See Constitution of India, Art. 14

SC 35 A (C N 10)

—Art. 16 — Expression "matters relating to employment or appointment to any office" in Art. 16 includes matter of promotion — See Constitution of India Art. 14

Pat 25 B (C N 6)

—Art. 16 — Tripura Employees' (Revision of Pay and Allowances) Rules, 1963 Sch. I, Serial No. 7 — Selection of Assistants on seniority-cum-merit basis to selection grade, after qualifying examination — Rules not laying down principles of selection — Selection made on basis of executive instructions — Not violative of Arts. 14 and 16 — See Constitution of India, Art. 14

Tripura 10 (C N 2)

—Art. 19 (1) (f) and 19 (5) — Right of a religious denomination to acquire and hold, dispose of property is guaranteed by Art. 19 (1) (f)—See Constitution of India Art. 26 (c)

Bom 23 D (C N 5)

—Art. 19 (1) (e) — Custody of minor child — Best interest of child is sole deciding factor — Art. 19 (1) (e) does not abrogate Court's jurisdiction in this respect — See Constitution of India Art. 226

Ker 1 B (C N 1) (FB)

—Art. 20 — Waiver of right under — Cannot be presumed from silent record—See Evidence Act (1872), S. 24

USSC 10 (C N 2)

—Art. 21 — Waiver of rights under — Cannot be presumed from silent record—See Evidence Act (1872), S. 24

USSC 10 (C N 2)

—Art. 21 — In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of Counsel for his defence — See Evidence Act (1872), S. 133

USSC 15 B (C N 3)

—Art. 21 — Custody of minor child—Best interest of child is sole deciding factor — Art. 21 does not abrogate Court's jurisdiction in this respect — See Constitution of India, Art. 226

Ker 1 B (C N 1) (FB)

—Art. 22 — American case — Alien crewman with a temporary landing permit apprehending physical persecution on return to his country informing Immigra-

Constitution of India (contd.)

tion and Naturalisation Service that he would not return to his ship — District Director of services revoking the permit and the District Court of Oregon holding that crewman was not entitled to a hearing before special inquiry Officer — Court of appeal holding that the ship having left, crewman was entitled to hearing before special inquiry Officer — On certiorari, U. S. Supreme Court reversed — Held, that an alien crewman whose temporary landing permit was properly revoked did not become entitled to a hearing before a special inquiry Officer merely because his deportation was not finally arranged or effected when his vessel left — Under these circumstances the Attorney General could provide for the crewman's request for political asylum to be heard by a District Director of the Immigration and Naturalization Service — See Constitution of India, Art. 14

USSC 1 (C N 1)

—Art. 22 — Dealing in rice and movement thereof without licence — Accused charge-sheeted before a Magistrate — Accused discharged at the request of Police who said that he was already detained under the Act — Order of detention held, was not mala fide — See Public Safety — Preventive Detention Act (1950), S. 3 (2)

Cal 12 C (C N 3)

—Arts. 25, 26 — Scope — Bombay Tenancy and Agricultural Lands Act (67 of 1948), Ss. 32 to 32R — Sections do not fall within clause (2) (a) of Art. 25 — There being no conflict between Art. 26 (c) and Art. 25 (2), there is no question of one being subordinate to other

Bom 23 C (C N 5)

—Art. 25 — Order granting custody of children to mother does not contravene Art. 25 — See Constitution of India Art. 226

Ker 1 B (C N 1) (FB)

—Art. 26 — There being no conflict between Art. 28 (c) and Art. 25 (2), there is no question of one being subordinate to other — See Constitution of India Art. 25

Bom 23 C (C N 5)

—Arts. 26 (c), 19 (1) (f), 19 (5) — Scope — Bombay Tenancy and Agricultural Lands Act (67 of 1948), Ss. 32 to 32R, 38B (1) Proviso — Sections do not violate Art. 26 (c)

Bom 23 D (C N 5)

—Art. 29 — Admission to Medical College — Reservation of seats — Reservations held were not violative of Article — See Constitution of India, Art. 14

SC 35 A (C N 10)

—Art. 29 — Maulana Azad Medical College Delhi Prospectus, R. 4 — Reservation of seats for certain categories — Nomination by Central Government — If some reserved seats fall vacant due to non-compliance with rules, Government cannot be compelled to release these seats

Constitution of India (contd.)

to general pool — Civ. Writ Petn. No 817 of 1968, D/- 3-12-1968 (Delhi), Reversed

SC 35 B (C N 10)

—Art. 31 — Metal Corporation of India (Acquisition of Undertaking) Act (1966), Pre. — Acquisition of company's smelters, other plant and machinery held for public purpose — See Metal Corporation of India, (Acquisition of Undertaking) Act (1966), Preamble

Cal 15 A (C N 4)

—Art. 31 — Metal Corporation of India (Acquisition of Undertaking) Act (1966) was not inspired by any improper or ulterior motive — See Metal Corporation of India (Acquisition of Undertaking) Act (1966), Preamble

Cal 15 B (C N 4)

—Art. 31 — Acquisition of mining company — Compensation to include value of minerals lying underground — See Metal Corporation of India (Acquisition of Undertaking) Act (1966), S. 11

Cal 15 F (C N 4)

—Art. 31 — Metal Corporation of India (Acquisition of Undertaking) Act (1966), S. 4 (1), Pre. — "Know how" of a mining company is not a saleable commodity — Absence of provision in Act for payment of compensation for "know how" — Act cannot be struck down on this ground — See Metal Corporation of India (Acquisition of Undertaking) Act (1966), S. 4 (1)

Cal 15 H (C N 4)

—Art. 31 (2) — Electricity Act (1910), S. 3 (2) (e) (as amended by U. P. Act 30 of 1961) — Grant of licence under Act to a company for certain area — Right of State to authorise supply of electrical energy to consumer through State Electricity Board in same area — There is no infringement of Article 31 (2)

SC 21 D (C N 7)

—Art. 31 (2) (as amended by the Constitution 4th Amendment Act) — Expropriation of property — Act fixing compensation or laying down principles for its computation — Compensation fixed on principles laid down not justiciable — Principles may be attacked as being irrelevant, AIR 1967 SC 637 and AIR 1954 SC 170 and AIR 1965 SC 190 held overruled by AIR 1969 SC 634, Observations in AIR 1965 SC 1017, Dissented from in AIR 1969 SC 634

Cal 15 D (C N 4)

—Art. 31 (2) — Acquisition statute fixing compensation — Absence of provision to pay interest does not offend article — Act not ultra vires on that ground

Cal 15 J (C N 4)

—Art. 31 (2) — Expropriation without any compensation — Plea to be substantial by material regarding value of assets.

Cal 15 K (C N 4)

—Arts. 32, 226 and 31 (2) — Petition for Rule nisi before Supreme Court under

Constitution of India (contd.)

Art. 32 — Petition dismissed in limine—
Aggrieved party filing writ petition in
High Court — Parties, subject matter and
ground of attack being same — Writ peti-
tion, held, barred by res judicata—Fact
that Supreme Court's order dismissing the
petition was not a speaking one held, not
material Cal 15 C (C N 4)

—Arts. 32 and 226 — Every Adminis-
trative Officer exercising quasi-judicial
functions to make speaking orders not-
withstanding that he is not a tribunal
within the meaning of Arts. 136 and 227
—AIR 1966 Guj 175 and Spl. Civil Appln.
No. 638 of 1965, D/- 7-9-1965 (Guj) held
Overruled by AIR 1967 SC 1606

Guj 1 A (C N 1) (FB)

—Art. 32 — Quasi-judicial order —
Elements of, stated — See Constitution of
India, Art. 226

Guj 1 B (C N 1) (FB)

—Art. 39 — Arts. 39, 41 and 47 do not
assist in establishing the case that the
medical practitioner is a Civil Post under
the Government — See Constitution of
India, Art. 311 Cal 1 (C N 1)

—Art. 41 — Arts. 39, 41 and 47 do not
assist in establishing the case that the
medical practitioner is a Civil Post under
the Government — See Constitution of
India, Art. 311 Cal 1 (C N 1)

—Art. 47 — Arts. 39, 41 and 47 do not
assist in establishing the case that the
medical practitioner is a civil post under
the Government — See Constitution of
India, Art. 311 Cal 1 (C N 1)

—Art. 51 — Goa, Daman and Diu (Bank
Reconstruction) Regulation (2 of 1962), is
valid — See Goa, Daman and Diu (Banks
Reconstruction) Regulation (2 of 1962),
Pre. Goa 11 A (C N 3)

—Art. 133 — Admission to Medical
College — Reservation of seats for some
categories — Contention that nomina-
tions were illegal as candidates who had
been nominated had not applied in time
— Held, that the contention could not be
entertained on two grounds, namely, that
it was not raised before the High Court
and that the petitioners did not compete
for the reserved seats and had no locus
standi in the matter of nomination to
such seats SC 35 C (C N 10)

—Art. 133(1)(b) — Loss which may
occur in future is not contemplated by
clause (b) — Election to Legislative As-
sembly declared void by High Court in
appeal — Certificate on ground of loss of
future emoluments cannot be granted
Madh Pra 7 A (C N 3)

—Art. 133(1)(c) — Order of detention
under Preventive Detention Act — Appli-
cation under S. 491 of Criminal P. C.
challenging order dismissed — Appli-
cation for leave to appeal to Supreme
Court on same points and further mate-
rials — Further materials, held, could not

Constitution of India (contd.)

be considered for issue of a certificate of
fitness under Art. 133(1)(c)

Cal 12 D (C N 3)

—Art. 133(1)(c) — Grant of certificate
under Clause (c) is discretionary — Prin-
ciples stated Madh Pra 7 B (C N 3)

—Art. 136 — Findings recorded by
High Court on appeal against conviction
based on adequate evidence and not
shown to be perverse — Supreme Court
on appeal by special leave refused to in-
terfere with findings SC 27 A (C N 8)

—Art. 136 — Supreme Court appeals
— Practice — Normally Supreme Court
does not re-appraise evidence unless the
findings are perverse or are vitiated by
any error of law or there is a grave mis-
carriage of justice SC 45 G (C N 13)

—Art. 141 — In face of Supreme Court
decision, it is not necessary to make
comments on English decisions — (Civil
P. C. (1908), Preamble — Precedents)

All 51 B (C N 8) (FB)

—Art. 141 — Question neither raised
nor discussed in Supreme Court judg-
ment — Principle of binding nature can-
not be deduced by implication

Delhi 29 A (C N 6) (FB)

—Arts. 162, 166, 309 and 311 — Right
to promotion in a cadre — Creation of
separate cadre is essential

Pat 25 A (C N 6)

—Art. 166 — Right of promotion in a
cadre — Creation of separate cadre is
essential — See Constitution of India,
Art. 162 Pat 25 A (C N 6)

—Art. 170 — Position of member of
Legislative Council is different from that
of member of Assembly — See Pan-
chayats — Mysore Village Panchayats and
Local Boards Act (10 of 1959), S. 96 (2)
Mys 7 (C N 3)

—Art. 171 — Position of member of
Legislative Council is different from that
of member of Assembly — See Pan-
chayats — Mysore Village Panchayats and
Local Boards Act (10 of 1959), S. 96 (2)
Mys 7 (C N 3)

—Arts. 226 and 227 — Dismissal by
High Court of revision against appellate
order under S. 29 of Bombay Act 57 of
1947 — Order merges with order made
in revision — It cannot thereafter be
challenged under Arts. 226, 227 — (1965)
67 Bom LR 690, Reversed; (1956) 58 Bom
LR 344, Overruled SC 1 (C N 1)

—Art. 226 — Administrative order —
Electricity Act (1910), S. 3(2)(e) (as
amended by U. P. Act 30 of 1961) —
Supply of energy to consumers within
area of licensee — Exercise of power
under Section — Satisfaction of Govern-
ment that supply is necessary in public
interest is in appropriate cases not ex-
cluded from judicial review — S. A. No.

Constitution of India (contd.)

- 317 of 1965, D/- 18-3-1968 (All). Reversed
SC 21 C (C N 7)
- Art. 226 — Appointment in promotion post made after thorough scrutiny of representations — Court will not interfere — See Civil Services — United Provinces Legislative Department Rules R. 7 SC 40 (C N 11)
- Arts. 226 and 227 — Jurisdiction and powers under — Exercise of — Maharashtra Municipalities Act (40 of 1965), S. 21(1) — Limitation for filing election petition — Order allowing petition — If time was counted from first publication, petition was beyond time — This point not raised by appellant before trial court — No error apparent on face of record before High Court — Jurisdiction under Article 226 could not have been exercised by issue of writ of certiorari — Nor could High Court have set aside order of trial court under Article 227 SC 61 B (C N 15)
- Arts. 226 and 227 — Power of High Court under — Appreciation of evidence — It does not act as court of appeal SC 61 D (C N 15)
- Art. 226 — Fair trial — Infraction of constitutional right — Trial, when vitiated — USSC 15 A (C N 3)
- Art. 226 — Error apparent on face of record — Limitation Act (1908), S. 14 — Findings of Court about due diligence and good faith based on evidence — No illegality committed — Question of application of S. 14 held could not be subject-matter of writ petition — Held, on facts that the respondent had succeeded in making out a case for being given benefit of S. 14 of the Limitation Act All 26 B (C N 5) (FB)
- Art. 226 — Principles of natural justice — Party forced to submit to arbitration of person who is biased against it — It is denial of natural justice — See Arbitration Act (1940), S. 20 All 31 E (C N 6)
- Art. 226 — Mandamus — Can be issued to enforce right under executive instruction — See Constitution of India, Art. 309 Assam 1 A (C N 1) (FB)
- Art. 226 — Acquisition of undertaking for purpose of development and exploitation of mines — Decision of Central Government on facts held not inspired by any improper or ulterior motive — See Metal Corporation of India (Acquisition of Undertaking) Act (1966), Preamble Cal 15 B (C N 4)
- Art. 226 — Petition under Art. 32 before Supreme Court — Petition dismissed in limine — Petitioner filing writ petition in High Court — Parties, subject-matter and ground of attack being same — Writ petition held barred by res judi-

Constitution of India (contd.)

- cata — See Constitution of India, Art. 32 Cal 15 C (C N 4)
- Art. 226 — Laches — Court to be cautious before rejecting petition Cal 15 E (C N 4)
- Art. 226 — Order of Central Government upon application for permission to appoint a person as Managing Director of Company having necessary power to impose, imposing conditions under Section 269(1) read with Section 637-A, Companies Act — Question of mala fide is not very relevant — (Companies Act (1956), Ss 269(1), 637-A) Delhi 5 C (C N 2)
- Art. 226 — Order of Central Government — Allegations of mala fide against some official — Allegations cannot be heard unless those persons were made parties to the petition and thus given opportunity to rebut those allegations Delhi 5 E (C N 2)
- Art. 226 — Conviction and sentence before court martial — Habeas Corpus petition — Court need not in every case call for the record to examine legality of conviction — Proceedings, however, not entirely immune from court's scrutiny — Writ not issued for examining mere errors of procedure — Provision under R 15 of the Air, Force Rules, one of procedure — Non-compliance not affecting jurisdiction will not vitiate trial and ultimate conviction — Prayer disallowed Delhi 29 B (C N 6) (FB)
- Art. 226 — Habeas Corpus — Petition may be by a person other than the prisoner Delhi 29 C (C N 6) (FB)
- Art. 226 — Certiorari — Petition if can be moved by person not directly affected or aggrieved by order (Quaere) Delhi 29 E (C N 6) (FB)
- Art. 226 — Administrative orders — Every Administrative Officer exercising quasi-judicial functions to make speaking orders notwithstanding that he is not a tribunal within the meaning of Arts. 136 and 227 — AIR 1966 Guj 175 and Spl Civil Appln. No. 638 of 1965, D/- 7-9-1965 (Guj) held overruled by AIR 1967 SC 1606 — See Constitution of India, Art. 32 Guj 1 A (C N 1) (FB)
- Arts. 226 and 32 — Quasi-judicial order — Elements of, stated Guj 1 B (C N 1) (FB)
- Arts. 226, 19(1)(e), 21, 25 — Habeas Corpus — Custody of minor child — Best interests of child is sole deciding factor in granting custody — Parens patriae jurisdiction — Nature of — Art. 19(1)(e) or Art. 21 does not abrogate jurisdiction of Court in this respect Ker 1 B (C N 1) (FB)
- Art. 226 — Writ proceedings — Plea that notice under Section 147, I. T. Act is barred by limitation — Cannot be permitted to be raised — Jurisdiction con-

Constitution of India (contd.)

ferred on High Court under Art. 226 is not intended to supersede jurisdiction and authority of Income Tax Officer to deal with merits of contentions that the assessee may raise before them — Objections relating to notice well within jurisdiction and competence of Income Tax Officer to decide, can and ought to be considered by him — AIR 1968 Ker 182, Reversed

Ker 14 (C N 2)

—Art. 226 — Award of arbitrator appointed under S. 10A of Industrial Disputes Act — Award vitiated by errors apparent on face of record — Certiorari will issue for quashing award

Madh Pra 16 A (C N 5)

—Art. 226 — Administrative and quasi judicial order — Distinction — See Rice Milling Industry (Regulation) Act (1958), S. 5(4)

Mad 34 A (C N 12)

—Art. 226 — Certiorari — Administrative orders — Power of High Court to interfere

Mad 34 B (C N 12)

—Arts. 226 and 227 — Error apparent on face of record—Construction of terms of contract — Contract for fishery rights in Government property — Two views possible — There is no error apparent which can be corrected by the High Court — Findings of fact cannot be interfered with

Manipur 16 A (C N 6)

—Arts. 226 and 227 — Other remedy open — Controversy as to terms of a contract — Contract as to fishery rights — Proper remedy is civil suit

Manipur 16 D (C N 6)

—Arts. 226 and 227 — Hardship to a litigant is no ground to refuse relief

Manipur 16 E (C N 6)

—Arts. 226 and 227 — Joint petition — Maintainability — Person not participating in proceedings which are being impugned cannot join as petitioner

Manipur 16 F (C N 6)

—Arts. 226 and 227 — Discretion of High Court — Delay and laches — Order of Panchayat directing respondent to demolish unauthorised construction passed under S. 53(2), Mysore Village Panchayats and Local Boards Act after unexplained delay of two years and without applying mind to the question whether demolition was necessary for promotion of public health or prevention of damage to life or property — On appeal Assistant Commissioner setting aside order — Divisional Commissioner wrongly dismissing revision as not maintainable — Writ petition to quash both the orders filed after unexplained delay of one year — Held that in the circumstances High Court would refuse to interfere especially when the order passed by Assistant Commissioner was unexceptionable — (Panchayats — Mysore Village Panchayats and Local Boards Act (10 of 1959), S. 53(2)(b))

Mys 10 B (C N 4)

Constitution of India (contd.)

—Art. 226 — Another remedy available — Ordinarily High Court will not interfere — In special case interference is proper

Orissa 9 C (C N 4)

—Arts. 226 and 227 — Other remedy open — Remedy of review cannot be a ground to oust the jurisdiction of High Court

Orissa 15 C (C N 7)

—Art. 226 — Quasi-judicial order — Speaking order — See Municipalities — Punjab Municipal Act (3 of 1911), S. 16(1)(e)

Punj 9 (C N 2) (FB)

—Art. 226 — "Having opposed the grant of permit" — Grant of temporary permit — Failure to oppose for want of notice — Right to appeal, not open — See Motor Vehicles Act (1939), S. 64(f)

Punj 18 (C N 3) (FB)

—Art. 226 — Matter not pleaded in writ petition — Question need not be decided, though a plea raised in the affidavit-in-rejoinder for the first time may also be considered

Tripura 10 B (C N 2)

—Art. 227 — Dismissal of revision against order, by High Court — Order merges with orders made in revision — It cannot thereafter be challenged under Arts. 226, 227 — (1965) 67 Bom LR 690 Reversed; (1956) 58 Bom LR 344 Overruled — See Constitution of India, Art. 226

SC 1 (C N 1)

—Art. 227 — Power of superintendence under — Power is confined to seeing that trial court had not transgressed limits imposed by Act — See Constitution of India, Art. 226

SC 61 B (C N 15)

—Art. 227 — Powers of High Court — Appreciation of evidence — It does not act as appellate Court — See Constitution of India, Art. 226

SC 61 D (C N 15)

—Art. 227 — Error apparent on face of record — Construction of terms of contract — Contract for fishery rights in Government property — Two views possible — There is no error apparent which can be corrected by the High Court — Findings of fact cannot be interfered with — See Constitution of India, Art. 226

Manipur 16 A (C N 6)

—Art. 227 — Other remedy open — Controversy as to terms of a contract — Contract as to fishery rights — Proper remedy is civil suit — See Constitution of India, Art. 226

Manipur 16 D (C N 6)

—Art. 227 — Hardship to a litigant is no ground to refuse relief — See Constitution of India, Art. 226

Manipur 16 E (C N 6)

—Art. 227 — Joint petition — Maintainability — Person not participating in proceedings which are being impugned cannot join as petitioner — See Constitution of India, Art. 226

Manipur 16 F (C N 6)

—Art. 227 — Order under S. 53(2)(b), Mysore Village Panchayats and Local

Constitution of India (contd.)

Boards Act (10 of 1959), directing respondent to demolish unauthorised construction — On appeal Assistant Commissioner setting aside order — Divisional Commissioner wrongly dismissing revision as not maintainable — Writ petition to quash both the orders filed after unexplained delay of one year — High Court refused to interfere — See Constitution of India, Art. 226 Mys 10 B (C N 4)

— Art. 227 — Other remedy open — Remedy of review cannot be a ground to oust the jurisdiction of High Court — See Constitution of India, Art. 226

Orissa 15 C (C N 7)

— Art. 240 — Goa, Daman and Diu (Banks Reconstruction) Regulation (2 of 1962), is valid — See Goa, Daman and Diu (Banks Reconstruction) Regulation (2 of 1962), Pre. Goa 11 A (C N 3)

— Art. 245 — Metal Corporation of India (Acquisition of Undertaking) Act (1966) Pre — Act deemed to be in force from 22-10-65 — Legislature competent to legislate retrospectively — See Metal Corporation of India (Acquisition of Undertaking) Act (1966), Pre

Cal 15 L (C N 4)

— Art. 245 — Goa, Daman and Diu (Banks Reconstruction) Regulation (2 of 1962) is valid — See Goa, Daman and Diu (Banks Reconstruction) Regulation (2 of 1962), Pre. Goa 11 A (C N 3)

— Art. 246 — Metal Corporation of India (Acquisition of Undertaking) Act (1966) Pre — Act deemed to be in force from 22-10-65 — Legislature competent to legislate retrospectively — See Metal Corporation of India (Acquisition of Undertaking) Act (1966), Preamble

Cal 15 L (C N 4)

— Art. 246, Schedule VII, List II, Entry 54 — Legislative competence — Madras General Sales Tax Act, 1959, S. 42(3)(a) — Provision for confiscation of goods by check-post officer irrespective of whether a taxable event has occurred — Repugnant to scheme of Sales tax law — Provision not ancillary to power to tax sales and hence unconstitutional

Mad 25 B (C N 10)

— Art. 246 — See Sales Tax — Madras General Sales Tax Act (1 of 1959), S. 42 (3) Mad 25 B (C N 10)

— Art. 300 — Liability of State for acts of its employees — Death caused by rash and negligent driving of truck by defendant-2 who was member of defence services of defendant-1, Union of India — Burden of proving existence of circumstances to claim immunity lies on defendants — See Tort — Vicarious liability — State servant J. & K. 5 C (C N 3)

— Arts. 309, 13(3)(a), 226 — Executive instruction raising superannuation age from 55 to 58 years, issued under F. R. 56 — It has force of law — Mandamus can

Constitution of India (contd.)

be issued to enforce right under such instruction Assam 1 A (C N 1) (FB)

— Art. 309 — Central Health Services Rules (1963) (as amended in 1966 and 1967), R. 7-A(1)(b) — Rule is not ultra vires the Constitution — See Civil Services — Central Health Services Rules, 1963 (as amended in 1966 and 1967), R. 7 Delhi 1 (C N 1)

— Art. 309 — Right of promotion in a cadre — Creation of separate cadre is essential — See Constitution of India, Art. 162 Pat 25 A (C N 6)

— Art. 309 — Tripura Employees' (Revision of Pay and Allowances) Rules, 1963 Sch I, Serial No. 7 — Selection of Assistants on seniority-cum-merit basis to selection grade, after qualifying examination — Rules not laying down principles of selection — Selection made on basis of executive instructions — Not violative of Arts. 14 and 16 — See Constitution of India, Art. 14

Tripura 10 A (C N 2)

— Arts. 310 and 311 — Reduction in rank — State cadre officer of Indian Administrative Service — Promotion to tenure post under Government of India — Reversion to State Service before expiry of tenure period — Reason for reversion, unsatisfactory performance — Reversion amounts to reduction in rank: AIR 1969 Cal 180, Reversed

SC 77 (C N 18)

— Arts. 310, 311, 14 — Pleasure of Governor cannot be exercised so as to abridge fundamental right of employee

Assam 1 C (C N 1) (FB)

— Arts. 310, 311 — "Dismissed or removed or reduced in rank" — Non-selection to post in selection grade is not removal or reduction in rank — Losing job on abolition of post is also not removal from service — See Civil Services — Central Health Services Rules, 1963 (as amended in 1966 and 1967), R. 7

Delhi 1 (C N 1)

— Art. 311 — Reversion amounting to reduction in rank — Non-compliance with Art. 311(2) — Order of reversion is not sustainable — See Constitution of India, Art. 310 SC 77 (C N 18)

— Art. 311 — Pleasure of Governor cannot be exercised so as to abridge fundamental right of employee — See Constitution of India, Art. 310

Assam 1 C (C N 1) (FB)

— Arts. 311, 39, 41 and 47 — Applicability — Insurance Medical Officer under Employees' State Insurance Scheme — He is not an employee of State Government Cal 1 (C N 1)

— Art. 311 — Right of promotion in a cadre — Creation of separate cadre is essential — See Constitution of India, Art. 162 Pat 25 A (C N 6)

— Arts. 311(2), 14 — Compulsory retirement — Ingredients of — Provision pre-

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scribing compulsory retirement before age of superannuation and after specified period of service but without assigning any reason — Provision offends Art. 14 but not Art. 311(2)

Assam 1 B (C N 1) (FB)
— Art. 311(2) — Termination of service of a probationer appointed in a temporary post — Petitioner selected for promotion to the post of a senior Draftsman in a temporary post, subsequently appointed as probationer in a clear vacancy on a probationary period of one year — Petitioner continuing to work for 5 years — Termination of service on the ground that the post was temporary attracts Art. 311 (2) — In the absence of a rule period of probation cannot be extended — Petitioner on completion of probation is deemed to have been confirmed — Termination is illegal

Assam 16 (C N 3)
— Art. 311(2) — Reasonable opportunity — What is — Enquiry against employee of State Transport Authority — Under R. 15(4) and (6) of Orissa Civil Services (Classification, Control and Appeal) Rules 1962, it is the right of delinquent to know time and place of evidence to be led on behalf of employer Authority — This right is not taken away merely because the employee failed to show cause — The fact that no witnesses had been examined makes no difference if their previous statements were taken into consideration as evidence — Held that petitioner was not afforded reasonable opportunity in the instant case

Orissa 1 (C N 1)
— Art. 311(2) — Officiation in higher post — Object of — Reversion to lower substantive post for unsatisfactory service — Does not amount to punishment — Art. 311(2) not attracted

Orissa 12 (C N 6)
— Art. 311(2) — Reasonable opportunity to defend — Delinquent charged for receiving illegal gratification — Failure to supply copy of complaint forming basis of departmental enquiry to the delinquent in spite of his request — His dismissal is illegal

Pat 23 (C N 5)
— Schedule VII, List II, Entry 54 — See Constitution of India, Art. 246

Mad 25 A (C N 10)
— Sch. VII, List II, Entry 54 — See Sales Tax — Madras General Sales Tax Act (1 of 1959), S. 42(3)

Mad 25 B (C N 10)
— Sch. VII, List II, Entry 54 — Sale of goods — Works contract — Materials used need not get transformed — Contract for pressing and packing cotton — Packing is integral part of pressing — Packing materials used not liable for sales tax. AIR 1957 Andh Pra 706 and 1956-7 STC 486 (Andh) and AIR 1957 Madh Pra 40 and AIR 1961 Madh Pra 88 (FB) and

Constitution of India (contd.)

1964-15 STC 598 (Bom) and 1968-21 STC 505 (MP) and 1968-22 STC 22 (MP), Dis-sented from

Raj 1 C (C N 1)
Contempt of Courts Act (32 of 1952)

— S. 1 — Contempt — What constitutes — Mere failure to deposit amount into Court as ordered, does not amount to contempt

Mad 14 (C N 7)
Contract Act (9 of 1872)

— S. 11 — Evacuee is competent to enter into any agreement in respect of evacuee property though he cannot transfer his right or interest in it — See Administration of Evacuee Property Ordinance (1949), S. 38

Guj 12 B (C N 3)
— S. 22 — Voidable contract — Contract for fishery rights — Unilateral mistake on part of one of the parties only — Contract cannot be avoided

Manipur 16 B (C N 6)
— Ss. 31, 32 — Agreement for sale of

evacuee property on condition that execution of sale deed to take place after obtaining certificate from Custodian under S. 40 of Administration of Evacuee Property Act (1950) — Held, since condition of obtaining certificate became unnecessary in view of property being restored free from any such restrictions under S. 16(1) of Act of 1950, contract did not depend upon condition so as to render it void

Guj 12 F (C N 3)
— S. 32 — Agreement for sale of evacuee property on condition that execution of sale deed to take place after obtaining certificate from Custodian under S. 40 of Administration of Evacuee Property Act (1950) — Held, since condition of obtaining certificate became unnecessary in view of property being restored free from any such restrictions under S. 16(1) of Act of 1950, contract did not depend upon condition so as to render it void — See Contract Act (1872), S. 31

Guj 12 F (C N 3)
— S. 151 — Board taking charge of goods under Ss. 39 and 40, Madras Port Trust Act (2 of 1905) — Its responsibility is that of a bailee under Ss. 151, 152 and 161 — Damage to goods, prima facie evidence of bailee's negligence — See Madras Port Trust Act (2 of 1905), S. 39

Mad 48 A (C N 18)
— Ss. 151, 152 & 161 — On facts, held, Madras Port Trust Board as bailee had been negligent

Mad 48 B (C N 18)
— S. 152 — Board taking charge of goods under Ss. 39 and 40, Madras Port Trust Act (2 of 1905) — Its responsibility is that of a bailee under Ss. 151, 152 and 161 — Damage to goods, prima facie evidence of bailee's negligence — See Madras Port Trust Act (2 of 1905), S. 39

Mad 48 A (C N 18)
— S. 152 — Madras Port Trust Board taking charge of goods as bailee — On

Contract Act (contd.)

facts held that it had been negligent — See Contract Act (1872), S. 151

Mad 48 B (C N 18)

—S. 161 — Board taking charge of goods under Ss. 39 and 40, Madras Port Trust Act (2 of 1905) — Its responsibility is that of bailee under Ss. 151, 152 and 161 — Damage to goods, prima facie evidence of bailee's negligence — See Madras Port Trust Act (2 of 1905), S. 39

Mad 48 A (C N 18)

—S. 161 — Madras Port Trust Board taking charge of goods as bailee — On facts, held, that it had been negligent — See Contract Act (1872), S. 151

Mad 48 B (C N 18)

—S. 172 — Agreement in respect of film under production — Party obliging himself to pay amounts in a particular manner and in addition giving camera as security — Instrument held not a mortgage but a bond as well as a pledge — See Stamp Act (1899), S. 6

Mad 10 (C N 5) (FB)

—S. 226 — Complaint filed by Municipal prosecutor on authority of resolution of Municipal Corporation — Complainant is Municipal Corporation: 1966 Cri LJ 734 (Punj). Reversed — See Criminal P. C. (1898), S. 417(3) SC 7 B (C N 3)

CO-OPERATIVE SOCIETIES

—Punjab Co-operative Societies Rules (1936)

—R. 25 — See Penal Code (1860), S. 10 Punj 21 (C N 4)

Co-sharers

See Limitation Act (1908), Art. 144

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See under Court-fees and Suits Valuations

COURT-FEES AND SUITS**VALUATIONS**

—Court-fees Act (7 of 1870)

—Sch. 1, Art. 1 — Memorandum of appeal filed against order rejecting plaint under Order 7, Rule 11(a) and (d) of Civil P. C. (1908) — Court-fee payable is governed by Sch. 1, Art. 1: AIR 1968 Andh Pra 239 (FB), Dissented from

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Criminal Procedure Code (5 of 1898)

—Ss. 34, 149 — Penal Code (1860), S. 302 — Persons aiding and abetting commission of robbery — One of them killing a person while acting in furtherance of common design — All are guilty of murder USSC 15 C (C N 3)

—S. 33 — Separate sentences for offence under S. 167(81), Sea Customs Act and one under S. 120-B, Penal Code — Not illegal — See Penal Code (1860), S. 71 SC 45 L (C N 13)

—S. 33 — Sanitary Inspectors would be deemed to be class of officers generally

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by their "official title" in the sense in which it was used in S. 39 — See Prevention of Corruption Act (1947), S. 6(1) (c) Tripura 1 D (C N 1)

—S. 145(5) — Cancellation of preliminary order — Satisfaction of Magistrate that dispute does not exist and did not exist is condition precedent

Manipur 12 A (C N 4)

—S. 145(5)(6) and (4) — Proceedings dropped — One party prohibited to interfere with possession of other — Order of Magistrate is illegal

Manipur 12 B (C N 4)

—S. 149 — Persons aiding and abetting commission of robbery — One of them killing a person while acting in furtherance of common design — All are guilty of murder — See Criminal P. C. (1898), S. 34 USSC 156 (C N 3)

—S. 197 — Wakfs Act (1954), S. 65 — Relative scope of two provisions — Complaint against 8 accused under Ss. 448, 454, 341, 295-A and 426, I. P. C. for invading premises housing private library in possession of complainant — Accused 1, Secretary of Wakfs Board and 2 to 4, employees thereof — S. 65 of Wakfs Act is no bar to prosecution — Sanction under S. 197 Cr. P. C. is not necessary, Cri. Revn. Case No. 441 of 1964, D/- 12-8-1964 (A. P.), Overruled

Andh Pra 13 (C N 2)

—S. 197 — See Penal Code (1860), S. 19 Punj 21 (C N 4)

—Ss. 236 and 237 — Principal offence and abetment — No specific charge of abetment — Accused having no notice of facts constituting abetment — Conviction for abetment is not justified

Orissa 10 A (C N 5)

—S. 237 — Principal offence and abetment — No specific charge of abetment — Accused having no notice of facts constituting abetment — Accused cannot be convicted for abetment — See Criminal P. C. (1898), S. 236

Orissa 10 A (C N 5)

—S. 255 — Plea of guilty — It is confession and must satisfy test of voluntariness — See Evidence Act (1872), S. 24

USSC 10 (C N 2)

—S. 286 — Duty of Prosecutor where he is satisfied that case is covered by S. 84, Penal Code Goa 1 D (C N 1)

—S. 341 — Trial of deaf and dumb accused — Duties and powers of Court before forwarding proceedings to High Court — Magistrate before making reference should ascertain whether accused can be made to understand proceedings — Similar duty is cast on Sessions Court after accused is committed to it

Orissa 3 (C N 2)

—S. 367 — Appreciation of evidence — "Prosecution story disbelieved as to its material part — As a rule of prudence it is not safe to rely on one part of

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story to convict the accused — See Evidence Act (1872), S. 3

Pat 20 A (C N 4)

—S. 369 — Inherent powers of High Court under S. 561-A — Can be exercised for revoking, reviewing or recalling its own decision in criminal revision and rehearing the same. AIR 1962 AP 179; (1964) 1 MLJ 361; AIR 1966 Mad 163 and AIR 1965 Ori 7 Dissented from — See Criminal P. C. (1898), S. 561-A

Punj 32 (C N 7)

—Ss. 403(1), 530(q) and 423 — Charge under S. 52, Post Office Act (1898) and S. 409, Penal Code — Order of acquittal by Magistrate — Trial by Magistrate in respect of offence under S. 52 is void under S. 530(q) — Retrial for charge under S. 52 not barred Goa 7 (C N 2)

—S. 411-A — Supreme Court appeals — Practice — New point — Point not taken either in trial court or High Court — Point ought not to be allowed to be raised for the first time in the Supreme Court SC 45 F (C N 13)

—S. 417(3) — "Complainant" — Prosecution under S. 20, Prevention of Food Adulteration Act — Offence committed within the Delhi Municipal Corporation area — Municipal prosecutor authorised by resolution of Municipal Corporation to file complaint — In filing the complaint he acts only in a representative capacity and the municipal corporation is the complainant within the meaning of S. 417(3), Criminal P. C. — Hence, petition for special leave for filing appeal against acquittal of accused and the appeal petition filed by the Municipal Corporation is properly instituted: 1966 Cri LJ 734 (Punj), Reversed SC 7 B (C N 3)

—S. 423 — Erroneous admission of co-accused's confession — Effect on jurors — Reviewing Court not knowing the jurors who sat, must base its judgment on its own reading of the record and on what seems to it to have been the probable impact of confession on minds of average jury USSC 15 D (C N 3)

—S. 423 — Charge under S. 52 Post Office Act (1898) and S. 409 Penal Code — Order of acquittal by Magistrate — Trial by Magistrate in respect of offence under S. 52 is void under S. 530(q) — Retrial for charge under S. 52 not barred — See Criminal P. C. (1898), S. 403(1)

Goa 7 (C N 2)

—S. 424 — Inherent powers of High Court under S. 561-A — Can be exercised for revoking, reviewing or recalling its own decision in criminal revision and rehearing the same, AIR 1962 AP 179; (1964) 1 MLJ 361; AIR 1966 Mad 163 and AIR 1965 Ori 7. Dissented from — See Criminal P. C. (1898), S. 561-A.

Punj 32 (C N 7)

—S. 430 — Inherent powers of High Court under S. 561-A — Can be exercised

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ed for revoking, reviewing and recalling its own decision in criminal revision and rehearing the same. AIR 1962 AP 179; (1964) 1 MLJ 361; AIR 1966 Mad 163 and AIR 1965 Ori 7 Dissented from — See Criminal P. C. (1898), S. 561-A.

Punj 32 (C N 7)

—S. 435 — Order under S. 517 affecting third party not before court in the main case — High Court can vary order in exercise of powers under S. 520 or in exercise of its powers under Ss. 435 and 439 — See Criminal P. C. (1898), S. 517

Guj 26 A (C N 4)

—S. 439 — Order under S. 517 affecting third party not before court in the main case — High Court can vary order in exercise of powers under S. 520 or in exercise of its powers under Ss. 435 and 439 — See Criminal P. C. (1898), S. 517

Guj 26 A (C N 4)

—S. 439 — Inherent powers of High Court under S. 561-A — Can be exercised for revoking, reviewing or recalling its own decision in criminal revision and rehearing the same. AIR 1962 AP 179; (1964) 1 MLJ 361; AIR 1966 Mad 163 and AIR 1965 Ori 7 Dissented from — See Criminal P. C. (1898), S. 561-A.

Punj 32 (C N 7)

—S. 476 — Application by a party under S. 476 — Person sought to be prosecuted given opportunity of being heard in that motion — Fresh show cause notice unwarranted — See Criminal Procedure Code (5 of 1898), S. 479-A

Ker 15 A (C N 3)

—S. 476 — Court not deciding to take action under S. 479-A — S. 476 cannot be resorted to subsequently — See Criminal Procedure Code (5 of 1898), S. 479-A

Ker 15 B (C N 3)

—Ss. 479-A and 476 — Application by a party under S. 476 — Person sought to be prosecuted given opportunity of being heard in that motion — Fresh show cause notice unwarranted

Ker 15 A (C N 3)

—Ss. 479-A and 476 — Disposal of judicial proceeding — Court not deciding to take action under S. 479-A — S. 476 cannot be resorted to subsequently

Ker 15 B (C N 3)

—S. 491 — Conviction and sentence before court martial — Habeas Corpus petition — Court need not in every case call for the record to examine legality of conviction — Proceedings however, not entirely immune from Court's scrutiny — Writ not issued for examining mere errors of procedure — See Constitution of India, Art. 226 Delhi 29 B (C N 6) (FB)

—S. 491 — Habeas Corpus — Petition may be by a person other than the prisoner — See Constitution of India, Art. 226 Delhi 29 C (C N 6) (FB)

—Ss. 497, 498 — Non-bailable offence registered against accused and warrant

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of arrest issued — Accused having surrendered himself before court, was entitled to ask for bail J & K 1 (C N 1)

—S. 498 — Non-bailable offence registered against accused and warrant of arrest issued — Accused having surrendered himself before Court, was entitled to ask for bail — See Criminal P. C. (1898), S. 497 J & K 1 (C N 1)

—S. 503 — May issue a commission — Application for issue of a commission for examination of witness either in Switzerland or U. K. or in Pakistan — No particulars indicating willingness of witness to be examined on commission given—Even address of the witness not given — Court cannot issue a roving commission to a Court or authority in any of those countries — Application is liable to be rejected on the ground of want of good faith alone SC 45 D (C N 13)

—Ss. 517, 520, 435 and 439 — S. 520 is only enabling provision — It confers no right as such for filing appeal or application for revision thereunder — Order under S. 517 affecting third party not before court in the main case — High Court can vary order in exercise of powers under S. 520 or in exercise of its powers under Ss. 435 and 439

Guj 26 A (C N 4)

—S. 517 — Order under section, sought to be revised by third party — Period will run from date of knowledge of order — See Limitation Act (1963), Art. 131

Guj 26 B (C N 4)

—S. 517(1) — Power to confiscate — It is to be exercised in reasonable and judicial manner — Accused found carrying stolen property in rickshaw — Rickshaw cannot be said to have been used in commission of offence — Order is liable to be set aside

Guj 26 C (C N 4)

—S. 520 — Scope — Order under S. 517 affecting third party not before court in the main case — High Court can vary order in exercise of powers under S. 520 — See Criminal P. C. (1898), S. 517

Guj 26 A (C N 4)

—S. 530(q) — Charge under S. 52 Post Office Act (1893) and S. 409 Penal Code — Order of acquittal by Magistrate — Trial by Magistrate in respect of offence under S. 52 is void under S. 530(q) — Retrial for charge under S. 52 not barred — See Criminal P. C. (1898), S. 403 (1)

Goa 7 (C N 2)

—S. 540 — Recalling witness — Court has inherent power to recall a witness, if satisfied that he is prepared to give evidence which is materially different from what he had given at the trial — Party asking for the recall of witness not placing material before court on which it could be so satisfied — Court acts rightly in rejecting the prayer

SC 45 E (C N 13)

Criminal P. C. (contd.)

—Ss. 561-A, 369, 439, 430 and 424 — Inherent powers of High Court under S. 561-A — Can be exercised for revoking, reviewing or recalling its own decision in criminal revision and rehearing the same AIR 1962 Andh Pra 479 (FB) & (1964) 1 Mad LJ 362 & AIR 1966 Mad 163 & AIR 1965 Orissa 7, Dissented from Punj 32 (C N 7)

Delhi Municipal Corporation Act (66 of 1957)

See under Municipalities.

Delhi Rent Control Act (59 of 1958)

See under Houses and Rents.

Divorce Act (4 of 1869)

—S. 7 — Section does not incorporate statutes of some other country as part of law of this land — See Divorce Act (1869), S. 10 Mad 12 A (C N 6) (SB)

—S. 8 — A petitioner requiring a trial on original side of High Court can approach the High Court in a suitable case, by invoking provisions of S. 8—See Constitution of India, Art. 14

Mad 12 B (C N 6) (SB)

—S. 10 — Divorce — Adultery — Standard of proof — Law in England and India — Burden of proof — Post-suit adultery — Evidentiary value of — See Hindu Marriage Act (1955), S. 13 (1) (i)

Cal 38 A (C N 7)

—Ss. 10, 7 and 22 — Decree for judicial separation cannot ripen into a decree for divorce, by mere lapse of time — Wife can obtain decree for dissolution of marriage under Section 10 only on grounds exhibited under that section — Fact that there was earlier decree for judicial separation and that though four years have passed since that decree, the parties did not resume co-habitation or matrimonial living, is not a ground entitling the wife to divorce — Provisions of Section 7 (1) to (3) of Matrimonial Causes Act, 1950, of United Kingdom cannot be invoked by virtue of Section 7 of Divorce Act, for granting a decree nisi for dissolution marriage on that ground — Section 7 does not incorporate statutes of some other country as part of law of this land — It merely makes a provision for conforming to practice and principles of matrimonial Courts in England in matter of divorce or dissolution of marriage subject to provisions and scheme of Indian Divorce Act — Case law discussed

Mad 12 A (C N 6) (SB)

—S. 12 — Divorce — Adultery — Standard of proof — See Hindu Marriage Act (1955), S. 13 (1) (i)

Cal 38 A (C N 7)

—S. 14 — Divorce — Adultery — Standard of proof — Law in England and India—Burden of proof — Post-suit adultery — Evidentiary value of — See Hindu Marriage Act (1955), S. 13 (1) (i)

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Divorce Act (contd.)

—S. 17 — Section not violative of Article 14 of Constitution on ground that it provides for reference to High Court to be heard by Bench of the co-judges, for confirmation of decree nisi for dissolution of marriage granted by District Court, whereas with regard to such cases arising under original civil jurisdiction of High Court, High Court itself exercises that jurisdiction as High Court — See Constitution of India, Art. 14

Mad 12 B (C N 6) (SB)

—S. 22 — Decree for judicial separation under S. 22 cannot ripen into a decree for divorce, by mere lapse of time — See Divorce Act (1869), S. 10

Mad 12 A (C N 6) (SB)

Easements Act (5 of 1882)

—S. 13 — Easement of necessity — Passage not part of lease — Lessees will have no better rights than lessors — Alternative access held obviated the necessity

Mad 37 B (C N 13)

EDUCATION**—Maulana Azad Medical College Delhi Prospectus**

—R. 4, categories (c) to (h) — Admission to Medical College — Reservation of seats — Categories (c) to (h) of R. 4 of College Prospectus — Reservation held were not violative of Article — See Constitution of India, Art. 14

SC 35 A (C N 10)

—R. 4 — Reserved seats falling vacant — Government cannot be compelled to release them to general pool — See Constitution of India, Art. 29

SC 35 B (C N 10)

Electricity Act (9 of 1910)

—Ss. 3 (1), 3 (2) (e) (ii) (as amended by U. P. Act 30 of 1961) — Grant of licence to a company to supply electrical energy for certain area — On that account State Government is not debarred from granting licence within that area to another person or to supply electrical energy to consumer if necessary in public interest

SC 21 A (C N 7)

—S. 3 (2) (e) (as amended by U. P. Act 30 of 1961) — Administrative order — Supply of energy to consumers within area of licensee — Exercise of power under Section — Satisfaction of Government that supply is necessary in public interest is in appropriate cases not excluded from judicial review — See Constitution of India, Art. 226

SC 21 C (C N 7)

—S. 3 (2) (e) (as amended by U. P. Act 30 of 1961) — Grant of licence to a company for certain area under Act — Right of State to authorise supply of electrical energy to consumer through State Electricity Board in same area — There is no infringement of Art. 31 (2) — See Con-

Electricity Act (contd.)

stitution of India, Art. 31 (2)

SC 21 D (C N 7)

Employees' State Insurance Act (34 of 1948)

—S. 3 — Insurance Medical Officer under Employees' State Insurance Scheme — He is not an employee of State Government — See Constitution of India, Art. 311

Cal 1 (C N 1)

—S. 4 — Insurance Medical Officer under Employees' State Insurance Scheme — He is not an employee of State Government — See Constitution of India, Art. 311

Cal 1 (C N 1)

—S. 21 — Insurance Medical Officer under Employees' State Insurance Scheme — He is not an employee of State Government — See Constitution of India, Art. 311

Cal 1 (C N 1)

—S. 57 — Scheme under Act — Insurance Medical Officer is not an employee of State Government — See Constitution of India, Art. 311

Cal 1 (C N 1)

—S. 58 — Insurance Medical Officer under Employees' State Insurance Scheme — He is not an employee of State Government — See Constitution of India, Art. 311

Cal 1 (C N 1)

—S. 92 — Scheme under Act — Insurance Medical Officer is not an employee of State Government — See Constitution of India, Art. 311

Cal 1 (C N 1)

—S. 95 — Scheme under Act — Insurance Medical Officer is not an employee of State Government — See Constitution of India, Art. 311

Cal 1 (C N 1)

—S. 96 — Rules under — Medical practitioner gives nothing more than a voluntary undertaking to offer services in lieu of fees for professional service rendered — Inclusion of names in list and preparation of list does not have the effect of making medical practitioner an employee of State — See Constitution of India, Art. 311

Cal 1 (C N 1)

Evidence Act (1 of 1872)

—Preamble — Object of Act — See Evidence Act (1872), S. 105

All 51 A (C N 8) (FB)

—S. 3 'Disproved' — Concept of — Its importance — See Evidence Act (1872), S. 105

All 51 A (C N 8) (FB)

—S. 3 — 'Not proved' — Concept of — Its importance — See Evidence Act (1872), S. 105

All 51 A (C N 8) (FB)

—S. 3 — 'Proved' — Concept of — Its importance — See Evidence Act (1872), S. 105

All 51 A (C N 8) (FB)

—S. 3 — Divorce — Adultery — Standard of proof — Law in England and India — Burden of proof — Post-suit adultery — Evidentiary value of — See Hindu Marriage Act (1955), S. 13(1)(i)

Cal 38 A (C N 7)

—S. 3 — Credibility of witness — Absence of inherent vice — Adverse presumption on any matter cannot be drawn

Evidence Act (contd.)

in absence of opportunity to explain it
— See Evidence Act (1872), S. 155

Cal 38 E (C N 7)

—S. 3 — Appreciation of evidence — Prosecution story disbelieved as to its material part — As a rule of prudence it is not safe to rely on one part of story for convicting the accused

Pat 20 A (C N 4)

—S. 5 — Divorce — Adultery — Standard of proof — Law in England and India — Burden of proof — Post-suit adultery — Evidentiary value of — See Hindu Marriage Act (1955), S. 13(1)(i)

Cal 38 A (C N 7)

—S. 5 — Partisan witness — Police Officer should not be disbelieved simply because he figures as witness, provided his evidence is reliable and credible

Tripura 1 A (C N 1)

—S. 8 — Divorce — Adultery — Post-suit adultery — Evidentiary value of — See Hindu Marriage Act (1955), S. 13(1)(i)

Cal 38 A (C N 7)

—Ss. 24, 115 — Case from USA — Confession must be voluntary — Plea of guilty is confession — It involves waiver of constitutional rights — Waiver cannot be presumed from silent record — (Criminal P. C. (1898), S. 255) — (Constitution of India, Arts 20 and 21)

U. S. S. C. 10 (C N 2)

—S. 30 — Retracted confession of co-accused — Though it can be taken into consideration against the other accused it can be used only in support of other evidence — It cannot be made the foundation of a conviction SC 45 K (C N 13)

—S. 35 — Manipur Land Revenue and Land Reforms Rules (1961), Rr. 66, 67, 56 — Dag chithas prepared under R. 66 — They are documents in nature of revenue records — Cannot be declared inadmissible on ground of non-publication for purpose of attestation Manipur 7 B (C N 2)

—S. 44 — Right under, is independent of right to get judgment or decree set aside by regular suit Pat 13 B (C N 3)

—S. 58 — Civil P. C. (1908) O. 12 R. 6

— Uniform law on bills of exchange and promissory notes, Arts. 2, 34, 53, 70 and 77 — Scope — Suit on basis of bills of exchange and promissory notes not in possession of plaintiff and deemed to be lost — Execution of instruments admitted by defendant — Non-production of instruments in Court is of no consequence and plaintiff can be granted relief — Held, on facts that defendants were immune from second suit at hands of endorsees of those instruments in view of Arts 2, 34, 53, 70 and 77 of Uniform Law Goa 11 C (C N 3)

—S. 60 — Hearsay evidence — What is

Cal 38 B (C N 7)

—S. 63 — Copy of original letter addressed by Government to Commissioner prepared privately by party at time of

Evidence Act (contd.)

inspection of relevant file is not secondary evidence of original letter — See Evidence Act (1872), S. 65

Manipur 7 A (C N 2)

—Ss. 65, 63 — Secondary evidence — Copy of original letter addressed by Government to Commissioner prepared privately by the party at time of inspection of relevant file is not secondary evidence of the original letter — Document is inadmissible in evidence and no reliance can be placed on it — If party is unable to procure in Court the original letter, it can only be proved by producing certified copy

Manipur 7 A (C N 2)

—S. 91 — Case to which S. 12(1) of Kerala Act (1 of 1964) will not apply, document has to be interpreted subject to Ss. 91, 92 of Evidence Act — See Tenancy Laws — Kerala Land Reforms Act 1963 (1 of 1964), S. 12(1)

Ker 16 B (C N 4) (FB)

—S. 92 — Document, whether a Kanom or a mortgage depends upon interpretation of document — See Transfer of Property Act (4 of 1882), S. 8

Ker 16 A (C N 4) (FB)

—S. 92 — Case to which S. 12(1) of Kerala Act (1 of 1964) will not apply, document has to be interpreted subject to Ss. 91, 92 of Evidence Act — See Tenancy Laws — Kerala Land Reforms Act, 1963 (1 of 1964), S. 12(1)

Ker 16 B (C N 4) (FB)

—Ss. 101-104 — Burden of proof — Meaning of — See Evidence Act (1872), S. 105

All 51 A (C N 8) (FB)

—Ss. 101-104 — Burden of proof and presumption — Function of — They have to be considered together — Their importance vanishes in the face of evidence given by both sides — See Evidence Act (1872), S. 105

All 51 A (C N 8) (FB)

—Ss. 101-104 — Criminal Trial — Proof of exception pleaded by accused — It may be proved by showing preponderance of probability — See Evidence Act (1872), S. 105

All 51 A (C N 8) (FB)

—Ss. 101-104 — Criminal Trial — Standard of proof — Prosecution has to prove its case beyond reasonable doubt — Reasonable doubt — Meaning of — See Evidence Act (1872), S. 105

All 51 A (C N 8) (FB)

—S. 101 — Divorce — Adultery — Burden of proof — See Hindu Marriage Act (1955), S. 13(1)(i)

Cal 38 A (C N 7)

—S. 101 — Benami — Burden of proving benami is on person who alleges it — But where all relevant facts are before Court all that remains is what inference should be drawn from them and question of onus becomes academic

Cal 38 C (C N 7)

—S. 101 — Benami — System of putting property benami being extremely

Evidence Act (contd.)

common, even slight quantity of evidence to show that transaction was sham transaction will suffice for the purpose

Cal 38 D (C N 7)

—Ss. 101 to 104 — Vicarious liability — Liability of State for acts of its employees — Burden of proving existence of circumstances to claim immunity lies on State and its employee — See Tort — Vicarious liability — State servant

J & K 5 C (C N 3)

—Ss. 101-104 — Loss of pecuniary benefit due to death of deceased — To sustain action under Fatal Accidents Act plaintiff has to prove reasonable expectation of pecuniary advantage — Expectation of pecuniary advantage is mixed question of fact and law — See Fatal Accidents Act (1855), S. 1-A

Mys 13 C (C N 6)

—Ss. 101-104 — Vicarious liability for tort committed by servant — Onus to prove employment — See Civil P. C. (1908) Preamble

Mys 13 G (C N 6)

—Ss. 101 to 104 — Hindu Law — Joint family — Acquisition of separate property by member — Onus is on member claiming such acquisition as his separate property to prove that it is so — See Hindu Law

Pat 13 A (C N 3)

—S. 102 — Board taking charge of goods under Ss. 39 and 40, Madras Port Trust Act (2 of 1905) — Its responsibility is that of a bailee under Ss. 151, 152 and 161, Contract Act — Damage to goods, prima facie evidence of bailee's negligence — Bailee to disprove it — See Madras Port Trust Act (2 of 1905), S. 39

Mad 48 A (C N 18)

—Ss. 105, 3, 101-104 and 114 — Presumption under — Nature of — It only operates initially — Section 105 makes possible both kinds of acquittal one by proving plea fully and another by raising genuine doubt in the case — Line of reasoning in Parbhoo's case, (AIR 1941 All 402 (FB)) Explained — Evidence as a whole (including evidence in support of general exception) creating reasonable doubt in the mind of Court as to guilt of accused — He is entitled to acquittal — Decision in Parbhoo's case, (AIR 1941 All 402 (FB)) is still good law — (Civil P. C. (1908), Pre. — Interpretation of Statutes) — (Evidence Act (1872), Preamble, Ss. 101-104 and 114) — (Evidence Act (1872), S. 3 'Proved', 'Disproved', 'Not proved') — Words and Phrases — "Reasonable doubt" — "Preponderance of probability" — (Penal Code (1860), Ss. 6, 96, 76, Chapter IV (General) and S. 299)

All 51 A (C N 8) (FB)

—S. 105 — Accused pleading insanity at time of act — Nature of burden of proof indicated — See Penal Code (1860), S. 84

Goa 1 A (C N 1)

Evidence Act (contd.)

—S. 114 — Succession to non-Talukdari property — Presumption is that it is also governed by rule of devolution on single heir and not by rule of Hindu law — See Tenancy Laws — Oudh Estates Act (1 of 1869), S. 22(6)

SC 42 A (C N 12)

—S. 114, Illustration (b) — Several accomplices simultaneously and without previous concert giving consistent account of the crime implicating accused — Court may accept the several statements as corroborating each other — See Evidence Act (1872), S. 133

SC 45 J (C N 13)

—S. 114 — Burden of proof and presumption — Function of — They have to be considered together — Their importance vanishes in the face of evidence given by both sides — See Evidence Act (1872), S. 105

All 51 A (C N 8) (FB)

—S. 114 — Hindu Law — Joint family — Acquisition of separate property by member — Presumption is that it is joint family property — See Hindu Law

Pat 13 A (C N 3)

—S. 114, Illustration (b) — Accomplice's evidence — Court will not accept it unless corroborated in material particulars — See Evidence Act (1872), S. 133

SC 45 H (C N 13)

—S. 114, Illustration (b) — Accomplice, who is — Though witness concerned may not confess to his participation in crime, court has to decide on a consideration of the entire evidence whether he is an accomplice — See Evidence Act (1872), S. 133

SC 45 I (C N 13)

—S. 115 — Waiver of constitutional rights — No presumption from silent record — See Evidence Act (1872), S. 24

USSC 10 (C N 2)

—S. 117 — Defendant in its proposal form dated 23-3-1960 stating that Telco with which there was a hire purchase agreement of Truck had released it — Accepting proposal form, Hire-purchase agreement was entered into on the same day — Under conditions of agreement defendant admitted plaintiff to be owner of truck, characterising himself as a bailee of vehicle — Release of truck could only be obtained from Telco when payment was made — Truck was released either on 25th March or 30th March 1960 — Held that the defendant could and did transfer ownership of vehicle to plaintiff on or before 23-3-1960 — He could not deny either the transfer of ownership or fact that plaintiff was owner of vehicle on that date

Pat 7 C (C N 2)

—S. 118 — Credibility of witness — Absence of inherent vice — Adverse presumption on any matter cannot be drawn in absence of opportunity to explain it — See Evidence Act (1872), S. 155

Cal 38 E (C N 7)

—S. 124 — Communications to public officer in official confidence — Cable ad-

Evidence Act (contd.)

— dresses and cables sent to those addresses are not communications to public officer in official confidence — Court acts wrongly in allowing the claim of privilege from production made by the Telegraph Check Office SC 45 C (C N 13)

— Sections 133 and 114, Illus. (b) — Accomplish's evidence — Court will not accept it unless corroborated in material particulars SC 45 H (C N 13)

— Ss 133 and 114, Illus. (b) — Accomplish — Participes criminis in respect of actual crime charged is an accomplice — Though witness concerned may not confess to his participation, court has to decide on a consideration of the entire evidence whether he is an accomplice SC 45 I (C N 13)

— Ss. 133 and 114, Illus. (b) — Several accomplices simultaneously and without previous concert giving consistent account of the crime implicating accused — Court may accept the several statements as corroborating each other SC 45 J (C N 13)

— S. 133 — Confession of co-accused inculcating accused — Co-accused not testifying — Rights of accused under confrontation clause of Sixth Amendment of Constitution of America are violated — Violation does not, however, warrant reversal of conviction when there is other overwhelming evidence — Constitution of India, Art. 21 — Constitution of America, Sixth Amendment USSC 15 B (C N 3)

— Ss 137 and 138 — Failure to cross-examine witness on point stated in examination-in-chief — Does not amount to acceptance of testimony when it is inherently incredible Cal 38 F (C N 7)

— S. 138 — Failure to cross-examine witness on point stated in examination-in-chief — Does not amount to acceptance of testimony when it is inherently incredible — See Evidence Act (1872), S. 137 Cal 38 F (C N 7)

— Ss. 155, 3 and 118 — Credibility of witness — Absence of inherent vice — Adverse presumption on any matter cannot be drawn in absence of opportunity to explain it Cal 38 E (C N 7)

Expenditure Tax Act (29 of 1957)

— Ss. 2 (g) (i), 4 (i) and (ii) (as amended by Act 12 of 1959) — Expression "dependent" in S. 2 (g) (i) — Meaning of — Assessee an individual — His wife and minor son owning separate property — Inclusion of expenditure incurred by them in his assessment is illegal. 11LR (1968) Andh Pra 279, Dissented from Mad 43 A (C N 16)

— Ss. 2 (g) (i) and 4 (ii) — Assessee, an individual — Inclusion of dependent's expenditure is not conditional on its being incurred from and out of income or property transferred by such individual. AIR 1968 Madh Pra 107, Dissented from Mad 43 B (C N 16)

Expenditure Tax Act (contd.)

— S. 4 (i) and (ii) (as amended by Act 12 of 1959) — Assessee an individual — His wife and minor son owning separate property — Inclusion of expenditure incurred by them in his assessment is illegal — Neither Cl. (i) nor Cl. (ii) of S. 4 applies — See Expenditure Tax Act (1957) (as amended by Act 12 of 1959), S. 2(g)(i) Mad 43 A (C N 16)

— S. 4 (ii) (as amended by Act 12 of 1959) — Assessee an individual — Inclusion of dependent's expenditure is not conditioned by the same having been incurred from and out of income or property transferred by such individual to such dependent. AIR 1968 Madh Pra 107, Dissented from — See Expenditure Tax Act (1957) (as amended by Act 12 of 1959), Section 2 (g) (i) Mad 43 B (C N 16)

Factories Act (63 of 1948)

— S. 2(f) — "Worker" — More than 20 persons working in premises of a company — Work being done under supervision of management — Held that the persons employed were workers as defined in S. 2(f) — Tests as to who is 'worker' indicated — See Factories Act (1948), S. 2(m) SC 66 A (C N 16)

— S. 2 (k) (i) — Sun-cured tobacco leaves subjected to processes of moistening, stripping, breaking up, adaptation and packing with a view to transport to company's main factory for their use in manufacturing cigarettes — Held that the "manufacturing process" as defined in S. 2(k) (i) were carried on in premises — See Factories Act (1948), S. 2(m) SC 66 A (C N 16)

— Ss. 2 (m), 2 (k) (i) and 2 (l) — "Factory," meaning of — Sun-cured tobacco leaves subjected to processes of moistening, stripping and packing in a company's premises with a view to transport to company's main factory to be used for manufacturing cigarettes — More than 20 persons under supervision of management working in premises — Held that the manufacturing process was carried on in premises and the persons employed were workers and premises a factory. SC 66 A (C N 16)

— S. 6(l) read with Section 92 — Prosecution under — Onus lies on prosecution to prove that workmen were employed by the management SC 66 B (C N 16)

— Ss. 79 and 80 — Scope of S. 79 — Retrenchment of employees held unlawful — Employees, under award, reinstated and paid back wages and bonus for period of enforced non-employment — Employees claiming wages for earned leave — Leave applied for and having been refused by employer not proved — Employees entitled to earned leave for that period — Proper course is to direct employer to credit such leave to employees Mys 1 (C N 1)

Factories Act (contd.)

—S. 80 — Retrenchment of employees held unlawful— Employees, under award reinstated and paid back wages and bonus for period of enforced non-employment— Employees entitled to wages for earned leave — See Factories Act (1948), S. 79

Mys 1 (C N 1)

Fatal Accidents Act (1846) (9 and 10 Vict. C. 93)

—S. 1 — Section is in *pari materia* with provisions of S. 1-A, Fatal Accidents Act (1855) (as amended by Act III of 1951) — English decisions in English Act are useful in deciding cases under Indian Act — See Fatal Accidents Act (1855), S. 1-A

Mys 13 B (C N 6)

—S. 2 — Section is in *pari materia* with provision under S. 1-A, Fatal Accidents Act 1855 (as amended by Act III of 1951) — English decisions in English Act useful in deciding cases under Indian Act — See Fatal Accidents Act (1955), S. 1-A

Mys 13 B (C N 6)

Fatal Accidents Act (13 of 1855)

—S. 1A — Jammu and Kashmir Fatal Accidents Act (17 of 1977 Sm.) S. 1 — Persons entitled to sue for compensation — Death caused by actionable wrong — Parents and grand-parents of deceased *inter alia* have a right to claim compensation — Principles on which compensation is to be awarded are same in State of Jammu and Kashmir as those in India and England — Compensation has to be proportionate to actual pecuniary benefit which dependants might reasonably expect to receive

J & K 5 A (C N 3)

—S. 1A — Damages — Mode of assessment — Factors to be considered indicated

J & K 5 B (C N 3)

—S. 1-A — Section as amended by Act III of 1951 is in *pari materia* with Ss. 1 and 2 of Fatal Accidents Act, 1846 — In deciding cases under Indian Act, English decisions under English Act are useful

Mys 13 B (C N 6)

—S. 1-A — Loss of pecuniary benefit due to death of deceased — Measure of damages — Considerations — All that is necessary to sustain an action is that the plaintiff had a reasonable expectation of pecuniary advantage — Expectation of pecuniary advantage is mixed question of fact and law

Mys 13 C (C N 6)

—Ss. 1-A and 2 — Claims under, are founded on distinct causes of action and must be separately averred in plaint — (Civil P. C. (1908), O. 6, R. 4)

Mys 13 D (C N 6)

—S. 2 — Claims under this section and S. 1-A are founded on distinct causes of action and must be separately averred in plaint — See Fatal Accidents Act (1855), S. 1A

Mys 13 D (C N 6)

—S. 2 — Loss of expectation of life — Assessment of damages — Principle — Death of very young child — Moderate figure should be taken as compensation

Mys 13 E (C N 6)

Fisheries Act (4 of 1897)

—S. 6 — Fishery Rules of Manipur, Rule 39 — Offer ripens into a contract only when bid is accepted by Chief Commissioner — Once bid is accepted the offer cannot be withdrawn

Manipur 16 C (C N 6)

Fishery Rules of Manipur

—R. 39 — Offer ripens into a contract only when bid is accepted by Chief Commissioner — Once bid is accepted the offer cannot be withdrawn — See Fisheries Act (1897), S. 6

Manipur 16 C (C N 6)

Foreign Exchange Regulation Act (7 of 1947)

—S. 8 — Notification restricting import of gold by air — Not restricted to import by sea and land by reason of fiction created by S. 23A — Import of gold by air in contravention of notification is punishable under S. 167 (81), Sea Customs Act, 1878 — See Sea Customs Act (1878), S. 167 (81)

SC 45 A (C N 13)

—S. 8 — Conspiracy to import gold by air punishable under S. 120A, Penal Code — See Penal Code (1860), S. 120-A

SC 45 B (C N 13)

—S. 12 (1) (2) (b) — Contravention of — Value of goods exported inflated by petitioner — Foreign buyer repatriating only true value of goods — No contravention of provisions and petitioners, held could not be penalised

Mys 3 A (C N 2)

—S. 12(2) — Disobedience of provision — What amounts to — Subsequent act or omission after export and not antecedent one contemplated. Mys 3 B (C N 2)

—S. 12(2) — Permission of Reserve Bank under, is scarcely necessary if there is, no inadequacy

Mys 3 C (C N 2)

—S. 12(2) — Whether the words "no person entitled to sell or procure the sale of the stated goods" occurring in S. 12(2) exclude from its purview a case in which the export is made pursuant to an already completed sale — (Quaere)

Mys 3 D (C N 2)

—S. 23A — Section creates legal fiction in respect of notification under S. 8(1) of the Act and attracts S. 167 (81) Sea Customs Act to contravention of notification — Legal fiction does not however cut down ambit of notification, restricting import of gold by air as well, to import by sea and land only — Import by air of gold is punishable under S. 167 (81) Sea Customs Act, 1878 — See Sea Customs Act (1878), S. 167 (81)

SC 45 A (C N 13)

General Clauses Act (10 of 1897)

—S. 9 — When certain time is allowed for doing an act, last day of time is included for performing that act — See Panchayats — Bombay Village Panchayats Act (3 of 1959), S. 15(1)

Bom 1 B (C N 1)

—S. 15 — Sanitary Inspectors would be deemed to be class of officers generally

General Clauses Act (contd.)

by their "official title" in the sense in which it was used in S. 39, Criminal P. C. — See Prevention of Corruption Act (1947), S. 6 (1) (c) Tripura 1 D (C N 1)

Goa, Daman and Diu (Banks Reconstruction) Regulation (2 of 1962)

—Pre. and Ss. 5, 6, 7 — Regulation is intra vires the powers of President under Art. 240(1) of the Constitution — Art. 245 (2) saves it from charge of invalidity on ground of extra territorial operation — President was justified in making a Regulation for reconstruction of branches of B. N. U., vesting the rights and obligations of those branches in the custodian and settlement of their accounts

Goa 11 A (C N 3)

—S. 5 — Regulation is valid — See Goa, Daman and Diu (Banks Reconstruction) Regulation (2 of 1962), Pre.

Goa 11 A (C N 3)

—S. 5(1) — Scope and interpretation of — What vests in custodian are the rights acquired and obligations undertaken by the B. N. U. through its branches in Portuguese territories in India

Goa 11 B (C N 3)

—S. 6 — Regulation is valid — See Goa, Daman and Diu (Banks Reconstruction) Regulation (2 of 1962), Pre.

Goa 11 A (C N 3)

—S. 7 — Regulation is valid — See Goa, Daman and Diu (Banks Reconstruction) Regulation (2 of 1962), Pre.

Goa 11 A (C N 3)

Government Grants Act (15 of 1895)

—S. 3 — Madras City Tenants Protection Act (3 of 1922), Ss. 1(3), Proviso and 7 (a) — Lease of Government land — State is excluded from operation of Act (3 of 1922) — Lessee cannot file petition for fair rent against State, S. A. No. 482 of 1964 (Mad), Overruled

Mad 27 (C N 11)

Guardians and Wards Act (8 of 1890)

—S. 25 — Custody of minor child — Best interest of child is sole deciding factor — See Constitution of India, Art. 226

Ker 1 B (C N 1) (FB)

HIGH COURT RULES AND ORDERS

—Rajasthan High Court Rules

—Chap. XXIX, R. 745 (2) — Banking Companies Act (1949), Ss. 45-B, 45-T — Objection to attachment of property — Executing Court is competent to investigate and decide upon objections — Alternative remedy open to objector is to prefer claim in High Court under S. 45-B — See Banking Companies Act (1949), S. 45-B

Raj 12 (C N 2)

Hindu Law

—Joint family — Acquisition of separate property by member — Property whether self-acquired or joint — Presumption is that it is joint family property — Onus is on member claiming

Hindu Law (contd.)

such acquisition as his separate property to prove that it is so Pat 13 A (C N 3)

—Joint family and coparcenary — Distinction SC 14 B (C N 5)

—Maintenance — Sister's right to — Commencement of — Sisters held entitled to maintenance from date of partition — See Civil P. C. (1908), O. 20, R. 4

Orissa 4 A (C N 3)

—Partition — Date of partition will mean the date when there is disruption of joint status amongst the coparceners resulting in numerical division of property — See Civil P. C. (1908), O. 20, R. 4

Orissa 4 A (C N 3)

Hindu Marriage Act (25 of 1955)

—Ss. 13 (1) (i) and 23 (1) — Divorce — Adultery — Standard of proof — Law in England and India — Burden of proof — Post-suit adultery — Evidentiary value of

Cal 38 A (C N 7)

—S. 23 (1) — Divorce — Adultery — Standard of proof — Law in England and India — Burden of proof — Post-suit adultery — Evidentiary value of — See Hindu Marriage Act (1955), S. 13 (1) (i)

Cal 38 A (C N 7)

—S. 24 — Suit by husband for judicial separation — Application by wife for grant of interim maintenance and litigation expenses — Considerations — Goodwill or charity of relations and friends cannot be taken into account while ordering any grant — Test is whether she has any independent income sufficient for her support and to bear necessary expenses of proceedings — Merely because of a potential capacity to earn something the Court cannot refuse to grant maintenance — Further, Section 24 does not envisage substitution of customary ornaments for income nor can Court refuse to make a grant merely because wife can pull on for some time by selling ornaments

Madh Pra 14 (C N 4)

HOUSES AND RENTS

—Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947)

—S. 29 — Dismissal by High Court of revision against appellate order — Order cannot thereafter be challenged under Arts. 226, 227. (1965) 67 Bom LR 690 Reversed; (1956) 58 Bom LR 344. Overruled — See Constitution of India, Article 226

SC 1 (C N 1)

—Delhi Rent Control Act (59 of 1958)

—S. 39 — Second appeal — Competency — Appeal must involve substantial question of law Delhi 26 B (C N 5)

—Madhya Pradesh Accommodation Control Act (41 of 1961)

—S. 12 — Word proceeding in sub-sections (1) and (2) of Section 13 includes appeal — Suit under Section 12 — Appeal by landlord against dismissal — Section 13 (1) becomes operative — Appeal by tenant against decree of ejectment, not

Houses & Rents — Madhya Pradesh Accommodation Control Act (contd.)

included in Section 13 (1) — See Houses and Rents — Madhya Pradesh Accommodation Control Act (41 of 1961), S. 13

Madh Pra 1 (C N 1) (FB)

—Ss. 13, 12 — Word 'proceeding' in sub-sections (1) and (2) of S. 13 — Suit to be construed to mean 'appeal' — Suit under Section 12 — Appeal by landlord against dismissal — Section 13 (1) becomes operative — Appeal by tenant against decree of ejectment, not included in Section 13 (1)

Madh Pra 1 (C N 1) (FB)

—Madras Buildings (Lease and Rent Control) Act (18 of 1960)

—S. 2 (3) — Rent Controller is not a Civil Court subordinate to appellate jurisdiction of High Court — See Civil P. C. (1908), S. 115

Mad 39 (C N 14)

Hyderabad Land Revenue Act (8 of 1317 F)

—S. 54 — Transfer — Meaning — See Tenancy Laws — A. P. (Telangana Area) Tenancy and Agricultural Lands Act (21 of 1961), S. 2 (o) and 2 (p)

Andh Pra 19 B (C N 3)

Income-tax Act (11 of 1922)

—S. 10 (2) (xv) — Capital and revenue expenditure — Expenditure incurred in obtaining new permit under Motor Vehicles Act — Expenditure is of capital character — Expenditure incurred in registering trade mark is revenue expenditure — Positions compared

Mad 23 (C N 9)

—S. 16 (3) — Assessee partner in firm — Minor sons of assessee also partners — Separate returns filed by minor sons through assessee's wife as guardian

SC 10 B (C N 4)

—S. 16 (3) (a) (ii) — Assessee partner having minors admitted to partnership firm — Fact not disclosed by assessee — Proceeding under Section 34 (1) (a) cannot be commenced — No obligation is cast on assessee to disclose the income liable to assessment under S. 16 (3) or Section 22 (5). (1965) 55 ITR 147, **Reversed** — See Income-tax Act (1922), Section 34 (1) (a)

SC 10 A (C N 4)

—S. 25 (5) — Assessee partner having minors admitted to partnership firm — Fact not disclosed by assessee — Proceeding under Section 34 (1) (a) cannot be commenced — No obligation is cast on assessee to disclose income liable to assessment under Section 16 (3) or S. 22 (5). (1965) 55 ITR 147, **Reversed** — See Income-tax Act (1922), S. 34 (1) (a)

SC 10 A (C N 4)

—Ss. 34 (1) (a), 16 (3) (a) (ii) and 25 (5) — Assessee partner having minors admitted to partnership firm — Fact not disclosed by assessee — No obligation on tax payer to disclose income liable to as-

Income-tax Act (1922) (contd.)

assessment — Proceeding under Section 34 (1) (a) cannot be commenced. (1965) 55 ITR 147 (Mad), **Reversed**

SC 10 A (C N 4)

—S. 34 (1) (b) — Reopening of assessment on information received and not as a result of change of opinion — Order of reassessment made well within four years from the last day of year of assessment — Notice under section held was competently issued by the Income-tax Officer

SC 10 C (C N 4)

—S. 34 (1), (3) 2nd proviso — Assessment made by Income-tax Officer in pursuance of a direction or remand constitutes "information" — Second proviso is a proviso to Section 34 (1) (a), (b), 34 (1-A) to 34 (1-D)

Bom 30 C (C N 6)

—S. 34 (3) proviso — Scope — Bar of limitation of 4 years applies only to assessments to be made by the Income-tax Officer — Appeals by the appellate Commissioner and the Tribunal are not covered by the limitation

Bom 30 B (C N 6)

—S. 34 (3), 2nd proviso — Vires — Proviso is ultra vires as violative of Article 14 of the Constitution only so far as strangers who are not parties to the proceedings are concerned — As regards parties intimately connected with assessment proceedings provisions are not ultra vires — Words "any person" means a person intimately connected with the assessment under appeal. AIR 1964 Bom 170, **Held no longer good law in view of** (1969) 71 ITR 51 (Bom) & AIR 1965 SC 342

Bom 30 A (C N 6)

Income-tax Act (43 of 1961)

—S. 147 — Objections relating to notice under Section 147 — Objections well within jurisdiction and competence of Income-tax Officer — Objections should be considered by him and not in writ proceedings — AIR 1968 Ker 182, **Reversed** — See Constitution of India, Art. 226

Ker 14 (C N 2)

Industrial Disputes Act (14 of 1947)

—S. 2 (j), 2 (s) — Hirakud Dam Project is industry — Telephone operator under Government of Orissa, though unconnected with main industry comes within definition of 'workman' in S. 2 (s) and therefore, provisions of S. 25-F (b) are applicable to his case even though he is a Government servant — See Industrial Disputes Act (1947), S. 25-F (b)

Orissa 9 A (C N 4)

—S. 2 (k) — Industrial dispute — When body of workmen, acting through their union or otherwise, sponsor workmen's dispute with management, it becomes industrial dispute

Madh Pra 16 C (C N 5)

—S. 10 — Petition under Art. 226 of Constitution — Another remedy available — Ordinarily High Court will not interfere — Interference proper in special case

Industrial Disputes Act (contd.)

— See Constitution of India, Art. 226

Orissa 9 C (C N 4)

—S. 10-A — Award of arbitrator appointed 'under Section 10-A' — Award vitiated by errors apparent on the record — Certiorari will issue for quashing the award — See Constitution of India, Article 226 Madh Pra 16 A (C N 5)

—S. 10-A (3) — Section is partly mandatory and partly directory

Madh Pra 16 D (C N 5)

—S. 11 — Application under Proviso to Section 33 (2) (b) is not an interlocutory one — It is an independent proceeding — See Industrial Disputes Act (1947), Section 33 (2) (b) Proviso

Guj 1 C (C N 1) (FB)

—S. 17-A — Finality of award and its enforceability are distinct — Words "subject to provisions of Section 6-A" in subsection (5) mean that award on becoming final does not automatically being to be operative — See U. P. Industrial Disputes Act (28 of 1947), S. 6

SC 70 A (C N 17)

—S. 25-F — Re-organisation of business for reasons of economy or convenience resulting in discharge of some employees — No inference can be drawn that discharge is mala fide

Madh Pra 16 B (C N 5)

—Ss. 25-F (b), 2 (i), 2 (s) — Hirakud Dam Project is industry — Telephone operator under Government of Orissa though unconnected with main industry comes within definition of 'workmen' in Section 2 (s) and therefore, provisions of Section 25-F (b) are applicable to his case even though he is a Government servant — (Point conceded in view of decision in AIR 1968 SC 554)

Orissa 9 A (C N 4)

—S. 25-F (b) — Payment of compensation is condition precedent — Non-performance of — Effect is that retrenchment order is vitiated

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—S. 149 — Assembly with lawful common object of preventing theft of their property — Some exceeding right of private defence and causing death but who exceeded right not known — No common knowledge of members that death was likely to be caused — No one accused could be held guilty under S. 302/149 — See Penal Code (1860), S. 34

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—Ss. 191 and 192 — Swearing to a false affidavit amounts to giving false evidence and fabricating false evidence

Ker 15 C (C N 3)

—S. 192 — Swearing to a false affidavit amounts to giving false evidence and fabricating false evidence — See Penal Code (45 of 1860), S. 191

Ker 15 C (C N 3)

—S. 299 — Mens rea — There are three species of mens rea in S. 299 — See Evidence Act (1872), S. 105

All 51 A (C N 8) (FB)

—S. 302 — Constructive liability for murder either under Section 34 or

Penal Code (contd.)

S. 149 — See Penal Code (1860), S. 34

SC 27 D (C N 8)

—S. 302 — Persons aiding and abetting commission of robbery — One of them killing a person while acting in furtherance of common design — All are guilty of murder — See Criminal P. C. (1898), S. 34

USSC 15 C (C N 3)

—S. 323 — Principal offence and abetment — No specific charge of abetment — Accused having no notice of facts constituting abetment — Conviction for abetment is not justified — See Criminal P. C. (1898), S. 236

Orissa 10 A (C N 5)

—S. 409 — Charge under S. 52, Post Office Act (1898) and S. 409, Penal Code — Order of acquittal by Magistrate — Trial by Magistrate in respect of offence under S. 52 is void under S. 530(a) — Retrial for charge under S. 52 not barred — See Criminal P. C. (1898), S. 403(1)

Goa 7 (C N 2)

—S. 420 — Prosecution under — Criminal intention of accused, at the time the offence is said to have been committed must be established — Mere breach of contract cannot give rise to criminal prosecution — Complainant having alternative remedy in civil court — Conviction, held, could not be sustained

Pat 20 B (C N 4)

—S. 441 — Intention to annoy — Law does not require that intention must be to annoy person who is actually present at time of trespass — Cri Rev. No 188 of 1966, D/- 11-5-1966 (Cal), Reversed

SC 20 (C N 6)

Post Office Act (6 of 1898)

—S. 4 — Exclusive privilege of conveying by post of postal articles — Is not a sovereign function — Govt. is liable for tort committed by servant of Post Office Department in discharge of his duty — See Tort

Mys 13 A (C N 6)

—S. 4 — See Tort — Master and Servant

Mys 13 H (C N 6)

—S. 6 — Exclusive privilege of conveying by post of postal articles — Is not a sovereign function — Govt. is liable for tort committed by servant of Post Office Department in discharge of his duty — See Tort

Mys 13 A (C N 6)

—S. 52 — Charge under S. 52 Post Office Act (1898) and S. 409 Penal Code — Order of acquittal by Magistrate — Trial by Magistrate in respect of offence under S. 52 is void under S. 530(a) — Retrial for charge under S. 52 not barred — See Criminal P. C. (1898), S. 403(1)

Goa 7 (C N 2)

Prevention of Corruption Act (2 of 1947) —S. 4(1) — Seizure of money from pocket of accused — Accused not proved to have accepted money as illicit gratification — Presumption under S. 4(1) cannot be raised — Tripura 1 B (C N 1)

Prevention of Corruption Act (contd.)

—S. 4(1)—Presumption under—Rebuttal of, need not be by direct evidence — Circumstances showing that prosecution version is not correct — Presumption is sufficiently rebutted

Tripura 1 C (C N 1)

—S. 6(1)(c) — Bengal Municipal Act (15 of 1932) (as applicable to Tripura), Ss. 66, 67 — Supersession of Municipality — Appointment of Sanitary Inspector by Administrator and empowering him to act as Food Inspector — Prosecution of Food Inspector for accepting bribe — Administrator is competent to give sanction under S. 6(1)(c) — (General Clauses Act (1897), S. 15) — (Criminal P. C. (1898), S. 39)

Tripura 1 D (C N 1)

Prevention of Food Adulteration Act (37 of 1954)

—S. 20(1) — Complaint filed by a person authorised by Municipal Corporation by resolution in that behalf — Complainant within meaning of S. 417(3) Cri P. C. is Municipal Corporation—1966 Cri LJ 734 Reversed — See Criminal P. C. (1898), S. 417(3) SC 7 B (C N 3)

Preventive Detention Act (4 of 1950)

See under Public Safety

PUBLIC SAFETY

—Preventive Detention Act (4 of 1950)

—S. 3(1)(a) & (b) — Order of detention need not be served on the detenu at the time of arrest — S. 3-A too does not require it — Copy of the grounds for detention need alone be served — The grounds to accompany a preamble complying with Sec. 3(1) — See Public Safety — Preventive Detention Act (1950), S. 7 Cal 12 A (C N 3)

—S. 3(1)(a) & (b) — On facts, held, that the grounds had proximate connection with the purpose of detention — Grounds also held to be not vague or misleading — See Public Safety — Preventive Detention Act (1950), S. 7 Cal 12 B (C N 3)

—Ss. 3(2) and 10(3) — Dealing in rice and movement thereof without licence — Accused charge-sheeted before a Magistrate — Accused discharged at the request of Police who said that he was already detained under the Act — Order of detention held, was not mala fide Cal 12 C (C N 3)

—S. 3-A — Order of detention need not be served on the detenu at the time of arrest — S. 3-A too does not require it — Copy of the grounds for detention need alone be served — The grounds to accompany a preamble complying with Sec. 3(1) — See Public Safety — Preventive Detention Act (1950), S. 7 Cal 12 A (C N 3)

—Ss. 7, 3-A, 3(1)(a) and (b), and 3(2) — Order of detention need not be served on

Public Safety — Preventive Detention Act (contd.)

the detenu at the time of arrest — S. 3-A too does not require it — Copy of the grounds for detention need alone be served — The grounds to accompany a preamble complying with S. 3(1) Cal 12 A (C N 3)

—Ss. 7 and 3(1)(a) and (b) — On facts, held, that the grounds had proximate connection with the purpose of detention — Grounds also held to be not vague or misleading Cal 12 B (C N 3)

—S. 10(3) — Dealing in rice and movement thereof without licence — Accused charge-sheeted before a Magistrate — Accused discharged at the request of Police who said that he was already detained under the Act — Order of detention held, was not mala fide — See Public Safety — Preventive Detention Act (1950), S. 3(2) Cal 12 C (C N 3)

Punjab Co-operative Societies Rules (1956)

See under Co-operative Societies.

Punjab Municipal Act (3 of 1911)

See under Municipalities.

Punjab Security of Land Tenures Act (10 of 1953)

See under Tenancy Laws

Railway Establishment Code

See under Civil Services

Rajasthan High Court Rules

See under High Court Rules and Orders.

Rajasthan Sales Tax Act (29 of 1954)

See under Sales Tax.

Representation of the People Act (43 of 1951)

—S. 7 — Election dispute — Plea of disqualification — Burden to prove lies on person who challenges election on such ground — See Panchayats — Orissa Panchayat Samitis and Zilla Parishads Act (7 of 1960), S. 25(1) (1) Orissa 15 B (C N 7)

—S. 54 — Bombay Village Panchayat Election Rules (1959), R. 34 — It is a wholesome rule adopted almost word for word from S. 54(4) which has received judicial recognition — See Panchayats — Bombay Village Panchayats (Election) Rules (1959), R. 34 Bom 1 A (C N 1)

—Ss. 90, 109, 110 — Election petition — Order dismissing election petition for default in appearance of petitioner — Ss. 109 and 110 which are intended to apply in case of withdrawal of petition are not attracted — Lacuna in the Act in this respect pointed out — Per Satish Chandra J. All 1 C (C N 1) (FB)

—Ss. 90(1) and (3), 92, 98(a), 99 and S. 116-A — Election petition — Trial of — Meaning — Trial commences from its

Representation of the People Act (contd.)
 first seisin by Tribunal and concludes when Tribunal passes an order putting end to proceedings — Procedure provided in O 9 and O. 17, Civil P. C. is attracted by virtue of S. 90(1) — Dismissal of election petition for default of appearance of petitioner under O. 9, R. 8 — Tribunal can restore it under O 9, R. 9 — Tribunal however dismissing it on merits — Appeal under S. 116-A — No relief can be granted to appellant if sufficient cause for non-appearance is not made out — 1964 All LJ 155 and AIR 1964 All 181 Overruled and AIR 1960 J & K 25 (FB). Dissented from All 1 A (C N 1) (FB)

—S. 92 — Election Tribunal can dismiss election petition for default of appearance of election petitioner — AIR 1961 All 181 Overruled — See Representation of the People Act (1951), S. 90(1) & (3) All 1 A (C N 1) (FB)

—S. 98(a) — Order of dismissal for default of election petitioner will be order dismissing it under S. 98(a) — AIR 1964 All 181 and 1964 All LJ 155 Overruled — See Representation of the People Act (1951), S. 90(1) & (3)

All 1 A (C N 1) (FB)
 —S. 99 — Order under S. 90(3) will be order under S. 98(a) — Order under S. 99 will not be inappropriate — Order of dismissal for default of appearance will stand identically on same footing — See Representation of the People Act (1951), S. 90(1) & (3)

All 1 A (C N 1) (FB)
 —S. 109 — Election petition — Order dismissing election petition for default in appearance of petitioner — Ss. 109 and 110 are not attracted — See Representation of the People Act (1951), S. 90

All 1 C (C N 1) (FB)
 —S. 110 — Election petition — Order dismissing election petition for default in appearance of petitioner — Ss. 109 and 110 are not attracted — See Representation of the People Act (1951), S. 90

All 1 C (C N 1) (FB)
 —S. 116-A — Dismissal of election petition for default of appearance of petitioner under O. 9, R. 8 — Tribunal can restore it under O. 9, R. 9 — Tribunal, however, dismissing it on merits — Appeal under S. 116-A — No relief can be granted to appellant if sufficient cause for non-appearance is not made out — See Representation of the People Act (1951), S. 90(1) & (3)

All 1 A (C N 1) (FB)
 —S. 116-B — Finality of order contemplated by S. 116-B is to be read as subject to other provisions of Act which provide for setting aside of specified orders — Section to be so construed as to harmonise with Ss. 90(2), 92(e) and O. 9, R. 9, Civil P. C. Per Satish Chandra J.

All 1 D (C N 1) (FB)

Requisitioning and Acquisition of Immoveable Property Act (30 of 1952)

—S. 8(3) — Acquired land already under requisition for nearly twelve years — Land round about being developed as building land — Compensation for acquired land — Building and development potentiality of acquired land would also increase resulting in rise in market value — This is not "some distant building potentiality", but will be a factor to be taken into account in determining market value of and on date of acquisition, for purposes of compensation

Bom 18 (C N 4)

Rice Milling Industry (Regulation) Act (21 of 1958)

—S. 5(4) — Order under, is administrative and not quasi-judicial — Power when can be said to be quasi-judicial

Mad 34 A (C N 12)

—S. 5(4) — Grant of licence under S. 5 to run rice-mill near temple — Complaint by worshipper that running of mill may affect temple building — Held, whether it was so or not, was not a consequence directly connected with grant of Rice Mill Licence — See Rice Milling Industry (Regulation) Act (1958), S. 12

Mad 34 C (C N 12)

—S. 6 — Grant of licence under S. 5 to run rice-mill near temple — Complaint by worshipper that running of mill may affect temple building — Held, whether it was so or not, was not a consequence directly connected with grant of Rice Mill Licence — See Rice Milling Industry (Regulation) Act (1958), S. 12

Mad 34 C (C N 12)

—Ss. 12, 6, 5(4) — Grant of licence under S. 5 to run a rice mill near temple — Complaint by worshipper that running of mill may affect temple building — Held, whether it was so or not, was not a consequence directly connected with grant of Rice Mill Licence — Worshipper could not be said to be person aggrieved — (Words and Phrases — "Aggrieved person" — Meaning of)

Mad 34 C (C N 12)

SALES TAX

—Bombay Sales Tax Act (3 of 1953)

—Ss. 14(3)(a) and 14(4) — Forming of the specified opinion, a condition precedent to issue of notice — Best judgment assessment must be preceded by notice under S. 14(3)(a) — Opinion formed by a person other than assessing authority is no opinion — Issue of notice under S. 14(3)(a) and subsequent assessment under S. 14(4) liable to be quashed

Mys 11 (C N 5)

—Madras General Sales Tax Act (1 of 1959)

—S. 42(3)(a) — See Constitution of India, Art. 246

Mad 25 A (C N 10)

Sales Tax — Madras General Sales Tax Act (contd.)

—S. 42 (3) — Provision for confiscation of goods and levy of penalty by checkpost officer — Ultra vires the Constitution of India — (Constitution of India, Art. 246, Sch. VII, List II, Entry 54)

Mad 25 B (C N 10)

Rajasthan Sales Tax Act (29 of 1954)

—S. 2 — "Sale" — Packing materials — Liability to tax — Whether there is agreement to sell packing materials is a question of fact and not law — Value not only criterion Raj 1 A (C N 1)

—S. 2(o) — Sale of goods — Works contract — Materials used need not get transformed — Contract for pressing and packing cotton — Packing is integral part of pressing — Packing materials used, not liable for Sales Tax, AIR 1957 Andh Pra 706, (1956) 7 STC 486 (Andh); AIR 1957 Andh Pra 40, AIR 1961 MP 88 (FB), (1964) 15 STC 598 (Bom), (1968) 21 STC 505 (MP) and (1968) 22 STC 22 (MP), Dissented from Raj 1 C (C N 1)

—S. 15 — Question of law — Vires of taxing provision — Not raised before the Board of Revenue — Cannot be urged before the High Court as it does not arise out of the judgment of the Board

Raj 1 B (C N 1)

U. P. Sales Tax Act (15 of 1948)

—Ss. 2(h) Expl. II, 2(i) — Exempted turnover — Computation — Turnover relating to sales outside State not includible — See Sales Tax — U. P. Sales Tax Act (15 of 1948), S. 3(1) 1st Proviso

All 20 (C N 3) (FB)

—Ss. 3(1) 1st proviso, 2(h) explanation II, 2(i) and 27 (before the amending Act 19 of 1958) — Exempted turnover—Computation — Turnover relating to sales outside State not includible

All 20 (C N 3) (FB)

—S. 27 — Exempted turnover — Computation — Turnover relating to sales outside State not includible — See Sales Tax — U. P. Sales Tax Act (15 of 1948), S. 3(1) 1st Proviso

All 20 (C N 3) (FB)

Sea Customs Act (8 of 1878)

—S. 167(81) — Import of gold by air — Fraudulent evasion of restrictions imposed under Foreign Exchange Regulation Act — Offence punishable under section — Conspiracy to evade restriction — Punishable under Section 120B, Penal Code SC 45 A (C N 13)

Specific Relief Act (1 of 1877)

—S. 18 — Agreement for sale of evacuee property by person having imperfect title to it due to statutory restrictions of S. 40, Administration of Evacuee Property Act (1950) — Held, purchaser was entitled to claim performance of contract after restrictions coming to end

Guj 12 E (C N 2)

Specific Relief Act (contd.)

—S. 18(b) — Scope — Suit for specific performance of agreement to direct the vendor to apply for permission under S. 47 of A. P. Act (21 of 1961) and then to execute a sale deed maintainable — S. 47 does not bar such a suit — See Tenancy Laws — A. P. (Telangana Area) Tenancy and Agricultural Lands Act (21 of 1961), S. 47

Andh Pra 19 A (C N 3)

—S. 21(b) — "Volition of parties" — Section refers to parties to agreement and not to any party such as statutory authority with powers to act according to provisions governing the same:

Guj 12 G (C N 2)

—S. 22 — Proceedings under S. 20 Arbitration Act — Agreed arbitrator biased — Principles underlying S. 22 of Specific Relief Act may be resorted to for doing justice — See Arbitration Act (1940), S. 20

All 31 E (C N 6)

—S. 22 — Circumstances prevailing at date of agreement are to be considered and not as to what happened subsequently

Guj 12 H (C N 2)

—S. 23(b) — Persons not parties cannot enforce arbitration agreement — See Arbitration Act (1940), S. 2(a)

Delhi 19 A (C N 4)

—S. 27(b) — Persons not parties cannot enforce arbitration agreement — Fact that person claiming under a party is empowered to move judicial authority is not material — See Arbitration Act (1940), S. 2(a)

Delhi 19 A (C N 4)

—S. 42 — Police seizing truck from custody of plaintiff — Suit for declaration that plaintiff is owner of truck — It is not necessary to ask for recovery of possession of truck — Seizure of truck by police will be tantamount to truck being in custody of police for benefit of party who is declared by Civil Court to be entitled to its possession

Pat 7 A (C N 2)

Stamp Act (2 of 1899)

See under Stamp Duty

STAMP DUTY

Stamp Act (2 of 1899)

—S. 2(17) and (5) — Agreement in respect of film under production — Party obliging himself to pay amounts advanced in a particular manner and in addition giving a camera as security—Film under production being neither a specified property nor property in existence, the instrument was not a mortgage but a bond — See Stamp Duty—Stamp Act (1899), S. 6

Mad 10 (C N 5) (SB)

—S. 5 — Instrument for dissolution of partnership — Instrument also effecting division of property — Higher duty under S. 6 is payable on instrument — See Stamp Duty — Stamp Act (1899), S. 6

Mad 2 (C N 2) (FB)

Stamp Duty — Stamp Act (contd.)

—S. 5 — Agreement in respect of a film under production — Party obliging himself to pay amounts advanced in a particular manner and in addition giving a Camera as security — S. 5 held not applicable — See Stamp Duty — Stamp Act (1899), S. 6 Mad 10 (C N 5) (SB)

—Ss 6, 5 — Instrument for dissolution of partnership — Instrument also effecting division of property — Higher duty under S. 6 is payable on the instrument

Mad 2 (C N 2) (FB)

—Ss. 6, 5, 2(17) and (5), Sch. I, Arts. 40 and 15 — Agreement in respect of film under production — Instrument attested — Party obliging himself to pay amounts advanced in a particular manner and in addition giving a camera as security — Instrument held not a mortgage but a bond as well as a pledge — Instrument held not consisting of distinct matters — Section 6 and not S. 5 held applicable and as such highest of the stamp duties payable thereunder was leviable

Mad 10 (C N 5) (SB)

—Ss. 9, 76(2) — Madras City Municipal Corporation Act 4 of 1919, Ss. 93 (h), 135(a) and (b) — Levy of tax under S. 93(h) read with S. 135 of Corporation Act — Nature of — Liability to pay duty under Stamp Act — Grant of exemption to certain instruments — Effect — Surcharge under Corporation Act cannot be levied — Words and Phrases — "Surcharge"

Mad 7 (C N 4) (FB)

—S. 76(2) — Grant of exemption under S. 76(2) read with S. 9 to certain instrument — Such instrument is not liable to surcharge under S. 93 read with S. 135 of Madras Act 4 of 1919 — See Stamp Duty — Stamp Act (1899), S. 9

Mad 7 (C N 4) (FB)

—Sch. 1, Art. 15 — Agreement in respect of film under production — Party obliging himself to pay amounts in a particular manner and in addition giving camera as security — Instrument held not a mortgage but a bond as well as a pledge — See Stamp Duty — Stamp Act (1899), S. 6

Mad 10 (C N 5) (SB)

—Sch. 1, Art. 17 — Instrument by which vendor of immovable property gives up his right of reconveyance — It is not a deed of cancellation — See Stamp Duty — Stamp Act (1899), Sch. 1, Art. 55

Mad 1 (C N 1) (FB)

—Sch. 1, Art. 23 — Instrument by which vendor of immovable property gives up his right of reconveyance — It is not conveyance — See Stamp Duty — Stamp Act (1899), Sch. 1, Art. 55

Mad 1 (C N 1) (FB)

—Sch. 1, Art. 23 (as amended by Madras Amendment Act 19 of 1958) — Parties to suit for partition entering into partnership by executing document — One of parties throwing family property in

Stamp Duty — Stamp Act (contd.)

partnership after releasing it from Court on payment — Document is deed of partnership simpliciter — Not dutiable under Art. 23 — See Stamp Duty — Stamp Act (1899), Sch. 1, Art. 46

Mad 5 (C N 3) (FB)

—Sch. 1, Art. 40 — Agreement in respect of film under production — Party obliging himself to pay amounts advanced in a particular manner and in addition giving a camera as security — Film under production being neither a specified property nor property in existence, the instrument was not a mortgage but a bond — See Stamp Duty — Stamp Act (1899), S. 6

Mad 10 (C N 5) (SB)

—Sch. 1, Arts. 46, 23 (as amended by Madras Amendment Act 19 of 1958) — Parties to suit for partition entering into partnership by executing a document — One of parties throwing family property in partnership after releasing it from Court on payment — Document is deed of partnership simpliciter — Dutiable as such under Art. 46 and not under Art. 23 — Partnership Act (1932), S. 14 — Transfer of Property Act (1882), S. 10

Mad 5 (C N 3) (FB)

—Sch. 1, Arts. 55, 23 and 17 — Instrument by which vendor of immovable property gives up his right of reconveyance — It is release and not conveyance or cancellation

Mad 1 (C N 1) (FB)

TENANCY LAWS

—Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948)

—S. 1(4) — Dispute arising after estate is notified — Interpretation of — Dispute already pending before Civil Court is not divested by S. 56(1) — See Tenancy Laws — Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 56(1)

Andh Pra 1 A (C N 1) (FB)

—S. 1(4) — Abolition of estate — Issue of notification under S. 1(4) — Effect — Civil Court cannot be divested of its jurisdiction when it has already seized of jurisdiction to decide matters contemplated by S. 56 — See Tenancy Laws — Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 56(1)

Andh Pra 1 B (C N 1) (FB)

—Ss. 56(1) and 1(4) — Dispute arising after estate is notified — Interpretation of — Dispute already pending before Civil Court is not divested by S. 56(1)

Andh Pra 1 A (C N 1) (FB)

—Ss. 56(1), 1(4) — Abolition of estate — Issue of notification under S. 1(4) — Effect — Civil Court's jurisdiction — (Civil P. C. (1908), S. 9)

Andh Pra 1 B (C N 1) (FB)

Tenancy Laws—Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (contd.)

—S. 56(1) — Vesting of estate in Government — Ryotwari Patta not issued in favour of person in previous occupation—He has, nevertheless, right to protection against trespasser — (1964) 2 Andh WR 332, Overruled

Andh Pra 1 C (C N 1) (FB)

—**A. P. (Telangana Area) Tenancy and Agricultural Lands Act (21 of 1961)**

—Ss. 2(o) and 2(p) and 47 — Transfer — Meaning

Andh Pra 19 B (C N 3)

—S. 47 — Scope — Suit for specific performance of agreement to direct the vendor to apply for permission under S. 47 and then to execute a sale deed maintainable — S. 47 does not bar such a suit. (1963) 1 Andh WR 165 & (1965) 2 Andh WR 61 Overruled and (1962) 2 Andh WR 462 partly overruled

Andh Pra 19 A (C N 3)

—S. 47 — Transfer — Meaning — See Tenancy Laws—A. P. (Telangana Area) Tenancy and Agricultural Lands Act (21 of 1961), Ss. 2(o) and 2(p)

Andh Pra 19 B (C N 3)

—**Bombay Tenancy and Agricultural Lands Act (67 of 1948)**

—Ss. 32 to 32R (as added in 1956) — Trust in question owning agricultural land, registered under Bombay Public Trusts Act on 28-3-1958 — Before that, tenant of land became owner by virtue of Ss. 32 to 32R — Trust, held could not get exemption under S. 88B — See Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 88B Bom 23 B (C N 5)

—Ss. 32 to 32R — Sections do not fall within Cl. (2)(a) of Art. 25 of Constitution — See Constitution of India, Art. 25

Bom 23 C (C N 5)

—Ss. 32 to 32R — Sections do not violate Art. 26(c) of Constitution — See Constitution of India, Art. 26(c)

Bom 23 D (C N 5)

—Ss. 88B, 32 to 32R (as added in 1956) — Exemption under S. 88B — Fact that trust was created after S. 88B came into force, would not disentitle it to claim exemption — Trust in question owning agricultural land was registered under Bombay Public Trusts Act on 28-3-1958 — Before that date, tenant of land became owner by virtue of Ss. 32 to 32R — Trust, held could not get exemption under S. 88B Bom 23 B (C N 5)

—S. 88B(1)(b) proviso — Word "trust" is not confined to trust for educational purposes — It covers trusts for other purposes including one for public religious worship — See Civil P. C. (1908), Pre

Bom 23 A (C N 5)

Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (contd.)

—S. 88B(1) proviso — Proviso to S. 88B(1) does not violate Art. 26(c) of Constitution — See Constitution of India, Art. 26(c) Bom 23 D (C N 5)

—**Bombay Tenancy and Agricultural Lands Rules (1956)**

—R. 52 — Word "trust" is not confined to trust for educational purposes — It covers trusts for other purposes including one for public religious worship — See Civil P. C. (1908), Pre.

Bom 23 A (C N 5)

—**J. & K. Tenancy Act (2 of 1980)**

—S. 85(3)(a) — Suit for two or more reliefs—One of them cognizable by Revenue Court — Jurisdiction of Civil Court not barred — See Civil P. C. (1908), S. 9

J & K 2 (C N 2)

—**Kerala Land Reforms Act, 1963 (1 of 1964)**

—S. 2(22) — Document described as "Kanyadharam" held on its construction to be mortgage and not a kanom — See Transfer of Property Act (1882), S. 8

Ker 16 A (C N 4) (FB)

—S. 12(1) — Section only removes the trammels imposed by provisions of Evidence Act especially Ss. 91 and 92 in interpretation of documents — In cases to which S. 12(1) will not apply, a document has to be interpreted subject to Ss. 91 and 92 Ker 16 B (C N 4) (FB)

—**Madras City Tenants Protection Act (3 of 1922)**

—S. 1(3), Proviso — Land owned by Government — Not included in proviso to S. 1(3) — See Government Grants Act (1895), S. 3 Mad 27 (C N 11)

—S. 7(a) — Lease of Government land — State is excluded from operation of Madras Act 3 of 1922 — Lessee cannot file petition for fair rent against State — S. A. No. 482 of 1964 (Mad) Overruled — See Government Grants Act (1895), S. 3 Mad 27 (C N 11)

—**Manipur Land Revenue and Land Reforms Rules (1961)**

—R. 56 — Dag chithas prepared under R. 66 — They are documents in nature of revenue records — See Evidence Act (1872), S. 35 Manipur 7 B (C N 2)

—Rr. 66, 67—Dag chithas prepared under R. 66 are documents in nature of revenue records — See Evidence Act (1872), S. 35 Manipur 7 B (C N 2)

—**Oudh Estates Act (1 of 1869)**

—S. 2 — Under S. 22(6) estate devolves on widow though technically not heir under S. 2 — See Tenancy Laws — Oudh Estates Act (1 of 1869), S. 22(6)

SC 42 A (C N 12)

Tenancy Laws — Oudh Estates Act (contd.)

—Ss 22(6), 22(7), 23, 2 — Taluqdar named in List 2 — Succession to non-taluqdari property — Presumption is that it is also governed by rule of devolution on single heir and not by rule of Hindu law — Such presumption is not inconsistent with Section 23

SC 42 A (C N 12)

—S. 23 — Taluqdar named in List 2 — Succession to non-Taluqdari property — Presumption is that it is also governed by rule of devolution on single heir and not by rule of Hindu law—Such presumption is not inconsistent with S 23 — See Tenancy Laws — Oudh Estates Act (1 of 1869), S. 22 (6)

SC 42 A (C N 12)

—Punjab Security of Land Tenures Act (10 of 1953)

—Ss 10A and 18 — Scope and object — Object of S. 10A is separate and distinguishable from S. 18 and there is no conflict between two sections — Law laid down in 1967 Pun LJ 38 (DB) is correct and unexceptionable

Punj 23 (C N 5) (FB)

—S 18 — Scope and object — See Tenancy Laws — Punjab Security of Land Tenures Act (10 of 1953), S. 10A

Punj 23 (C N 5) (FB)

—U. P. Agricultural Tenants (Acquisition of Privileges) (Amendment) and Miscellaneous Provisions Act (7 of 1950)

—S 10 — Ejectment of sub-tenant barred by virtue of S. 10 — His suit for possession is not barred by proviso to S. 133 of U. P. Tenancy Act — 1965 All LJ 290, Overruled; Civil Misc. Writ No. 3075 of 1966, D/- 6-1-1967 (All), Reversed — See Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 133, Proviso

All 26 A (C N 5) (FB)

—Sch. Entry III — Ejectment of sub-tenant barred by virtue of S. 10 read with entry 3 of Schedule — His suit for possession is not barred by proviso to S. 133 of U. P. Tenancy Act, 1965 All LJ 290, Overruled. Civil Misc. Writ No. 3075 of 1966, D/- 6-1-1967 (All), Reversed — See Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 133 Proviso

All 26 A (C N 5) (FB)

—U. P. Tenancy Act (17 of 1939)

—S 133, Proviso — U. P. Agricultural Tenants (Acquisition of Privileges) (Amendment) and Miscellaneous Provisions Act (7 of 1950), S. 10 and Sch. Entry III — "Is liable to ejectment" in Proviso to S. 133 — Interpretation — Ejectment of sub-tenant barred by virtue of S 10 read with Entry III of Schedule, of Act 7 of 1950 — His suit for possession is not barred by proviso to S. 133 of Tenancy Act, 1965 All LJ 290 Overruled; Civ. Misc. Writ No 3075 of 1966, D/- 6-1-1967 (All), Reversed

All 26 A (C N 5) (FB)

Tenancy Laws — U. P. Tenancy Act (contd.)

—S. 289 — Reference of question of jurisdiction to High Court — Revenue Court holding that it has no jurisdiction — Civil Court deciding matter — Party not raising objection to jurisdiction of Civil Court — Same held could not be raised in appeal to the High Court, S E. D. A. Nos. 3 and 4 of 1961, D/- 26-3-1965 (All—LB), Reversed

SC 30 (C N 9)

Tort

—Damages — Negligence resulting in death — Mode of assessment of damages — See Fatal Accidents Act (1855), S. 1A J & K 5 B (C N 3)

—Damages — Personal injury due to accident — Assessment of damages — Principles — (Civ) P. C. (1908), Sections 100-101 — Interference by appellate Court in assessment of damages by lower Court) Mys 13 F (C N 6)

—Master and servant — Sovereign act — Act by servant of State in performance of sovereign act — Liability of State—Postal service of Government of India is not a sovereign function of State — Union of India is liable for torts committed by servants of Postal Department in course of discharge of their duties

Mys 13 A (C N 6)

—Master and servant — Vicarious liability — Hire of motor vehicle with driver — Driver committing accident while driving vehicle in course of employment by hirer—Liability of hirer and owner of vehicle — Extent of — (Civil P. C. (1908), Preamble)—(Maxims —Pro hac vice) — (Evidence Act (1872), Ss. 101-104 — Vicarious liability for tort committed by servant — Onus to prove employment) Mys 13 G (C N 6)

—Master and servant — Vicarious liability — Union of India having statutory duty to convey and carry mail, giving contract to independent contractor, an owner of motor vehicle, to convey mail from one place to another — Driver of contractor's vehicle, while conveying mail, by negligent act meeting an accident and causing death of plaintiff's son — Liability of Union of India is truly not vicarious but because of breach of statutory duty — (Post Office Act (1898), Section 4) Mys 13 H (C N 6)

—Vicarious liability — State servants — Liability of State for acts of its employees — Unless it is shown that employee was acting in exercise of sovereign power delegated to him by some law or rule and was doing something which could not be done by private individual, State cannot claim any immunity from tortious acts of its employees — Death caused by rash and negligent driving of a truck by defendant-2 who was a

Tort (contd.)

member of defence services of defendant-1, Union of India — Burden of proving existence of circumstances to claim immunity lies on defendants — No material on record to indicate that defendant-2 while driving military truck at time of accident was carrying on any peculiar duty of sovereign nature or that there was anything special about his employment— Defendant-1 held liable in damages

J & K 5 C (C N 3)

Trade and Merchandise Marks Act (43 of 1958)

—S. 18 — See Income Tax Act (1922), S. 10 (2) (xv)

Mad 23 (C N 9)

Transfer of Property Act (4 of 1882)

—S. 6 — "Know-how" of a mining company is not a saleable commodity — See Metal Corporation of India (Acquisition of Undertaking) Act, (1966), S. 4 (1) Cal 15 H (C N 4)

—Ss. 8, 58, 98, 105 — Kerala Land Reforms Act 1963 (1 of 1964), S. 2 (22)— Deed — Construction — Document described as "kanyadharam" — Transaction whether a Kanom or a mortgage — Depends upon interpretation of document — Intention of parties must be looked into — Nature of transaction to be decided from terms of document — Held, on construction of document that it was a mortgage and not a Kanom under Kerala Act (1 of 1964) — Merely because a 'marupat' was executed on same date in favour of executant of "kanyadharam" it could not be said that transaction was a lease

Ker 16 A (C N 4) (FB)

—S. 10 — Parties to suit for partition entering into partnership by executing document — One of parties throwing family property in partnership after releasing it from Court on payment — Document is deed of partnership simpliciter — See Stamp Duty — Stamp Act (1899), Sch. 1 Art. 46

Mad 5 (C N 3) (FB)

—S. 53A — Scope — Suit for specific performance of agreement to direct the vendor to apply for permission under Section 47 of A. P. Act (21 of 1961) and then to execute a sale deed maintainable — S. 47 does not bar such a suit — See Tenancy Laws — A. P. (Telangana Area) Tenancy and Agricultural Lands Act (21 of 1961), S. 47

Andh Pra 19 A (C N 3)

—S. 54 — S. 38 of Administration of Evacuee Property Ordinance or S. 40 of the Act operates only upon transfers creating right or interest in property. ILR (1965) 1 Punj 619, Diss. from—See Administration of Evacuee Property Ordinance (1949), S. 38

Guj 12 C (C N 2)

Transfer of Property Act (contd.)

—S. 54 — Contract for sale of immoveable property does not create any interest in or charge on property so as to attract provisions of S. 38 Administration of Evacuee Property Ordinance or S. 40 of Act — AIR 1956 Cal. 462, Diss. from — See Administration of Evacuee Property Ordinance (1949), S. 38

Guj 12 D (C N 3)

—S. 55 — Scope — Suit for specific performance of agreement to direct the vendor to apply for permission under S. 47 of A. P. Act (21 of 1961) and then to execute a sale deed maintainable — S. 47 does not bar such a suit — See Tenancy Laws — A. P. (Telangana Area) Tenancy and Agricultural Lands Act (21 of 1961), S. 47

Andh Pra 19 A (C N 3)

—S. 55 (6) (b) — Contract for sale of immoveable property does not create any interest in or charge on property so as to attract provisions of S. 38, Administration of Evacuee Property Ordinance or S. 40 of Act — AIR 1956 Cal. 462 Diss. from — See Administration of Evacuee Property Ordinance (1949), S. 38

Guj 12 D (C N 3)

—S. 58 — Document described as "kanyadharam" — Held, on construction of document that it was a mortgage and not a kanom under Kerala Act (1 of 1964) — See Transfer of Property Act (1882) S. 8

Ker 16 A (C N 4) (FB)

—S. 92 — See Madras Port Trust Act (2 of 1905), S. 110

Mad 48 F (C N 18)

—S. 98 — Transaction whether a Kanom or mortgage depends upon interpretation of document — Document described as "kanyadharam" held on its construction to be mortgage and not a Kanom — See Transfer of Property Act (1882), S. 8

Ker 16 A (C N 4) (FB)

—S. 105 — Document described as "Kanyadharam" held on its construction to be mortgage and not a Kanom — Execution of "marupat" in favour of executant — Transaction could not be said to be lease — See Transfer of Property Act (1882), S. 8

Ker 16 A (C N 4) (FB)

—S. 105 — Question whether disputed passage forms part of tenancy granted to a tenant subject to right of other tenants or occupants of premises — Question is one of law—See Civil P. C. (1908), Ss. 100-101

Mad 37 A (C N 13)

—S. 108 (c) — Passage not part of lease — Lessees will have no better rights than lessors—See Easements Act (1882), S. 13

Mad 37 B (C N 13)

—S. 122 — Gift of house — Donor and donee living in house, the subject-matter of gift — Donor need not necessarily part from house in order to make gift effective — There must be clear intention

Transfer of Property Act (contd.)

to make gift and to part with possession of property — See *Mahommadan Law*

Mad 17 A (C N 8)

Travancore Christian Guardianship Act (11 of 1116)

—S. 1 — Custody of minor child — Best interest of child is sole deciding factor — See *Constitution of India*, Art. 226

Ker 1 B (C N 1) (FB)

Tripura Employees' (Revision of Pay and Allowances) Rules, 1963, Sch. I, Serial No. 7

— Selection of Assistants on seniority-cum-merit basis to selection grade, after qualifying examination — Rules not laying down principles of selection — Selection made on basis of executive instructions — Not violative of Arts. 14 and 16 — See *Constitution of India*, Art. 14

Tripura 10 A (C N 2)

U. P. Agricultural Tenants (Acquisition of Privileges) (Amendment) and Miscellaneous Provisions Act (7 of 1950)

See *Under Tenancy Laws*.

U. P. Civil Laws (Reforms and Amendment) Act (24 of 1954)

—S. 3 — Suit instituted in 1934 and valued at less than Rs. 10,000 but more than Rs. 5,000 — Decree and execution after commencement of Amending Act — Appeal against order in execution lies to District Judge and not to High Court — See *Bengal, Agra and Assam Civil Courts Act* (12 of 1887), S. 21 as amended by *U. P. Civil Laws (Reforms and Amendment) Act*, 1954

All 15 (C N 2)

U. P. Industrial Disputes Act (28 of 1947)

—Ss 6 and 6A — Finality of award and its enforceability are distinct — Words "subject to provisions of S. 6A" in sub-sec. (5) mean that award on becoming final does not automatically begin to be operative

SC 70 A (C N 17)

—Ss. 6 (6) and 6D — Correctional jurisdiction of Labour Court — There is no time limit imposed by Section 6 (6) — No such time limit can be read by implication by resorting to Section 6D. AIR 1967 All 430, Reversed. (Decision, however, upheld on another ground)

SC 70 B (C N 17)

—S. 6A — Finality of award and its enforceability are distinct — Words "subject to provisions of S. 6A" in sub-s. (5) mean that award on becoming final does not automatically begin to be operative — See *U. P. Industrial Disputes Act* (28 of 1947), S. 6

SC 70 A (C N 17)

—S. 6D — Correctional jurisdiction of Labour Court — There is no time limit imposed by S. 6 (6) — No such time limit can be read by implication by resorting to S. 6D — AIR 1967 All 430, Reversed (Decision, however, upheld

U. P. Industrial Disputes Act (contd.)

on another ground) — See *U. P. Industrial Disputes Act* (28 of 1947), S. 6 (6)

SC 70 B (C N 17)

—Ss. 6E (ii) (b) & 6F — "Workman concerned in such dispute" — All workmen who are members of the Union sponsoring the dispute are not covered

All 24 (C N 4)

—S. 6F — All members of the Union sponsoring the dispute are not workmen concerned in that dispute — See *U. P. Industrial Disputes Act* (28 of 1947), S. 6E (ii) (b)

All 24 (C N 4)

U. P. Legislative Department Rules
See *Under Civil Services*.

U. P. Municipalities Act (2 of 1916)
See *Under Municipalities*.

U. P. Sales Tax Act (15 of 1948)
See *Under Sales Tax*.

U. P. Tenancy Act (17 of 1939)
See *Under Tenancy Laws*.

Wakfs Act (29 of 1954)

—S. 65 — Criminal P. C. (1898), S. 197 — Relative scope of two provisions — Complaint against 8 accused under Sections 448, 454, 341, 295A and 426 I. P. C. for invading premises housing private library in possession of complainant — Accused, 1 Secretary of Wakfs Board and 2 to 4, employees thereof — S. 65 of Wakfs Act is no bar to prosecution — Sanction under S. 197 Cr. P. C. is not necessary — See *Criminal P. C.* (1898), S. 197

Andh Pra 13 (C N 2)

Wealth Tax Act (27 of 1957)

—S. 3 — Expression "Hindu Undivided family" is synonymous with Hindu joint family — Existence of two male members is not a condition for formation of Hindu Undivided family as a taxing unit

SC 14 A (C N 5)

—Sections 3 and 5 — Assessment of Hindu Undivided family — Determination of status — Considerations. AIR 1965 Andhra Pra 447, Reversed

SC 14 C (C N 5)

—S. 5 — Assessment as Hindu Undivided family — Determination of status — Considerations — AIR 1965 Andhra Pra. 447 Reversed — See *Wealth Tax Act* (1957), S. 3

SC 14 C (C N 5)

W. B. Employees' State Insurance (Medical Benefit), Rules (1965)

—R. 4 — Scheme under Act — Insurance Medical Officer is not an employee of State Government — See *Constitution of India*, Art. 311

Cal 1 (C N 1)

—R. 8 — Scheme under Act — Insurance Medical Officer is not an employee of State Government — See *Constitution of India*, Art. 311

Cal 1 (C N 1)

—R. 9 — Scheme under Act — Insurance Medical Officer is not an employee of State Government. — See

W. B. Employees' State Insurance (Medical Benefit) Rules (contd.)

Constitution of India, Art 311

Cal 1 (C N 1)

—Sch. I, Cl. II (1) — Scheme under Act — Insurance Medical Officer is not an employee of State Government — See Constitution of India, Art. 311

Cal 1 (C N 1)

—Sch. I, Cl. 7 — Scheme under Act — Insurance Medical Officer is not an employee of State Government — See Constitution of India, Art. 311

Cal 1 (C N 1)

—Sch. 3, Cl. 6 — Scheme under Act — Insurance Medical Officer is not an employee of State Government — See Constitution of India, Art. 311

Cal 1 (C N 1)

Words and Phrases

—Word "Accrued" — Word refers to "the existence of a present enforceable right" or "fixed" or "assessed and determined" — See Panchayats — Orissa Panchayat Samitis and Zilla Parishads Act (7 of 1960), S. 25 (1) (1)

Orissa 15 B (C N 7)

—Words "after the publication of notification under S. 4 (1)" in S. 17 (4) — See Land Acquisition Act (1894), S. 17 (1) (4)

Punj 29 C (C N 6)

—"Aggrieved person" — Meaning of — Grant of licence to run rice-mill near temple — Complaint by worshipper that running mill may affect temple building — Worshipper is not aggrieved person — See Rice Milling Industry (Regulation) Act (1958) S. 12

Mad 34 C (C N 12)

—Words "any person" in 2nd proviso to S. 34 (3) of Income-tax Act (1922), means a person intimately connected with the assessment under appeal

Bom 30 A (C N 6)

—"Dispute" — Interpretation of — See Tenancy Laws — Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 56 (1)

Andh Pra 1 A (C N 1) (FB)

Words and Phrases (contd.)

—Words "Ejusdem Generis" — See Land Acquisition Act (1894), S. 17 (2), (c), (Punj) Punj 1 B (C N 1) (FB)

—"Exploit" — Word "exploit" in Metal Corporations of India (Acquisition of Undertaking) Act (1966) means to turn to industrial account natural resources — See Metal Corporation of India, (Acquisition of Undertaking) Act (1966), Preamble

Cal 15 A (C N 4)

—"Grade" — In U. P. Legislative Department Rules, R. 7 the word 'Grade' is suggestive of status and not class — It means person enjoying same scales of pay — See Civil Services — United Provinces Legislative Department Rules, R. 7

SC 40 (C N 11)

—Judge — Definition — See Penal Code (1860), S. 19

Punj 21 (C N 4)

—Preponderance of probability — Meaning of — See Evidence Act (1872), S. 105

All 51 A (C N 8) (FB)

—"Proceeding" — Meaning of — See Houses and Rents — Madhya Pradesh Accommodation Control Act (41 of 1961), S. 13

Madh Pra 1 (C N-1) (FB)

—"Reasonable doubt" in Criminal case — Meaning of — See Evidence Act (1872), S. 105

All 51 A (C N 8) (FB)

—"Suit" — Means only suit and not appeal — AIR 1928 Cal 222 Dissented from — See Civil Procedure Code (5 of 1908), O. 21 R. 29

Manipur 14 A (C N 5)

—"Transfer" — Meaning of — See Tenancy Laws — A. P. (Telangana Area) Tenancy and Agricultural Lands Act (21 of 1961), Ss. 2 (o) and 2 (p)

Andh Pra 19 B (C N 3)

—"Trial" — Trial commences from its first seisin by Tribunal and concludes when Tribunal passes an order putting end to proceedings — See Representation of the People Act (1951), S. 90 (1) & (3)

All 1 A (C N 1) (FB)

—"Within fifteen days" — Words do not exclude fifteenth day — See Panchayats — Bombay Village Panchayats Act (3 of 1959), S. 15 (1)

Bom 1 B (C N 1)

SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC. in A. I. R. 1970 JANUARY

DISS.=Dissented from in; Not F.=Not Followed in; OVER.=Overruled in; REVERS.=Reversed in

Administration of Evacuee Property Act (31 of 1950)

—S. 40 — AIR 1956 Cal 462 — DISS. AIR 1970 Guj 12 D (C N 3).

—S. 40 — ILR (1965) 1 Punj 619 — DISS. AIR 1970 Guj 12 C (C N 3).

Administration of Evacuee Property Ordinance (1949)

—S. 38 — AIR 1956 Cal 462 — Diss. AIR 1970 Guj 12 D (C N 2).

Administration of Evacuee Property Ordinance (contd.)

—S. 38 — ILR (1965) 1 Punj 619 — DISS. AIR 1970 Guj 12 C (C N 2).

Cattle Trespass Act (1 of 1871)

—S. 10 — AIR 1963 Orissa 52 — Held to be no longer good law in view of AIR 1965 SC 926 As Interpreted AIR 1970 Orissa 10 B (C N 5).

—S. 20 — AIR 1963 Orissa 52 — Held to be no longer good law in view of AIR

Cattle Trespass Act (contd.)

1965 SC 926 As Interpreted AIR 1970 Orissa 10 B (C N 5).

Civil Procedure Code (5 of 1908)

—S. 9 — AIR 1916 Lah 86 — Held impliedly Overruled by AIR 1962 SC 547. As Interpreted AIR 1970 J & K 2 (C N 2).

—S. 11 — AIR 1929 All 132 — Diss. AIR 1970 Delhi 14 E (C N 3).

—S. 11 — AIR 1941 Cal 493 — Diss. AIR 1970 Delhi 14 E (C N 3).

—S. 11 — R. F. A. No. 164-C of 1963, D/-17-12-1963 (Punj) — Revers. AIR 1970 SC 5 (C N 2).

—S. 115 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—S. 115 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

—O. 1, R. 10 — AIR 1951 Pat 315 — Over. AIR 1970 Pat 1 (C N 1) (FB).

—O. 6, R. 17 — ('66) Original Decree in Suit No. 821 of 1960, D/-7-2-1966 (Cal) — Revers. AIR 1970 Cal 8 B (C N 2).

—O. 7, R. 11 (a) (d) — AIR 1968 AP 239 (FB) — Diss. AIR 1970 Madh Pra 5 A (C N 2).

—O. 8-A, R. 1 (Mad) — AIR 1956 Mad 155 — Diss. AIR 1970 Mad 47 A (C N 17).

—O. 9 — AIR 1964 All 181 — Over. AIR 1970 All 1 A (C N 1) (FB).

—O. 9 — AIR 1960 J & K 25 (FB) — Diss. AIR 1970 All 1 A (C N 1) (FB).

—O. 17 — AIR 1964 All 181 — Over. AIR 1970 All 1 A (C N 1) (FB).

—O. 17 — AIR 1960 J & K 25 (FB) — Diss. AIR 1970 All 1 A (C N 1) (FB).

—O. 21, R. 29 — AIR 1928 Cal 222 — Diss. AIR 1970 Manipur 14 A (C N 5).

—O. 22, R. 3 — AIR 1929 Pat 565 (FB) — Diss. AIR 1970 J & K 13 (C N 4).

—O. 22, R. 4 — AIR 1929 Pat 565 (FB) — Diss. AIR 1970 J & K 13 (C N 4).

—O. 22, R. 8 — AIR 1929 Pat 565 (FB) — Diss. AIR 1970 J & K 13 (C N 4).

—O. 22, R. 12 — AIR 1929 Pat 565 (FB) — Diss. AIR 1970 J & K 13 (C N 4).

—O. 22, R. 12 — AIR 1929 Pat 565 (FB) — Diss. AIR 1970 J & K 13 (C N 4).

—O. 22, R. 12 — AIR 1929 Pat 565 (FB) — Diss. AIR 1970 J & K 13 (C N 4).

—O. 22, R. 12 — AIR 1929 Pat 565 (FB) — Diss. AIR 1970 J & K 13 (C N 4).

—O. 22, R. 12 — AIR 1929 Pat 565 (FB) — Diss. AIR 1970 J & K 13 (C N 4).

—O. 22, R. 12 — AIR 1929 Pat 565 (FB) — Diss. AIR 1970 J & K 13 (C N 4).

—O. 22, R. 12 — AIR 1929 Pat 565 (FB) — Diss. AIR 1970 J & K 13 (C N 4).

—O. 22, R. 12 — AIR 1929 Pat 565 (FB) — Diss. AIR 1970 J & K 13 (C N 4).

—O. 22, R. 12 — AIR 1929 Pat 565 (FB) — Diss. AIR 1970 J & K 13 (C N 4).

—O. 22, R. 12 — AIR 1929 Pat 565 (FB) — Diss. AIR 1970 J & K 13 (C N 4).

—O. 22, R. 12 — AIR 1929 Pat 565 (FB) — Diss. AIR 1970 J & K 13 (C N 4).

—O. 22, R. 12 — AIR 1929 Pat 565 (FB) — Diss. AIR 1970 J & K 13 (C N 4).

Constitution of India (contd.)

—Art. 32 — AIR 1966 Guj 175 — Held Overruled by AIR 1967 SC 1606. As Interpreted AIR 1970 Guj 1 A (C N 1) (FB).

—Art. 226 — S. A. No. 317 of 1965, D/-18-3-1968 (All) — Revers. AIR 1970 SC 21 C (C N 7).

—Art. 226 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

—Art. 226 — ('65) Spl. Civil Appln. No. 638 of 1965, D/- 7-9-1965 (Guj) — Held Overruled by AIR 1967 SC 1606. As Interpreted AIR 1970 Guj 1 A (C N 1) (FB).

—Art. 226 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).

—Art. 226 — (1965) 67 Bom LR 690 — Revers. AIR 1970 SC 1 (C N 1).

Criminal Procedure Code (5 of 1898)

—S. 197 — ('64) Cri. Revn. Case No. 441 of 1964, D/- 12-8-1964 (AP) — Over. AIR 1970 Andh Pra 13 (C N 2).

—S. 369 — AIR 1962 Andh Pra 479 (FB) — Diss. AIR 1970 Punj 32 (C N 7).

—S. 369 — (1964) 1 Mad LJ 362 — Diss. AIR 1970 Punj 32 (C N 7).

—S. 369 — AIR 1966 Mad 163 — Diss. AIR 1970 Punj 32 (C N 7).

—S. 369 — AIR 1965 Orissa 7 — Diss. AIR 1970 Punj 32 (C N 7).

—S. 417 (3) — 1966 Cri LJ 734 (Punj) — Revers. AIR 1970 SC 7 B (C N 3).

Criminal P. C. (contd.)

- S. 424 — AIR 1962 Andh Pra 479 (FB)
- Diss. AIR 1970 Punj 32 (C N 7).
- S. 424 — (1964) 1 Mad LJ 362 — Diss. AIR 1970 Punj 32 (C N 7).
- S. 424 — AIR 1966 Mad 163 — Diss. AIR 1970 Punj 32 (C N 7).
- S. 424 — AIR 1965 Orissa 7 — Diss. AIR 1970 Punj 32 (C N 7).
- S. 430 — AIR 1962 Andh Pra 479 (FB)
- Diss. AIR 1970 Punj 32 (C N 7).
- S. 430 — (1964) 1 Mad LJ 362 — Diss. AIR 1970 Punj 32 (C N 7).
- S. 430 — AIR 1966 Mad 163 — Diss. AIR 1970 Punj 32 (C N 7).
- S. 430 — AIR 1965 Orissa 7 — Diss. AIR 1970 Punj 32 (C N 7).
- S. 439 — AIR 1962 Andh Pra 479 (FB)
- Diss. AIR 1970 Punj 32 (C N 7).
- S. 439 — (1964) 1 Mad LJ 362 — Diss. AIR 1970 Punj 32 (C N 7).
- S. 439—AIR 1966 Mad 163—Diss. AIR 1970 Punj 32 (C N 7).
- S. 439 — AIR 1965 Orissa 7 — Diss. AIR 1970 Punj 32 (C N 7).
- S. 561-A — AIR 1962 Andh Pra 479 (FB)
- Diss. AIR 1970 Punj 32 (C N 7).
- S. 561-A — (1964) 1 Mad LJ 362 — Diss. AIR 1970 Punj 32 (C N 7).
- S. 561-A — AIR 1966 Mad 163 — Diss. AIR 1970 Punj 32 (C N 7).
- S. 561-A — AIR 1965 Orissa 7 — Diss. AIR 1970 Punj 32 (C N 7).

Expenditure Tax Act (29 of 1957)

- S. 2 (g) (i) (as amended by Act 12 of 1959) — ILR (1968) Andh Pra 279 — Diss. AIR 1970 Mad 43 A (C N 16).
- S. 2 (g) (i) (as amended by Act 12 of 1959) — AIR 1968 Madh Pra 107 — Diss. AIR 1970 Mad 43 B (C N 16).
- S. 4 (i) & (ii) (as amended by Act 12 of 1959) — ILR (1968) Andh Pra 279 — Diss. AIR 1970 Mad 43 A (C N 16).
- S. 4 (ii) — AIR 1968 Madh Pra 107 — Diss. AIR 1970 Mad 43 B (C N 16).

Government Grants Act (15 of 1895)

- S. 3 — ('64) S. A. No. 482 of 1964 (Mad)
- Over. AIR 1970 Mad 27 (C N 11).

HOUSES & RENTS

- Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947)
- S. 29 — (1956) 58 Bom LR 344 — Over. AIR 1970 SC 1 (C N 1).
- S. 29 — (1965) 67 Bom LR 619—Revers. AIR 1970 SC 1 (C N 1).

Income-tax Act (11 of 1922)

- S. 16 (3) (a) (ii) — (1965) 55 ITR 147 (Mad) — Revers. AIR 1970 SC 10 A (C N 4).
- S. 25 (5) — (1965) 55 ITR 147 (Mad) — Revers. AIR 1970 SC 10 A (C N 4)
- S. 34 (3), 2nd Proviso — AIR 1964 Bom 170 — Held no longer good law in view of (1969) 71 ITR 51 (Bom) and AIR 1965 SC 342 as interpreted AIR 1970 Bom 30 A (C N 6).

Income-tax Act (43 of 1961)

- S. 147 — AIR 1968 Ker 182 — Revers. AIR 1970 Ker 14 (C N 2.)
- Land Acquisition Act (1 of 1894)**
- S. 4 (1) — AIR 1968 Manipur 45 — Diss. AIR 1970 Punj 29 C (C N 6).
- S. 5-A — AIR 1968 Manipur 45 — Diss. AIR 1970 Punj 29 C (C N 6).
- S. 6 — AIR 1968 Manipur 45 — Diss. AIR 1970 Punj 29 C (C N 6).
- S. 17 (1) & (H) — AIR 1968 Manipur 45 — Diss. AIR 1970 Punj 29 C (C N 6).
- S. 17 (2), (c) (Punj) — AIR 1964 Punj 477 — Over. AIR 1970 Punj 1 B (C N 1) (FB).
- S. 17 (2) (c) (Punj) — AIR 1964 Punj 477 — Held Overruled in view of 1969 Cur LJ 594 (FB). As Interpreted AIR 1970 Punj 29 A (C N 6).
- S. 17 (4) — 68 Pun LR 503 — Revers. AIR 1970 Punj 1 A (C N 1) (FB).
- Madras Port Trust Act (2 of 1905)**
- S. 110 — ('57) C. S. Nos. 5 & 6 of 1957 by Ganapathia Pillai, J. — Revers. AIR 1970 Mad 48 F (C N 18).

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- Punjab Municipal Act (3 of 1911)
- S. 16 (1) (e) — ILR (1964) 1 Punj 500 — Revers. AIR 1970 Punj 9 (C N 2) (FB).
- U. P. Municipalities Act (2 of 1916)
- S. 126 (1) — W. P. Nos. 108 and 109 of 1962, D/- 20-1-1965 (All) — Revers. AIR 1970 SC 58 (C N 14).

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- S. 441 — Cri. Revn. No. 188 of 1966, D/- 11-5-1966 (Cal) — Revers. AIR 1970 SC 20 (C N 6).

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- S. 20 (1) — 1966 Cri LJ 734 (Punj) — Revers. AIR 1970 SC 7 B (C N 3).

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- S. 90 (1) & (3) — AIR 1960 J & K 25. (FB) — Diss. AIR 1970 All 1 A (C N 1) (FB).
- S. 90 (1) & (3) — AIR 1964 All 181 — Over. AIR 1970 All 1 A (C N 1) (FB).
- S. 90 (1) & (3) — 1964 All LJ 155 — Over. AIR 1970 All 1 (C N 1) (FB).
- S. 90 (a) — AIR 1960 J & K 25 (FB) — Diss. AIR 1970 All 1 A (C N 1) (FB).
- S. 90 (a) — AIR 1964 All 181 — Over. AIR 1970 All 1 A (C N 1) (FB).
- S. 90 (a) — 1964 All LJ 155 — Over. AIR 1970 All 1 A (C N 1) (FB).
- S. 92 — AIR 1960 J & K 25 (FB) — Diss. AIR 1970 All 1 A (C N 1) (FB).
- S. 92 — AIR 1964 All 181 — Over. AIR 1970 All 1 A (C N 1) (FB).
- S. 92 — 1964 All LJ 155 — Over. AIR 1970 All 1 A (C N 1) (FB).

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- Rajasthan Sales Tax Act (29 of 1954)
- S. 2(o) — (1964) 15 STC 598 (Bom) — Diss. AIR 1970 Raj 1 C (C N 1)

- Sales Tax — Rajasthan Sales Tax Act (contd.)**
 —S. 2(o) — (1956) 7 STC 486 (Andh) — Diss. AIR 1970 Raj 1 C (C N 1)
 —S. 2(o) — AIR 1957 Andh Pra 706 — Diss. AIR 1970 Raj 1 C (C N 1)
 —S. 2(o) — AIR 1957 Madh Pra 40 — Diss. AIR 1970 Raj 1 C (C N 1)
 —S. 2(o) — AIR 1961 Madh Pra 88 (FB) Diss. AIR 1970 Raj 1 C (C N 1)
 —S. 2 (o) — (1968) 21 STC 505 (M.P.) — Diss. AIR 1970 Raj 1 C (C N 1)
 —S. 2(o) — (1968) 22 STC 22 (M.P.) — Diss. AIR 1970 Raj 1 C (C N 1)

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- Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948)
 —S. 56(1) — (1964) 2 Andh W R 332 — Over. AIR 1970 Andh Pra 1 C (C N 1) (FB)
 —A. P. (Telangana Area) Tenancy and Agricultural Lands (Validation) Act (21 of 1961)
 —S. 47 — (1963) 1 Andh W. R. 165 — Over. AIR 1970 Andh Pra 19 A (C N 3)
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- Tenancy Laws (contd.)**
 —U. P. Agricultural Tenants (Acquisition of Privileges) (Amendment and Miscellaneous Provisions) Act (7 of 1950)
 —S. 10 — 1965 All L J 290 — Over. AIR 1970 All 26 A (C N 5) (FB)
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 —Sch. Entry III — 1965 All L J 290 — Over. AIR 1970 All 26 A (C N 5) (FB)
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 —S. 54 — ILR (1965) 1 Punj 619 — Diss. AIR 1970 Gui 12 C (C N 2)
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 —S. 6 (6) — AIR 1967 All 430 — Revers. AIR 1970 SC 70 B (C N 17)
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 —S. 3 — AIR 1965 Andh-Pra 447 — Revers. AIR 1970 SC 14 C (C N 5)
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COURTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC., IN A. I. R. 1970 JANUARY

DISS.=Dissented from in; Not F.=Not Followed in; OVER.=Overruled in;
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Supreme Court

- AIR 1954 SC 170=1954 SCR 558, State of West Bengal v. Mrs. Bela Banerjee — Held overruled by AIR 1969 SC 634 as interpreted AIR 1970 Cal 15 D (C N 4).
 AIR 1965 SC 190=(1964) 6 SCR 936, State of Madras v. Namashivayya Mudaliar — Held overruled by AIR 1969 SC 634 as interpreted AIR 1970 Cal 15 D (C N 4).
 Observations in AIR 1965 SC 1017=(1965) 1 SCR 614, P. Vajravelu Mudaliar v. Spl Duty Collector, Madras — Diss. AIR 1970 Cal 15 D (C N 4).
 AIR 1967 SC 637 = (1967) 1 SCR 255, Union of India v. Metal Corporation of India Ltd. — Held overruled by AIR 1969 SC 634 as interpreted AIR 1970 Cal 15 D (C N 4)

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- AIR 1929 All 132=10 LRA Rev 173, Jwala Debi v. Amrir Singh — Diss. AIR 1970 Delhi 14 E (C N 3).
 AIR 1964 All 181, Vishwanath Prasad v. Malkhan Singh Sharma — Over. AIR 1970 All 1 A (C N 1) (FB).
 1964 All LJ 155=ILR (1964) 1 All 498, B. P. Mauriava v. Election Tribunal — Over. AIR 1970 All 1 A (C N 1) (FB).
 1965 All LJ 290, Phailu v. Board of Revenue, U.P. — Over. AIR 1970 All 26 A (C N 5) (FB).
 (1965) W. P. Nos 103 and 109 of 1962, D/- 20-1-1963 (All) — Revers. AIR 1970 SC 58 (C N 14).
 (1965) Second Exe. D. A. Nos. 3 and 4 of 1961, D/- 26-3-1965 (All-LB) — Revers. AIR 1970 SC 30 (C N 9).

Allahabad (contd.)

- AIR 1967 All 430, Tulsipur Sugar Co. Ltd. v. State of U. P. — Revers. AIR 1970 SC 70 B (C N 17).
 (1967) Civ. Misc. Writ No. 3075 of 1966, D/- 6-1-1967 (All) — Revers. AIR 1970 All 26 A (C N 5) (FB).
 (1968) S. A. No. 317 of 1965, D/- 18-3-1968 (All) — Revers. AIR 1970 SC 21 C (C N 7).

Andhra Pradesh

- (1956) 7 STC 486 (Andh), B. V. Hanumantha Rao v. State of Andhra — Diss. AIR 1970 Raj 1 C (C N 1).
 AIR 1957 Andh Pra 706=(1956) 7 STC 26, A. S. Krishna and Co. Ltd., Guntur v. State of Andhra Pradesh — Diss. AIR 1970 Raj 1 C (C N 1).
 AIR 1962 Andh Pra 479 (FB), Public Prosecutor, A. P. v. Devi Reddi Nagi Reddi — Diss. AIR 1970 Punj 32 (C N 7).
 (1962) 2 Andh. WR 462, Kondapally Vasudev Reddy v. Baireddy Venkat Reddy — Partly overruled. AIR 1970 Andh Pra 19 A (C N 3).
 (1963) 1 Andh WR 165=(1963) 1 Andh LT 207, Ramulu v. Narasimhulu — Over. AIR 1970 Andh Pra 19 A (C N 3).
 (1964) 2 Andh WR 332, Guddiwadi v. Murugappa Mudali — Over. AIR 1970 Andh Pra 1 C (C N 1) (FB).
 (1964) Cri. R. C. No. 441 of 1964, D/- 12-8-1964 (A. P.) — Over. AIR 1970 Andh Pra 13 (C N 2).
 AIR 1965 Andh Pra 447, Commr. of Wealth Tax, A. P. v. N. V. Narendranath — Revers. AIR 1970 SC 14 C (C N 5).
 (1965) 2 Andh WR 61=ILR (1965) Andh Pra 1226, Raghavachari v. Ramkrishna Reddy — Over. AIR 1970 Andh Pra 19 A (C N 3).
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 (1968) ILR (1968) Andh Pra 279, Prince Azam Jah v. Expenditure Tax Officer — Diss. AIR 1970 Mad 43 A (C N 16)

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- (1956) 58 Bom LR 344=ILR (1956) Bom 442, K. B. Sipahimalani v. Fidahusein Vallibhoy — Over. AIR 1970 SC 1 (C N 1).
 AIR 1964 Bom 170=65 Bom LR 674=56 ITR 522, Mahendra Bhawanji Thakar v. S. P. Pandey — Held no longer good law in view of (1969) 71 ITR 51 (Bom) and AIR 1965 SC 342 as interpreted AIR 1970 Bom 30 A (C N 6).
 (1964) 15 STC 598 (Bom), Babulal Gakarmal and Co. v. State of Bombay — Diss. AIR 1970 Raj 1 C (C N 1).
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- (1965) 67 Bom LR 690, Krishnaji Dattatraya v. Dr. Shankar Ramchandra — Revers. AIR 1970 SC 1 (C N 1)

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- AIR 1928 Cal 222=ILR 55 Cal 512, Mahesh Chandra v. Jogendralal — Diss. AIR 1970 Manipur 14 A (C N 5).
 AIR 1941 Cal 493=73 Cal LJ 410, Meghraj Golab Chand Firm v. Chandra Kamal — Diss. AIR 1970 Delhi 14 E (C N 3).
 AIR 1956 Cal 462=97 Cal LJ 62, Rabindra Nath Banerjee v. Harendra Kumar — Diss. AIR 1970 Guj 12 D (C N 3).
 (1966) O. D. S. No. 821 of 1960, D/- 7-2-1966 by A. K. Mukherjee J. (Cal) — Revers. AIR 1970 Cal 8 B (C N 2).
 (1966) Cri. Rev. No. 188 of 1966, D/- 11-5-1966 (Cal) — Revers. AIR 1970 SC 20 (C N 6).
 AIR 1969 Cal 180, Debesh Chandra Das v. Union of India — Revers. AIR 1970 SC 77 (C N 18).

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- (1968) Civ. Writ Petn. No. 817 of 1968, D/- 3-12-1968 (Delhi) — Revers. AIR 1970 SC 35 B (C N 10).

Gujarat

- (1965) Spl. Civil Appln. No. 638 of 1965, D/- 7-9-1965 (Guj), Trimbaklal Mohanlal v. M. K. Thakore — Held overruled by AIR 1967 SC 1606 as interpreted AIR 1970 Guj 1 A (C N 1).
 AIR 1966 Guj 175=(1965) 6 Guj LR 554, Pirbhaj v. B. R. Manepatil — Held overruled by AIR 1967 SC 1606 as interpreted AIR 1970 Guj 1 A (C N 1).

Jammu and Kashmir

- (1960) AIR 1960 J & K 25 (FB), Dina Nath Kaul v. Election Tribunal J & K — Diss. AIR 1970 All 1 A (C N 1) (FB).

Kerala

- AIR 1968 Ker 182, Subramania Iyer v. I. T. Officer, Kottayam — Revers. AIR 1970 Ker 14 (C N 2).

Lahore

- AIR 1916 Lah 86=34 Ind Cas 209, Ibrahim v. Akbar — Held impliedly overruled by AIR 1962 SC 547 as interpreted AIR 1970 J & K 2 (C N 2).

Madhya Pradesh

- AIR 1957 Madh Pra 40=(1957) 8 STC 286, Jaikishan Gopikrishan v. Commr. Sales Tax, Madhya Bharat — Diss. AIR 1970 Raj 1 C (C N 1).
 AIR 1961 Madh Pra 88=(1961) 12 STC 313 (FB), Nimar Cotton Press v. Sales Tax Officer, Nimar Circle, Khandwa — Diss. AIR 1970 Raj 1 C (C N 1).

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- AIR 1968 Madh Pra 107=1967 Jab LJ 878, Raj Kumar Singhji v. Commr of Expenditure Tax, M. P. — Diss. AIR 1970 Mad 43 B (C N 16).
 (1968) 21 STC 505=1968 MPLJ 582, Numar Cotton Press Factory v. Commr. of Sales Tax, Madhya Pradesh, Indore — Diss. AIR 1970 Raj 1 C (C N 1).
 (1968) 22 STC 22=1968 MPLJ 665, Vimalchand Prakashchand Sarafa v. Commr. of Sales Tax, Madhya Pradesh — Diss. AIR 1970 Raj 1 C (C N 1).

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- AIR 1956 Mad 155=68 Mad LW 810, Uthaman Chettiar v. Thiagaraja Pillai — Diss. AIR 1970 Mad 47 A (C N 17).
 (1957) C. S. Nos 5 and 6 of 1957, by Ganapathia Pillai J. (Mad) — Revers. AIR 1970 Mad 48 F (C N 18).
 (1964) 1 Mad LJ 362 — Diss. AIR 1970 Punj 32 (C N 7).
 (64) S. A. No 482 of 1964 (Mad), Nallanna Gounder v. Muthuswami Gounder — Over. AIR 1970 Mad 27 (C N 11).
 (1965) 55 ITR 147 (Mad), Muthiah Chettiar v. Commr. of Income-tax, Madras — Revers. AIR 1970 SC 10 A (C N 4).
 AIR 1966 Mad 163, S. Rangaswamy v. R. Narayanan — Diss. AIR 1970 Punj 32 (C N 7).

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- AIR 1968 Manipur 45, Heisnam Chonjong Singh v. Union Territory of Manipur — Diss. AIR 1970 Punj 29 C (C N 6).

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- AIR 1963 Orissa 52=(1963) 1 Cri LJ 303, Lokenath v. Rahas Beura — Held to

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- be no longer good law in view of AIR 1965 SC 926 as interpreted. AIR 1970 Orissa 10 B (C N 5).
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Patna

- AIR 1929 Pat 565=ILR 9 Pat 372 (FB), Hakim Syed v. Fateh Bahadur — Diss. AIR 1970 J. & K 13 (C N 4).
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- (1963) R. F. A. No. 164-C of 1963, D/- 17-12-1963 (Punjab) — Revers. AIR 1970 SC 5 (C N 2).
 AIR 1964 Punj 477=ILR (1964) 2 Punj, 405, Muraril Gupta v. State of Punjab — Over. AIR 1970 Punj & H 1 B (C N 1) (FB).
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 (1964) 1LR (1964) 1 Punj 500, Bhagat Ram Patanga v. State of Punjab — Revers. AIR 1970 Punj 9 (C N 2) (FB).
 1LR (1965) 1 Punj 619, Net Ram v. Custodian General of Evacuee Property — Diss. AIR 1970 Guj 12 C (C N 3).
 1966 Cri LJ 734 (Punjab), Municipal Corporation of Delhi v. Jagdishlal Radha Kishan — Revers. AIR 1970 SC 7 B (C N 3).
 (1966) 68 Punj LR 503 — Revers. AIR 1970 Punj 1 A (C N 1) (FB).

COMPARATIVE TABLE

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THE
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EIGHTH CONGRESS OF THE INTERNATIONAL ACADEMY OF
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[PESCARA (ITALY), SEPTEMBER, 1970]

SECTION I, B. 3.

"The relation between social and economic development of society and the development of law : Hindu law in India."

(By PROF. J. DUNCAN M. DERRETT, D. C. L. (OXON), (LONDON).)

(This paper is published in order that readers may have advance notice of what is propounded, and may make their objections, if any, and comments. These may be sent to Professor A. N. Allott, University of London, London W.C. 1.)

At previous congresses the partial codification of Hindu law in India was described and criticised.(1) The year 1970 is a suitable point at which to ask whether the impetus received in India by the challenges of Independence (1947) is exhausted, and, if not, in which direction it impels Hindus. It will be quite sufficient and appropriate to confine this survey to the main field of Hindu law which was only marginally affected by the codification of 1955/6, namely that of the Joint Family.

It is now recognised that the Joint Family can consist with modern industrial life.(2) Its special features of consolidation of wealth and minimising of waste are as useful in the commercial world as in the agricultural. The psychological foundation of the family as a single property-owning entity is the relationship between father and son(3); and the derivation of the modern law must be sought in the family solidarity of prehistoric India(4) through the well charted

1. A I R 1953 Jour 52-3, 57-62 (new reprinted at Derrett, *Religion, Law and the State in India*, London, Faber, 1968); *Rapports généraux Ve Congrès international de droit comparé* (Bruxelles, 1958), Brussels, Bruylant, 1960, pp. 101-124 (likewise reprinted); finally "The relationship between Law and Religion in Oriental Legal Systems : India" printed at Kerala Law Times, 1966, Journal, pp. 16-19.

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2. M. Singer, "The Indian Joint Family in Modern Industry" in M. Singer and B. S. Cohn, ed., *Structure and Change in Indian Society*, Chicago, Aldine, 1968, pp. 423-452.

3. Derrett, *Religion, Law and the State in India* (cit. suppl.), 433 ff., 441.

4. This is elaborated in G. Mazzarella's works, particularly "Die Familiengemeinschaft im gegenwärtigen Indien, Ein Beitrag zur bes-

developments of the British period and immediately post-British period.(5) It will be appreciated that India is a vast country, and that a few societies governed by custom remain, only partially affected in some respects by the Hindu Succession Act and the Hindu Adoptions and Maintenance Act (1956)(6) and that there is a matrilineal system still alive (more in jurisprudence than in fact) in Kerala; there are also the minor legal systems surviving in former French India and former Portuguese India (Franco-Hindu law and Luso-Hindu law), which the reformer must not forget; but in this paper I shall, in order to avoid confusion, proceed as if anomalous systems and minority customs did not exist.

The major, and pervasive development in society has been the demand by the State of revenue out of every form of acquisition, and from the property belonging to the citizen when he dies. The same need impels both attacks upon the Joint Family, but since they are juridically distinct I shall deal with them separately. A minor, but not less serious development has been the progressive enlargement of exemptions from the joint-family ownership in cases where individuals, assisted materially by the family, have claimed that their earnings, or rather the profits made through their instrumentality, belong to them exclusively. Such problems arise especially in contexts in which it is contended that the demands for revenue are higher than the law permits, and the coincidence is really no mere coincidence.

There is a long tradition in India(7) that income-tax will be levied on individuals and, *inter alios*, Joint Families (described as "Hindu undivided families"). Similarly the Wealth Tax Act, the various State Agricultural Income-tax Acts, and several other statutes(8) discriminate be-

tween individuals and Hindu Joint Families. In the allowances permitted to be claimed against the taxable income, and in the ceilings which are provided to regulate the incidence of taxation, a difference exists between the position of an individual and that of a Joint Family. It may be remarked in parentheses that there are Muslim Joint Families, and a serious attack has been launched upon the legislative custom of distinguishing between individuals and Hindu undivided families on the ground that it offends against the provision of the Constitution that the State shall not discriminate between individuals on the ground of religion. This complaint, though extremely inconvenient for the revenue, was technically correct.(9) The Supreme Court, however, has found (or sought to find) a justification for the ancient dichotomy as it stood, and has ruled that Muslim Joint Families must be assessed as "individuals." The inconvenience which this will cause is ignored, since it is very much less than that which would result from a ruling to the effect that assessments of Hindus were void as *ultra vires* and unconstitutional.(10) It follows that a decision in South India that Muslim Joint Families must be counted as Hindus (1) for this purpose(11) is rendered otiose and as wrong technically as it is patently absurd.

To return to our theme: in order to avoid incidence of tax at the higher rate applicable to Hindu undivided families Hindus have been obliged to try two devices. The first, simpler, and more successful (though perhaps not finally approved) is to divide the assets, or some of the assets, whilst remaining *de facto* joint in food, worship, and the balance of the estate. Such partial partitions were known to the Hindu law, and have perforce to be recognised by the revenue

chreibenden Rechts — Athologie," *Blätter für Vergleichende Rechtswissenschaft* 2, No. 8 (1906), 323-331; and in his great *Etnologia Analitica dello Antico Diritto Indiano I* (= *Studi di Etnologia Giuridica III*), pp. 10-16, and VIII (= S. E. G. X), pp. 9-27, 240-253, and XIII (= S. E. G. XV), pp. 9-15. Throughout the sections which deal with particular institutions, e.g., debt, the family plays a role.

5. See Dorratt, *cit. sup.*, ch. 12.

6. *Ibid.*, p. 345, n. 4.

7. Surveyed in V. Venugopala v. Union of India, AIR 1969 S C 1094.

8. *Ibid.* For the curious anomaly that a Hindu undivided family can consist only of a man, his wife and daughter(s) (the rule is that once joint-family property comes into the hands of

one member and he does not cease to hold it as such it remains such and its income and wealth are those of the family, even if there be no other male member alive joint with him) see N. V. Narendranath v. Commr. of Wealth-Tax, Andhra Pradesh, AIR 1970 S C 14. This finding does not threaten the welfare of genuine Joint Families, and is not attacked in this present paper. For Gift Tax and its effects see Commr. of Gift-Tax, Andhra Pradesh v. Salyanarayana Murthy, AIR 1965 Andh Pra 95.

9. Mammad Keyi v. Wealth Tax Officer, Calicut, AIR 1966 Ker 77 (FB) (discussed at 1966 Ker LT Jour 71-73).

10. N. 7 above.

11. Abdul Kader Haji v. Agricultural Income-tax Officer, 1966 Ker LT 731.

authorities.(12) Considerable difficulties arise when family assets are separated in this collusive manner, and then invested, or sold and then new enterprises are started with the proceeds, and it is claimed that these are the property of individuals, the income of which must be impressed from the first with the character of individual income; and some very intricate technical problems have arisen out of Hindu ingenuity.(13)

The second device, to which the Supreme Court has recently given its blessing incautiously, is that when a member of the family (perhaps its head) earns money in an enterprise financed by or with the aid of family funds that money is not the income of the family unless there was a "real and sufficient connexion"(14) between the investment and the appointment which is the occasion for his earning: so that where the family took good care to pronounce in the deed of appointment, or the deed of partnership, or the appropriate instrument issued with or in the course of the business of a company constituted with the aid of family funds, that the member-assessee was appointed for his "rich personal experience," the revenue authorities had no choice but to assess the income as that of the individual member.(15) The resulting situation, whereby a member either earns *all* his salary and his fees as a mere tool of the family, taking nothing for himself, or earns *all* his salary, etc., for himself alone, a difference depending not upon the family's investment, but upon the chain of causation leading to his opportunity to earn, is manifestly unsatisfactory.(16) The revenue will lose on balance, as the public learns another new trick: But more unfortunately the

spotlight will be thrown uncomfortably upon the difference between joint status and separate status, and the desire to separate for economy's sake will operate adversely to the interests of Hindu society, and possibly also to its industrial and commercial health.

A solution to that particular problem is available by referring to principles of Equity, and to ancient texts of Hindu law, which the Courts have not hitherto consulted. Reference to discovered texts is now accepted as an appropriate method of law reform without legislation, in society's wider interests.(17) In this case a wealth of texts supports a proportional allotment of the income between the family and the individual, and Equity supports his being subject to a constructive trust, subject to compensation for whatever contribution was made through his individual skill.(18)

The same damage to the psychology and material prosperity of the Joint Family is being done by the Expenditure Tax. In order to determine what is expended by the Family it is necessary to look into the circumstances of expenditure by individual members, whether or not, for example, the expenditure was undertaken for family purposes.(18a) If it was, the Family is assessable, not the spenders individually, and hotly contested suits founded upon evidence of long past transactions may add to our knowledge of law, but detract from the harmony and security of the family as a unit.

The Wealth Tax Act has a similar effect, because the ownership of the Family must be examined wherever it is claimed that the incidence of tax would be different if the items which the Family enjoys as a whole *de facto* were actually owned *de jure* individually. The same is the effect of the Estate Duty Act. There the undivided interest of a deceased co-owner ("co-parcener") at Mitakshara law is rendered liable to tax along with his separate and self-acquired property. Such a liability arising on the death of any male coparcener must stimulate claims, in everyone's interest, on the part of the survivors that as many items as possible were originally acquired as self-acquired property and not as an accretion to Family property. This reinforces the importance of the cases I

12. *Meyappa v. Commr. of Income-tax*, A I R 1951 Mad 506; *Devayya and Sons v. Commr. of Income-tax, Madras*, A I R 1953 Mad 315; *Chandradas Haridas v. Commr., Income-tax*, A I R 1955 Bom 343, on appeal before the Supreme Court at A I R 1960 S C 910. See Derrett at "Recent Decisions in Hindu Law," (1961) Bom L R J., 17-23. Also *Joint Family of Udayan Chinubhai v. Commr., Income-tax, Gujarat*, AIR 1967 S C 762.

13. As in *Swaminathan Chettiar v. Commr. of Income-tax, Madras*, AIR 1967 Mad 328.

14. The leading case in the positive direction is *V. D. Dhanwatey v. Commr. of Income-tax, M. P.*, AIR 1968 SC 683.

15. *Commr. of Income-tax, Bangalore v. D. C. Shah*, AIR 1969 SC 927.

16. The last-mentioned case is criticised at (1969) 1 SCWR., Journal section 29-35, and a nearly contemporary article in (1969) Bom L R., Journal section (not to hand).

17. As occurred in *Guramma v. Mallappa*, AIR 1964 S C 510.

18. See article cited last at N. 16 above.

18a. *Commr. of Exp. Tax, Gujarat v. Darshan*, AIR 1968 S C 1125, *Commr. of Exp. Tax v. Charat Ram and Sons*, AIR 1968 Delhi 193.

have alluded to above, since they unduly and inequitably cast the disputed income either into the joint pot or separate pots, as it were, and make every act pregnant with repercussions.

Meanwhile the known law of "merger" has been sharpened. Psychologically, and practically, it is in everyone's interest that rich members should not only allow their relatives to utilise their acquisitions, but even resign their separate interests in the Family's favour. But the law, no doubt impelled by considerations outlined above, has consistently required the most positive proof of renunciation or merger, and will accept nothing short of a well-authenticated proof that the acquirer, ceasing to be merely generous, literally renounced his separate rights and interests in favour of the group, which might well include members to whom he is antipathetical.(19)

The claims that earnings are separate and not joint is not confined to loving relatives who wish to save wastage upon revenue. The revenue cases sharpen the law for the individualist and this is an unintended by-product. Claims that earnings are not joint have been exemplified above. Where the Family merely enables the member to earn (otherwise than by his "learning," which is a source always protected under the statute of 1930 [mentioned below]), and his earning is not an obvious direct product of family investment, it is regularly held that the income is separate: but this may well be an unfair result.(20) Meanwhile Hindu Law has proved itself incapable of independent growth in a case of such curious interest to comparative lawyers that it deserves a paragraph to itself.

A problem which arose recently in Andhra Pradesh (a somewhat traditional part of India) concerned the earnings of a professional holy man.(21) His hereditary duty was to go from village to

village meeting the members of the sect to which he belonged, and giving to their uninitiated members the initiation which by custom he alone could give. This practice had been going on for not less than eight centuries. The tours no doubt had their spiritual value, which it is not our function to question; but they were also money-gathering tours. The priests accumulated wealth and bought lands with it and prospered, and when their sons separated from each other they divided the villages geographically and abstained from "poaching" upon each other's circuit. But Anglo-Hindu law proved quite incapable of understanding this form of property, for it savoured of monopoly, and could not be traced to royal grant, Charter, statute, or any other official public recognition. In the eyes of Anglicised Indian lawyers it seemed manifest that no member of the sect could be forced to pay any fee, for the amount of the fee was never liquidated by any element of contract or grant. Under the Constitution of 1950, also, individuals could not be forced to pay for religious services which they did not want.(22) Although in some parts of India customary patron-client relationships had been recognised prior to the Constitution, and could conceivably survive in marginal cases, the weight of judicial precedent was against legal recognition of the professional holy man's flourishing business. He could not, in short, sue for his fees, even if he performed ceremonies, still less if he were not invited to do so. Therefore the fees which were in fact earned were gifts, and consequently of a personal character, they were not accretions to an ancestral business capital. It might successfully have been urged that after the coming into force of the Hindu Gains of Learning Act, 1930, such fees would in any event have been separate property; but the case was decided with the aid of the conception that the amounts could not have been exacted and so were gifts. The importance of the case lies, as indicated, in the incompetence of the system to recognise facts—for it is clear that the sacred literature of the sect recognised the holy man's rights to his fee if he initiated the member of the sect, and this ought to have been a sufficient basis for legal recognition of the custom. As it was, the old bias against recognition of a "heathen monopoly" (according to an 18th century outlook) has operated as

19. Derrett, *Introduction to Modern Hindu Law*, Bombay, 1963, para. 549 and Lakshredda Channa v. L. Lakshmana, AIR 1963 SC 1601, 1604.

20. Palaniappa Chethiar v. Commr. of I-T., AIR 1968 SC 678, Foll. Payare Lal's case, AIR 1960 SC 997. A strange result of the inequitable dichotomy is that a family may actually pay its managing member for his services (he himself decides how much he is worth?) and he then retains this income as his separate income (Jugal Kishore Baldeo Sahai v. Commr. I. T., U. P., AIR 1967 SC 435). In course of time the collusive arrangement may be acted upon as genuine, to the detriment of the family.

21. I. N. S. J. Tiruvenkatachariar v. Andalamma, AIR 1969 Andh Pra 503 (FB).

22. G. B. Sarma v. Thinganani, AIR 1960 Mani 34 (and references there cited).

surely against an indigenous institution, and indirectly against the Joint Family, as have the much more understandable decisions inspired by the needs of revenue administration.

In sum, the modern case-law gives no recognition whatever to the social and economic merits of the Joint Family, but sympathises with the ingenuity of avoiders of tax.⁽²³⁾

23. In fairness I should add that *Shri Narayanlal P. Lahoti v. Controller of Estate Duty, Andhra Pradesh*, AIR 1969 Andh-Pra 188 strikes a

different note. By their decision the learned Judges enabled the Estate Duty Officer to levy duty on the whole of a dead man's life-insurance benefits instead of the mere share in those moneys which would have been attributed to him if (as his surviving coparceners contended) the moneys had been joint family property. They claimed their rights by virtue of the general principle (asserted in *Smt. Parbati Kuer v. Sarangdhar Sinha*, AIR 1960 S.C. 403 and illustrated at *Manharanlal v. Jagjiwanlal*, AIR 1952 Nag 73 that insurance policies paid for out of joint family funds are joint family money. But the High Court found (in the Revenue's favour) that the manager-insurer intended only to benefit his immediate family (in fact his prospective widow).

OPERATION OF EXEMPTION CLAUSES IN STANDARDIZED CONTRACTS

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Standard-form contracts are rapidly becoming one of the major problems of the modern law of contract, for they are to be found in every walk of life.⁽¹⁾ They have a long history in various fields of commerce, particularly in that of shipping, charterparties and bills of lading. They are still based on ancient forms and even the complicated marine insurance policy has changed little during the centuries.⁽²⁾ Though most of the transactions are claimed to be on a balanced economic power, where the bargaining power of the parties seems to be apparently more counter-balanced but in reality the complex of stereo-typed monopolistic tendencies engulfs the major portion of the bargaining region.

2. The abstract legal theory of a contract as an agreement arrived at through discussion and negotiation must be supplemented by a realistic study of its actual operation in the world today.⁽³⁾ While it remains true that, in most cases, the actual creation of a contract (and hence the essential terms) requires the agreement of the parties, it is no longer true in many circumstances that the detailed terms of a contract depend on the agreement of the parties.⁽⁴⁾

3. Just as the property owners were entitled to prefer their own interest to public good, so also anyone who had a bargaining lever was able to exploit it for his own benefit. It was all done, under the name of 'freedom of contract.'

However harsh were the terms of any contract, the judges enforced it. They said "You have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."⁽⁵⁾

4. Though according to the recognised general rule of law, the knowledge of the existence of the conditions will amount to a constructive notice, but Lord Haldane had to evolve objective standards emphatically with the following words in the House of Lords:⁽⁶⁾

"The duty in these instances is ascertained by a standard which depends, not on mere general principles fashioned by the jurist, for no such general principles can provide for all the concrete details of which account must be taken, but on the opinion of reasonable men who have considered the whole of the circumstances in the particular instance and can be relied on to say how, according to accepted standards of conduct a reasonable man ought to behave in these circumstances towards whom he is bound by the necessities of the community to act with forbearance and consideration when the law takes cognizance of duties imposed by such social standards it usually refers question relating to them to a tribunal which is one of fact, rather than of abstract legal principle."

5. On the other hand, disregard of the words, including whole terms, which the

1. P. S. Atiyah, *An Introduction To The Law Of Contract*, p. 11.
2. Prof. H. B. Sales, *M. L. R.* Vol. 16, p. 319.
3. G. W. Paton, *A Text-book of Jurisprudence*, p. 297.
4. *Ibid.*, p. 11.

5. *Jessel, M. R. in Printing and Numerical Registering Co. v. Sampson*, (1875) *L. R.* 19 *Eq.* 462, at p. 465; quoted from *Dennig, L. J., Freedom Under the Law*, p. 69.
6. *Per Viscount Haldane in Hood v. Anchor Line (Henderson Bros), Ltd.*, (1918) *A. C.* 837, at pp. 843-844.

parties have put in their contract are being undertaken by the Courts, where there is something in the contract itself which makes that course inevitable. In *Glynn v. Margetson & Co.*(7) a printed clause would have allowed the ship to proceed to and stay at any port within a very wide range in carrying oranges from Malaga to Liverpool. A deviation by the ship caused damage to this perishable cargo and the owners were held liable.

6 Lord Halsbury said : (8)

"... one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract."

7. The judges have been astute to interpret the exemption clauses in such a way that a very serious breach occurs, notwithstanding the loss or damage falling within the ambit of the exemption clauses of the contract. In *Alexander v. Railway Executive*, (9) the servants of the executive allowed an unauthorised person access to articles. The executive based their contention on the terms of an exemption clause in the contract,

"Not liable for loss, misdelivery or damage to any articles which exceed the value of £5 unless at the time of deposit the true value and nature thereof have been declared by the depositor (and an extra charge paid)."

8. Devlin, J., in spite of the admittance of sufficient notice of the terms, gave judgment for the plaintiff, the word "misdelivery" not being apt to describe a deliberate delivery to the wrong person. (10)

9. Where a term is meaningless or so vague as to be insensible in such class of cases, Lord Wright said : (11)

"The test of intention, however, is to be found in the words used. If these words, considered however broadly and technically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract."

10. If the main purpose of the contract has not been performed the party in default will be liable whether the non-

performance occurred because of his negligence or by his deliberate act. (12)

Lord Greene, M. R. said : (13)

"What I may call the hard core of the contract, the real thing to which the contract is directed, is the obligation of the defendants to launder. That is the primary obligation. It is the contractual obligation which must be performed according to its terms, and no question of taking due care enters into it.... That is the essence of the contract...."

11. In *Lily White v. Munuswami*, (14) on the reverse of the bill which was handed over by the firm of launderers to its customer when receiving the article was a printed condition that the customer would be entitled to claim only 50% of the market price or value of the article in case of loss. The question arose whether the condition printed on the bill was valid in law and if it could be enforced as between the parties.

12. It was held by the learned judge that the term being *prima facie* opposed to public policy and to the fundamental principles of the law of contract, would not be enforced only because it was printed on the reverse of the bill and there was a tacit acceptance of the term when the bill was received by the customer. If a condition is imposed, which is in flagrant infringement of the law relating to negligence, and a bill containing this printed condition is served on the customer, the court will not enforce such a term, which is not in the interests of the public, and which is not in accordance with public policy.

13. Lord Greene, M. R. laid the *piñ* and substance rule—a varied manifestation rule as follows : (15)

Every contract contains a "core" or fundamental obligation, which must be performed. If one party fails to perform this fundamental obligation, he will be guilty of a breach of the contract whether or not any exempting clause has been inserted which purports to protect him.

14. Closely allied with this principle is yet another: that a party will only be protected by an exemption clause in a contract while he is performing that contract and not when he has deviated from it in a substantial manner.

12. *Cf. Alderslade v. Hendon Laundry, Ltd.* (1945) K. B. 189.

13. *Ibid.*, at p. 193.

14. A I R 1966 Mad 13.

15. Per Lord Greene, M. R. at p 193, in *Alderslade v. Hendon Laundry, Ltd.* (1945) K. B. 189.

7. (1893) A. C. p. 351.

8. *Ibid.*, p. 357.

9 (1951) 2 K. B. 892; (1951) 2 All E. R. p. 442.

10. *Ibid.*, p. 447.

11. *G. Scammell and Nephew, Ltd. v. Ouston* (1941) 1 All E. R. p. 14, at p. 25.

15. Yet another illustration of a recent practice, especially adopted in the bills of lading, parties borrowing a clause from one form or even a section from a statute, has been evidenced in the recent case of the House of Lords.

16. In *Compania Naviera aeolus S. A. v. Union of India*,⁽¹⁶⁾ a bill of lading incorporated the strike clause of the Centrocon Charterparty. Lay time for discharge of the cargo having expired, the respondent cargo owners were admittedly in breach of contract and the vessel was on demurrage, when a strike occurred at the port of unloading. The strike prevented discharge of the cargo for eight days. The respondent sought a declaration that they were not liable to the appellant shipowners for demurrage in respect of the period during which discharge was prevented by the strike, demurrage for this period amounting to £ 1,683 Gs. 8d.

17. The appellants submitted that the strike clause must be read as a whole and, applying the *noscitur a sociis* principle, since the first, second, and fourth portions of the clause plainly applied only when the strike commenced during the lay time, a similar limitation must be read into the third part.⁽¹⁷⁾

18. Lord Cohen said :⁽¹⁸⁾

"This is an attractive argument but I am unable to accept it. It seems to me to do too much violence to the language used, and to require too much to be read into it. The natural meaning of the words "before-mentioned causes" is that they refer back to riots, civil commotion or strike or lock-out. They do not introduce a time factor at all, and I see no reason to introduce one."

19. In *Adamastos Shipping Co., Ltd. v. Anglo-Saxon Petroleum Co., Ltd.*,⁽¹⁹⁾ the charterparty incorporated the U. S. "Paramount Clause," which was attached to the charterparty and was in these terms:

"This bill of lading shall have effect subject to the Carriage of Goods by Sea

16. (1962) 3 All E. R. at p. 670.

17. The Centrocon Charterparty provided 'so far as material:

"Part I. If the Cargo cannot be loaded by reason of...a strike...of any class of workmen... or if the cargo cannot be discharged by reason of...a strike...of any class of workmen..., the time for loading or discharging as the case may be, shall not count during the continuance no claim for...demurrage, shall be made by the...owners of the steamer.

18. (1962) 3 All E R 670 at pp. 674-75.

19. (1959) A C 133.

Act of the U. S. which shall be deemed to be incorporated herein.....If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further." Section 5 of the U. S. Act provided that the Act should "not be applicable to charterparties"; Section 13 limited the scope of the Act to contracts for carriage of goods by sea to or from ports of the U. S. in foreign trade. Owing to mechanical breakdowns, the first of which occurred on the vessel's voyage to the port of loading, and owing to other breakdowns and incidents, she lost 106 days. The charterers claimed damages for this delay.

20. It was held by the House of Lords:

On the true construction of the charterparty the Paramount Clause was incorporated in the contract, and accordingly (a) the words "bill of lading" in that clause should be rejected as 'falsa demonstratio', and the reference should be read as referring to the charterparty, and (b) it being insensible for the Paramount Clause to incorporate Section 5 of the U. S. Act in the charterparty (as Section 5 would prevent the Act from applying to it) that enactment would be rejected as inapplicable.

21. In the words of Lord Reid :⁽²⁰⁾

"This case appears to me to raise in an acute form the question how far a Court is entitled to go in disregarding words in a contract in order to discover the intention of the parties. It is difficult to see how anyone who had given any thought to the provision of the U. S. Act could have drafted this Paramount Clause for inclusion in a charterparty; it must have been drafted for inclusion in a bill of lading where it would be quite appropriate. But it appears that, for a considerable time, a clause in substantially this form has been included in a number of charterparties. We do not know how this practice originated, and we do not know, and are not entitled to guess, just what the parties had in mind when they agreed to incorporate the clause in this charterparty. The intention of the parties can only be inferred from the words which they have used. Undoubtedly the charterparty must be read as a whole, and any term in it must be read in light of the general nature of the contract, of the fact that the contracting parties were business men, and of all relevant facts known to the parties when it was made. But in the

20. (1958) 1 All E R 725 at p. 741.

end, we must take the words which the parties have used, and interpret them.

22. As the parties have chosen to incorporate in a charterparty provisions which are designed to apply and only to apply, to bills of lading, one must think, infer that they included these provisions to be incorporated *mutatis mutandis*.

23. In *Mrs. D. Gobindram v. Messrs Shamji K. & Co.*(21) the buyers entered into an agreement with sellers, for purchase of 500 bales of African raw cotton. The material portions of the letter were as follows:

"We confirm having sold to you African raw cotton on the following terms and conditions subject to the usual force majeure clause...". By a subsequent letter, the contract was amended by the parties, as follows:

"With reference to the above-mentioned contracts we hereby confirm that, if necessary, we shall carry over... The other terms and conditions remain unaltered...".

24. Clause I of terms and conditions stated:

"The shipment is subject to any cause beyond seller's or seller's shippers control and is also subject to availability of freight."

25. In the words of *Hidayatullah, J.* (now *C. J.*):(22)

Where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to "force majeure", and even if this be the meaning, it is obvious that the condition about "force majeure" in the agreement was not vague. The use of the word "usual" makes all the difference and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties.

In words of *Lord Goddard*:(23)

"Abbreviated references in a commercial instrument are, in spite of brevity, often self-explanatory or susceptible of definite application in the light of the circumstances, as, for instance, whether the reference is to a term, clause or document of a well-known import like *c. i. f.* or which prevails in common use in a

particular place of performance as may be indicated by the addition of the epithet 'usual': in *Shamrock S. S. Co. v. Storey & Co.*(24) 'Usual' colliery guarantee was referred to in a charter-party in order to define loading obligations."

25. The addition of the word "usual" refers to something which is invariably to be found in contracts of a particular type. Commercial documents are sometimes expressed in language which does not, on its face, bear a clear meaning. The effort of Courts is to give a meaning, if possible. Moreover, effort should always be made to construe commercial agreements broadly and one must not be astute to find defects in them, or reject them as meaningless.(25)

27. In *Atlantic Maritime Co. Inc. v. Gibbon*.(26) by a charterparty it was agreed between the agents of the assured and charterers that the vessel should proceed to Taku Bar in North China to load a cargo of salt and thence to a port in Japan to deliver the cargo. At all material times, Taku Bar was in territory under the control of Chinese communist forces who were engaged in civil war against the Nationalist Government of China. The vessel arrived at Taku Bar on Aug. 1, and on Aug. 8 while she was still awaiting instructions to load, the master of the vessel was instructed by a message from the destroyer to leave the anchorage.

28. On and after Aug. 10, other ships, chiefly liners, arrived at Taku Bar and loaded small quantities of cargo. In an action against the insurer for an indemnity, under the Lloyd's marine policy, it was contended on his behalf, first that the proximate cause of the loss of the freight was the loss of the adventure within the frustration clause in the policy, and/or,

Secondly, the loss of freight was due to delay, which excluded the insurer's liability under the policy. It was contended on behalf of the assured, the owners of a Panamanian vessel, that their claim was not based on the loss or frustration of, or delay in the voyage or adventure, but on the perils insured.

29. In the words of *Sir Raymond Eversted, M. R.*(27)

"In this case, it seems to me that the time element is relevant, not as a conse-

24. (1899) 5 Comp. Cas; at p. 21.

25. *Per Viscount Simonds in Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.* (1955) 2 A.C. 133, at p. 158.

26. (1953) 2 All E.R. at p. 1086.

27. *Ibid.* p. 1090.

21. AIR 1961 8 C 1285.

22. *Ibid.* p. 1285.

23. *Bishop & Baxter Ltd. v. Anglo-Eastern Trading and Industrial Co. Ltd.* (1944) 1 K.B. 12.

quence of the mishap, but to ascertain correctly the nature and quality of the accident. . . . The real, efficient cause of the loss was the restraint of princes, which was covered by the frustration clause in the policy, and it was immaterial that the restraint was also, an incident of a civil war (to which the warranty did not apply) as the civil war, per se, was not responsible for the loss, and, therefore, the insurer was relieved from liability."

30. The policy common in cases of this kind, was based on the Standard form of Lloyd's policy, to which numerous slips,(28) ten in all, were appended so that little was left of the original foundation. It cannot be easily denied that, in such cases the effect produced is in some degree, one of taking away with one hand what has been given with the other, and the task of the Courts in construing the resultant documents is certainly rendered more difficult.

Unnecessary, irrelevant or redundant conditions in a contract do not warrant a conclusion that, because a clause is inserted in a contract, that clause must cover some point upon which the general law is silent. Difficulties have arisen as to what could legitimately be included in "force majeure". Judges have been vigilant to include strikes, breakdown of machinery, in "force majeure", though normally not included in "vis major". Mc Cardie J. in *Lebeaupin v. Crispin*(29) has given an account of what is meant by "force majeure", being not merely a french version of the latin expression "vis major". It is undoubtedly a term of wider import.

31. The virtual eclipse of the doctrine of *laissez-faire* as a political force is an indication that people no longer think or feel in the same way about the law.(30) Apart from the law, we sometimes see that powerful suppliers may require a consumer to contract on dictated terms or not at all; lastly, for reasons of convenience certain types of contract are standardized in the interests of all concerned. Rule 415 of the Railways Code for stores enumerates that the terms and conditions of the contract should be clear and beyond doubt.

32. In *Bhimji N. Dalal v. Bombay*

Trust Corporation Ltd..(31) it was pointed out that in construing a hire-purchase agreement the substance of the agreement must be considered as a whole, not the substance apart from the language used, nor the mere word divorced from the substance, but the substance which must be gathered from the true meaning of the language in which it is sought to be expressed.

33. In *Dakshinamurthi v. G. & C. Corporation*.(32) the goods in question were a cinema projector set, the particulars of which were given in the hire-purchase agreement, a standardized form of hire-purchase agreement. It was held that where the agreement is only a device or cloak to conceal a loan, it is open to the Court to ascertain the real transaction.

34. There is no provision in the Indian Contract Act, 1872, regulating a transaction of hire-purchase, which is also a method of selling goods. It is a transaction of hire at the inception with an option to purchase. In its eighth report, on the Sale of Goods Act, the Law Commission of India made the following observations.(33)

There is no provision in the Act regulating at all stages of the terms of the hire-purchase agreement, so that the hirer or buyer must be kept fully informed about his rights. To safeguard their own interest the Finance companies invariably introduce an arbitration clause in the model agreement. Although it does safeguard the interest of financier, it leads to many malpractices as against the hirers.

35. The standard clauses in insurance policies are the most striking illustrations of successful attempts on the part of business enterprises to select and control risks assumed under a contract.(34) In the *Central Bank of India Ltd., Amritsar v. The Hartford Fire Insurance Co. Ltd.*, the insurance was subject to various conditions and stipulations printed in the policy, the terms of the policy were common terms generally present in such policies. Originally the policy did not afford any insurance against loss caused by persons taking part in riot or civil commotion but by subsequent agreements made from time to time it was extended.

31. AIR 1930 Bom p. 306.

32. AIR 1960 Mad 328 at p. 330.

33. Eighth Report on Sale of Goods Act, (1959), p. 4, Para. 12.

34. 43 Col. L.R. p. 631, quoted from Patterson, *Essentials of Insurance Law*, (1985), p. 282.

28. Slip connotes exceptions clause.

29. (1920) 2 K.B. 714.

30. Atiyah, 'An Introduction to The Law of Contract' p. 10.

to cover these riot risks. The Supreme Court held very categorically for such standard form contracts in writing as follows:(35)

"The plain and categorical language cannot be radically changed by relying upon the surrounding circumstances. Thus right to terminate at will cannot, by reason of the circumstances, be read as a right to terminate for a reasonable cause."

36. Although a transitional arrangement has been a judicial stratagem, nothing very clear has been brought out by the Courts to differentiate between such a transition, while shifting towards the doctrine of constructive notice. The exemption clause does not exonerate one, who seeks its protection, from all liability under the contract. If it did, there would be no contract at all.(36) In *John Lee and Sons (Grantham), Ltd. v. Railway Executive*,(37) while dealing with the scope of inequitable exclusion clauses, Lord Denning vehemently spoke of the "vigilance of the Common Law, which, while allowing freedom of contract watches to see that it is not abused." To the learned Lord what seemed to be the nexus of the principle of applicability of exemption clauses could not be shared by the other Lords.

37. Courts would be propitious to interpret the exclusion clause so strictly that it does not cover the circumstances in question. The best illustration is *Wallis v. Pratt*,(38) wherein an exclusion of warranties was not allowed to cover conditions—notwithstanding the patent absurdity of expecting the parties to have used words with utmost precision.

38. While maintaining the shadow of freedom of contract they (the Courts) have come close to destroying its (exemption clause) substance in this field. This is a highly significant illustration of the way in which the law has adapted itself to the growing paternalism of the welfare State.(39)

Conclusions.

39. During recent years the Legislature of this country has taken steps, but somewhat belated to check the growth of unreasonable conditions. What still lacks at the bedrock of such legislation is the adequacy of the rights of the parties—

that sufficient provisions should be made thereto, in order to safeguard the means which lead to the expedient and smooth recourse to the knowledge or existence of such rights. What is needed in a fast developing economy is an effective process—a procedural machinery to minimise the bridge between bargaining; it does not imply to mean that bargain itself leads to a notion of bad or harsh contract in the eye of law, whereas an unfair bargaining power, or inequality of bargaining, or the differentiation in the expectation levels of the contracting parties definitely jeopardises the economic power of not only the individual who is contracting, but repercussions would be likely to be impinged on the economy of such a market.

40. The formidable problems which standard-form contracts present today, could not have been even visualized by the framers of the Indian Contract Act, a century ago. Although it is true that standardized contracts or "Adhesion Contracts" are not hit by any provision in the Indian Contract Act, 1872, which lays down general principles relating to contracts, but at the same time, its Preamble states that it does not profess to be a complete code dealing with the law relating to all types of contracts.(40) Presumably, it is a point in consideration for the law-makers that unfairness inherent in the conditions takes away the essence of a valid contract, such a contract amounts to circumvention of law. An important example of this phenomena is the increasing practice of excluding the warranties and conditions otherwise implied under the Sale of Goods Act, 1930, in contracts for the purchase of goods, and substituting printed guarantees of more dubious character.

41. A pertinent question which draws attention of many a great Judges, is that, would it be of spasmodic or everlasting relief to have a legislation concerned to every particular trade. It is submitted that even such a step would not be much fruitful, uniformity of terms or so-called "codification" of terms may result more beneficial to the interests of combines. The Indian Contract Act lays down in very specific terms, that all unjust or unreasonable conditions in contracts would make such a contract void,(41) but to pinpoint any eventuality in the chang-

35. AIR 1963 SC 1288.

36. Prof. J. L. Montrose, CBR, Vol. 15, p. 760.

37. (1949) 2 All E R p. 591 at p. 585.

38. (1910) 2 K B 1003; (1911) A C 394.

39. Prof. L. C. B. Gower, (1954) 17 Mod L R p. 155.

40. *Irrawaddy Flotilla Co. v. Bugwandas* (1891) 18 Ind App p. 121. Cited in *Jwaladutt B. Pillani v. Bansilal Motilal*, AIR 1929 PC 132 at p. 154.

41. See sections 8 and 9, Indian Contract Act, 1872.

ing socio-economic conditions would tantamount to synchronizing with the Benthamite notion.

42. Legislation should come forward with the following objectives in view:

1. (a) The terms and conditions of standard-form contracts should be made subject to the approval of an independent body. It is more important in the case of public sector undertakings where the administrative control tilts its balance in favour of public power, overwhelming the private interests.

(b) Such clauses in the Standard-form contracts which exempt a party from liability for negligence, should be prohibited. Such exemption is a direct negation of the concept of public policy.

2. In such fields where wide discretion is vested in the administrative officers, limitations on the following lines may be provided—

(a) Specific norms can be evaluated in accordance with the discretionary power vested in the administrative authority, such discretion exercised, enumerated along with the reasons, shall be made available to the knowledge of the affected person,

(b) such discretion exercised should be subjected to an authority, higher in hierarchy, for review and scrutiny, in order to ventilate grievances of the aggrieved person.

43. Much is expected from the legislation pertaining to Monopolies and Restrictive Trade Practices Act, which strives in the direction of equality of bargaining power. In England, after the passing of the Misrepresentation Act, 1967, a wide resort to section 3 of this Act has been undertaken in order to exclude the liability. (42)

42. Atiyah and Trietel give a critical account of the 'Misrepresentation Act, 1967,' S. 3 of which excludes liability for misrepresentations only, provided if such intention to exonerate themselves from liability have been brought under the notice of the buyer; (1967) 30 Mod L R p. 369 at p. 385.

44. Exemption clauses are not blame-worthy all the times, sometimes even the standardized terms and conditions themselves prove to be onerous. Provisions purporting to allow unilateral modification, unilateral cancellation of the contract, or imposing impracticable settlement procedures in the event of dispute rather make it more enigmatic than the remedies available. "Stipulations" ironically casted out by the exigencies of the commercial classes during the past two centuries, which act as a "catalytic reagent," in case a party is unable to perform the obligation, deserve an analytical consideration.

45. Normally the exemption clauses enumerated particularly in the "time essence contracts," allow the parties to redress the balance over a limited period. Although this argument savours for 'status quo,' but lacks a fundamental discrepancy. Such limited period would be used rather as a 'defence' by the powerful firms and combines.

46. A reconciliation between the two concepts of public policy and behavioural patterns of socio-economic order is required, as opposed to any empirical formulae. The pure theory of consensus has given way to commercial expediency. The two corner-stones of the classical law of contract, the freedom of contract and the sanctity of contract have been outworn by the present-day needs of socio-economic patterns, hence they are to be refurbished anew, by the well-adjusted pieces of "mixed economy," a task to be grappled with by the jurists and Judges alike.

47. One of the cardinal principles in the construction of contracts is that the entire contract must be taken as constituting an organic synthesis, embodying provisions which balance in the sum of reciprocal rights and obligations. It is through the prism of that principle that the terms of the contract should be analysed.

LAW COMMISSION OF INDIA

REVISION OF THE INDIAN PENAL CODE

QUESTIONNAIRE

(From :—Joint Secy. and Legal
Adviser to the Govt. of
India, New Delhi.)

APPLICATION OF THE CODE

1. Extra-territorial operation of the Code in respect of aliens is at present confined to offences committed on ships or aircraft registered in India (Section 4). Should this be enlarged in any manner, e. g., to offences committed by aliens in the service of Government outside India?

PUNISHMENTS

2. The punishments provided in the Code are death, imprisonment for life, rigorous and simple imprisonment, forfeiture of property and fine. Do you consider it necessary or desirable to add any other punishments, e. g.:

(a) banishment for a term to a specified locality within India;

(b) externment for a term from a specified locality;

(c) corrective labour;

(d) imposition of a duty to make amends to the victim, by repairing the damage done by the offence;

(e) publication of name of the offender and details of the offence and sentence;

(f) confiscation.

In respect of what offences or types of offences would such punishments be appropriate?

3. The Code lays down only the maximum punishment for offences, and no minimum punishment except in very few cases. Are you in favour of laying down a minimum term of imprisonment for any offences? If so, for what offences?

4. Should imprisonment for life as the punishment prescribed for some offences be replaced by imprisonment for a specified long term, e. g. 20 years?

5. Have you any general suggestions to make for a reduction or increase in the quantum of punishment for various offences under the Code?

6. Are you in favour of providing any special form of punishment (such as, ordering suspension or winding up of business), for persistent violations of the law by Corporations?

7. (a) Where an offence is conjointly committed by a group of persons (say, exceeding ten in number), should the maximum punishment be higher than the maximum prescribed for that offence?

(b) For instance, should 'gherao' (wrongful restraint by a large group of persons) be made a separate offence with a severe punishment?

(c) Have you any other additions to suggest for dealing with violent crimes committed by organised groups or by unruly crowds?

8. When a person commits an offence in a state of intoxication (self-induced), should that be made a ground for enhanced punishment?

9. (a) Do you think that there are too many provisions in the Code dealing with aggravated form of particular offences and the law should be simplified in this respect?

(b) Would it be preferable to give a list of aggravating and another of mitigating circumstances and provide generally that, in case of aggravating circumstances, the ordinary maximum punishment will be doubled, and, in case of mitigating circumstances, it will be halved?

GENERAL EXCEPTIONS

10. Would you allow mistake of law to be pleaded either as a defence or as a mitigating circumstance, for offences constituted by contravention of subordinate legislation, such as, statutory rules, bye-laws, orders and the like?

11. Do you consider that any increase is necessary in the minimum age of criminal responsibility which is 7 years at present (section 82)? If so, what should it be?

12. (a) Should the existing provision (section 84) relating to the defence of insanity be modified or expanded in any way?

(b) Should the test be related to the offender's incapacity to know that the act is wrong or to his incapacity to know that it is punishable?

(c) Should the defence of insanity be available in cases where the offender, although aware of the wrongful, or even criminal, nature of his act, is unable to desist from doing it because of his mental condition?

13. There is at present no right of private defence in cases in which there is time to have recourse to the protection of public authorities (section 99). Do you think that this restriction is necessary or that it should be removed or that it should be modified?

14. In regard to entrapment cases where the Law enforcement officers or their agents directly instigate the commission of an offence, as distinct from those cases where they merely provide the opportunity for the commission of the offence, would you say—

(a) that the procedure adopted is so unfair and unethical that the accused should be deemed not to have committed any offence, or

(b) that, at any rate, a lesser sentence should be provided in the Code?

ABETMENT AND ATTEMPT

15. Where a person abets an offence by instigating a minor to commit it, should the abettor be punishable with a punishment higher than that prescribed for abetment in general?

16. Are you in favour of introducing the principle of full vicarious liability of the master for an offence committed by a servant in the course of his employment for the benefit of the master?

17. At present, preparation to commit an offence is by itself an offence in very few cases. Would it be desirable to increase this number, and if so, in respect of what types of offences?

OFFENCES AGAINST THE STATE

18. Do you consider that the law relating to sedition should be amplified or modified? If so, in what respect?

OFFENCES AFFECTING THE HUMAN BODY

19. Should euthanasia (or 'mercy killing' as it is popularly called) be exempted from punishment either as homicide or as abetment of suicide?

20. Should there be a provision in the Code for punishing a person who drives another person by systematic cruel treatment to commit suicide?

21. (a) Should attempt to commit suicide be punishable at all?

(b) Where a person threatens to put an end to his life or attempts to do so, with a view to compelling another person or authority to do or omit to do anything which that person or authority is not bound to do or, as the case may be, omit to do, should such act be made punishable?

22. The Code contains a few provisions for punishing sexual offences (rape, unnatural offence, etc.). Are any additions to, or alterations in, these provisions necessary?

23. (a) Should unnatural offences be punishable at all or with heavy sentences as provided in section 377?

(b) Should exception be made for cases where the offence consists of acts done in private between consenting adults?

OTHER OFFENCES

24. (a) Should adultery be punishable at all?

(b) If so, should the offence be limited to men only, as in section 497?

25. (a) Should defamation as at present elaborately defined in section 499 be punishable at all?

(b) Would it be preferable to limit criminal defamation to cases where a person defames another person (living or dead) intending or knowing it to be likely that such act will lead to a breach of the peace?

26. In view of Article 12 of the Universal Declaration of Human Rights (1948), do you think that the criminal law ought to recognise and protect the right of privacy, and, if so, what kind of interference with that right should, in your view, be punishable?

LIMITATION FOR PROSECUTIONS

27. Do you consider that there should be a statutory period of limitation for prosecution for any offences under the Code, and, if so, for what offences?

A CRITICAL COMMENT ON ANANDILAL BEHARA v. COMMISSIONER OF SALES TAX (M. P.) (1968) 22 S. T. C. 19 (M. P.)

(By : V. K. SHARMA, Advocate & Lecturer, Gandhi Road, Indore-2 (M. P.))

1. In *Anandilal v. Commissioner of Sales Tax, M. P. and others* (1968) 22 S.T.C. 19 : 1968 Jab L J 675 the facts in so far as they are relevant to the present discussion may be stated thus:—

The State Government gave two forest contracts to the petitioner firm for extrac-

tion of gum from forest trees growing in certain forest lands in Dhar district. The Assistant Sales Tax Officer thought that under the said contracts there was a sale of gum to the petitioner firm and accordingly assessed them to Sales Tax. An appeal preferred by the petitioner-firm

against the said order of assessment was dismissed and a revision application against the appellate order met the same fate.

2. The petitioner thereupon challenged by a petition under Articles 226 and 227 of the Constitution, the validity of the orders of the Sales Tax Authorities which held that there was sale of gum under the contracts. The petitioner firm also sought a writ of Certiorari for quashing the appellate and revisional orders confirming the said order.

3. An interesting aspect of the case emerged for discussion and was considered in High Court. It was held that the contracts between the State and the petitioner-firm which stated that they were for sale and purchase of forest produce, were misconceived by both parties. And, it was further observed that the Sales Tax Authorities had also uniformly misinterpreted the contracts.

4. Dixit C. J., who delivered the decision of the Bench observed that the finding of the Sales Tax Authorities that what was sold under the contracts was gum, was "wholly erroneous." His Lordship seems to have been much impressed by what appeared to him two salient features of the contracts; the first being that although the contracts stated that they were for sale and purchase of the forest produce, regard being had to the fact that "the contracts gave to the petitioner a right to collect not only that gum which was collected and exuded from the trees at the time of the contracts, but also that which might be secreted in future;" and, secondly, "regard being had to the other conditions of the contract, including that the occurrence of the forest produce its quantity and quality is 'not guaranteed' the contracts, it was held, were in essence and in effect licences granted to the petitioner firm to enter upon the forest lands coupled with a grant to collect gum existing on trees or might be secreted in future during the periods of the contracts."

On these facts it was held that a right to collect and appropriate gum from the gum bearing trees is a benefit arising out of land and therefore an interest in immovable property.

5. Dixit C. J., who spoke for the Bench, however, observed at para 4 of the decision that there is under the contracts "sale of the right to appropriate gum from trees that was existing at the time of the contracts and that might secrete in

future during the period of contracts." It was further observed in para. 5 of the decision that "there was under the contracts concluded between the petitioner-firm and the State no sale of gum as such but only the sale of an interest in immovable property, namely the right to collect and appropriate gum from trees....."

6. It is pertinent to note that the case was under the General Sales Tax Act, 1958 (M. P.) and therefore the definitions of "goods" and "sale" thereunder are of importance here. We may at once advert to the definition of 'goods' in Section 2 (g) of the Act which in so far as is relevant for the present discussion includes "all growing crops, grass, trees, plants and things attached to or forming part of the land, which are to be severed before sale or under the contract of sale."

This clearly suggests that even unextracted gum on the trees falls within the definition of goods and is therefore "goods." Clearly, therefore we find that "trees" and unextracted "gum" are both goods within the meaning of section 2 (g) of the Act. And therefore in the light of the above discussion the correctness of the application of the general principles relating to transfer of property that a right to collect gum from forest trees amounts to an interest in immovable property is exposed to serious doubt. In my humble opinion the contracts in the above case cannot be construed as transfer of interests in immovable property.

7. Reliance was placed by Dixit C. J., on *Parmanand v. Birkhu*, (1909) 5 Nag L R 21 and *Ananda Behera v. State of Orissa*, AIR 1956 S C 17 (by Bose J.) in support of his proposition that the right to collect and appropriate gum from the gum bearing trees, is an interest in immovable property. So far as the general law relating to transfer of immovable property in India and England is concerned, the above proposition does not admit of any doubt. But Dixit C. J., was speaking for the Bench in the present case which arose out of liability to sales tax under the M. P. General Sales Tax Act. A look at the provisions of the Sales Tax Act would show that the decisions relied on by Dixit C. J., are not in point and clearly distinguishable in the present case, as under the said Act neither 'trees nor unextracted gum is immovable property' in the light of the definition of "Goods."

8. Of course, there is no scope for doubt whether the word 'Sale' used in the

decision under discussion has reference to sale under the Transfer of Property Act or under the General Sales Tax Act which applied to the case, because when Dixit C. J., says "Sale of interest in immovable property" the unequivocal reference, it appears, is to sale under the Transfer of Property Act, 1888. Even if we assume for a moment that the present case is not governed by the General Sales Tax Act, 1958, it is submitted that the contracts in the above case cannot be construed as sales of interests in immovable property.

It is also pertinent here to note that the contracts were for a specified period only. In my humble view, there is in every sale, an absolute transfer of all the rights in the property sold. In a lease for example there is a 'partial transfer' or 'demise' and the rights left in the transferor are called the 'reversion.' An idea involving, 'sale of an interest in immovable property' is thus repugnant to the spirit and terms of the contract. Even if we construe these disputed contracts as transfers of immovable property, it is

pertinent to note that both the contracts would amount to partial transfer only. To put it broadly, sale is a transfer of ownership in property.

9. A reference to the A.I.R. commentaries on the Transfer of Property Act, 1882, 4th (1968) Edition, page 862 (Note 5) and authorities referred to therein further enlighten the present discussion :

"In order to constitute a sale there must be a transfer of ownership from one person to another. A 'transfer of ownership' by a person means a transfer by such person of his rights and interest in the property in full and permanently. A transfer of a part only of such interests or for a particular period reserving the rest for the transferor himself is not a transfer of ownership."

A conclusion therefore follows that the contracts under discussion in the above case cannot be construed as 'sales of immovable property.' And it is further most humbly submitted, that the correctness of the decision under discussion is open to some doubt and needs reconsideration.

REVIEWS

REVENUE LAW By: Barry Pinson, LL. B., of Gray's Inn, Barrister-at-law, Fellow of the Institute of Taxation, Third Edition. Published by Sweet & Maxwell Ltd., 11: New Fetter Lane, London. 1968. Sole Agents in India, N. M. Tripathi Private Ltd, Princess Street, Bombay 2. Pages 697. Price in India Rs. 70.20.

The book treats the whole of the English revenue law in a single volume. It comprises Income tax, Sur-tax, Capital Gains Tax, Corporation Tax, Estate Duty, Betterment Levy, Stamp Duties, Tax and Estate Planning. This new edition has been enlarged to deal with effects of Betterment Levy. The general practitioner finds the interaction of the various taxes, hardest to grasp and there is a real need for such a book. Besides a chapter on Betterment Levy, another chapter summarising the interaction of Betterment Levy with other taxes and with Estate Duty has been added in this third edition.

Though the book deals with the English Revenue law, the tax practitioner in India will derive immense benefit by consulting this book off and on, in construing the provisions of the various tax laws of India. R.G.D.

FAMOUS MURDER TRIALS By S. Rajagopalan, Advocate, Madras with an introduction by V. N. Srinivasrao, Advocate and President, Bar Association, Madras, Published by N. M. Tripathi (P.) Ltd. Bombay, 1968 Ed. Price Rs. 10/-.

The book under review gives an account of about 75 cases. As the title suggests in all the cases the accused have been tried for murder. A few foreign cases also find a place. The book is mostly meant for laymen and combines well the narrative aspect as well as legal one. Problems of criminal law and forensic science have been elucidated. Two famous cases of Anant Chintaman Lagu and Nanavati also have been given. The readers will enjoy reading the book. G.G.M.

MERGERS, AMALGAMATION AND TAKE OVERS By S. C. Sen., 1st Edition 1969, Publishers Eastern Law House, Calcutta, Price Rs. 25-00.

Amalgamation and Merger have become important features in the company world today. Their existence and frequent occurrence is necessitated by the modern corporate economy and results in emergence of giant corporations which can weather the storm of changing concepts of industrial policies.

The learned author a leading corporation lawyer has in a short compass lucidly dealt with the essential features of mergers, amalgamation and take overs. Besides being useful to company lawyers, book is very useful to

industrialists and businessmen seeking to expand their business. Chapters on planning of mergers are of special importance and benefit to business management. The book fully deals with law and procedure. G.G.M.

CORRESPONDENCE

Sir,

I am a regular reader and subscriber of your esteemed journal 'A I R'. Through your journal section of this educative Law Journal I as a humble citizen of India, would like to draw the kind attention of the Union Law Ministry and the Union Law Commission to Section 197 of the Code of Criminal Procedure and request them to repeal this section as the provisions of this section are in conflict with Article 14 of the Indian Constitution and the "Rule of Law".

Though the underlying principle of this section is to protect judges and a class of public servants from unnecessary harassment, yet it impugns Article 14 of the Constitution which provides equality before the law or the equal protection of the law to all persons. Moreover, it has been observed in a number of cases that this section protracts the proceedings in the Court of law as it provides ample opportunity to an accused to put forward a pretended or fanciful claim that he has been accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties even though the act does not bear any relation to the duty. This section often helps an accused to adopt a delaying tactics by moving the higher tribunals for revision on the plea that sanction of the Govt. is necessary, which causes a great hardship to a complainant and thus complainant is harassed. The complainant who resorts to law

for redress ultimately becomes the victim of circumstances, losing the material evidence due to the frailty of human memory on account of the lengthy process of law involving time. Dicey's enshrined "Rule of Law" is based on the principle that equality of all persons before the eye of law. As Dicey says, "Every official from Prime Minister down to a Constable or a Collector of Taxes is under the same responsibility for every act done without legal justification as any other citizen". Rule of Law is sine qua non for the successful working of democracy. Section 197 of the Criminal P. C., stands against the cardinal principle of the Rule of Law as under the section a class of public servants are not amenable to the jurisdiction of the ordinary tribunals without previous sanction of the Govt.

My humble submission, therefore, to the Union Law Ministry and the Law Commission is to delete Section 197 of the Code of Criminal Procedure (1893) in order to remove the disparity among persons and persons who possess the same rights and status in a democratic country like India.

Yours faithfully,

Amarendra Dutt Choudhary
C/o. M. K. Dey,

Collectorate Central Excise,

Shillong, P. O. Shillong,
the 22nd Sep. 69. Dist. K. & J. Hills
(Assam).

BOOK RECEIVED

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Notes of Supreme Court Cases

[Notes made by Shri S. B. Wad, Advocate, Supreme Court, New Delhi.]

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AIR 1970 N. S. C. 1 (V 57)

SHAH, J. (HEGDE, J. concurring)
Kanaiyalal Maneklal Chinai and Another v. State of Gujarat and others.

Civil Appeal No. 1102 of 1967, D/- 17-10-1969.

The Land Acquisition Act, 1894.

Section 4(1) — Whether fresh Notification necessary where the acquired lands become a part of new State on reorganisation. Since the Act under which the lands were acquired continued to be in force in the new State, no fresh Notification is necessary. Land Acquisition Act, Section 6(3) public purpose — conclusiveness. Failure to mention the instrumentality in the Notification not fatal.

Whether acquisition was made without application of mind by the new State — Section 6(3) Notification deletes the part of the area notified under Section 4(1) — Application of mind by the State Government.

Public purpose — Acquisition of land for Gandhi Samadhi was a public purpose.

Provincial Municipal Corporation Act, 1949.

Sections 77 and 78(1) — It is not obligatory to exhaust the method of agreement before the State Government is advised to acquire the land.

Bombay Commissioners Division Act, 1958.

Section 3(4) — Does not suffer from the vice of excessive delegation. Notification issued by the Commissioner under Section 4(1) of the Land Acquisition Act — Valid.

Appellant's lands situated on the southern bank of river Sabarmati within

1970 N. S. C./1 (1) I G—1 (8 pages)

the limits of the Municipal Corporation of Ahmedabad were acquired for Mahatma Gandhi's Samadhi. The acquisition was challenged on the grounds that the Commissioner of Ahmedabad was not competent to acquire the said lands as the delegation of the powers of acquisition under the Bombay Commissioners Division Act, 1958, amounted to excessive delegation, that Section 4(1) Notification under the Land Acquisition Act became bad and inoperative in law after the creation of Gujarat State, that acquisition of land for the Samadhi of Mahatma Gandhi was not a purpose for which lands could be acquired under the Provincial Municipal Corporation Act, 1949, that the State Government had not explored the method of agreement envisaged under the Corporation Act before acquisition under the Land Acquisition Act, Section 6(3) Notification suffered from the vice of non-application of mind at the time of acquisition.

Held, Section 3(4) of the Bombay Commissioners Division Act, 1958, does not suffer from the defect of excessive delegation.

Arnold Rodricks v. State of Maharashtra, AIR 1966 SC 1788 relied upon.

Held, Section 4(1) Notification was valid and no fresh Notification was needed as on reorganisation, Ahmedabad went into Baroda Division and the Bombay Commissioners Division Act continued to be in operation in Gujarat State. Acquisition of land associated with Gandhiji's work and life was an acquisition for a public purpose. Under Section 6(3), the decision on the said public purpose was concluded. Failure to mention the instrumentality in Section 4 or Section 6 of the Act does not affect the validity of the Notifications issued under the said section.

Vishnu Prasad Ram Das Gohil v. State of Gujarat, C. A. No. 1983 of 1966, D/- October 9, 1969 (SC), Relied upon.

It is not necessary to consider whether acquisition of land for Gandhi's Samadhi was for the purposes of the Municipal Corporation under the Provincial Municipal Corporation Act, 1949

It is not obligatory to exhaust the method of agreement before the acquisition is made under the Land Acquisition Act, when the lands are purported to be acquired under Sections 77 and 78(1) of the Provincial Municipal Corporation Act 1949

Held, while issuing Section 6(3) Notification, the part of the areas notified under Section 4(1) were deleted for the actual acquisition. The authorities had thus applied their mind.

AIR 1970 N. S. C. 2 (V 57)

1 SHAH, J. (HEGDE, J. concurring)

Dattatraya Shankar Bhatt Ambalgi & Others v. The Collector of Sholapur & another.

Civil Appeals Nos. 2343-2344 of 1966, D/- 17-10-1969.

Land Acquisition Act, 1894.

Section 18 — Compensation—Supreme Court does not normally interfere with valuation — Omission to consider the agreement under which Government was committed to higher rate — Held agreement was a conclusive piece of evidence regarding the value — Agreement prevails over evidence relating to the value of other distant lands.

The Land Acquisition Officer awarded Rs. 2,000 per acre as compensation for the lands acquired for establishing a polytechnic institute. The same was raised to Rs 2600 by the High Court. On negotiations culminating in the formal agreement, the Government of Bombay agreed to the rate of Rs. 500 per acre. But, as the agreement was not executed in the manner required by Article 299(1) of the Constitution, the Government repudiated it and proceeded to acquire lands at the rate of Rs. 2,000 per acre. It was established that the Collector had agreed to purchase the land on behalf of the Government of Bombay at the rate of Rs. 5,000 per acre. The agreement was executed a few months before Section 4 Notification.

Held, although the agreement was not enforceable for non-compliance with Article 299(1), it was a document of strong probative value regarding the rate of payment of compensation. It was wrong to ignore the said agreement and prefer to rely on the value of the pieces of lands far remote from the acquired land

for fixing the rate of compensation. The compensation fixed at the rate of Rs. 5000 per acre.

The Supreme Court does not ordinarily interfere with the valuation under the Land Acquisition Act unless there was wrong application of principles or where important points affecting valuation have been over-looked or mis-applied.

The Special Land Acquisition Officer, Bangalore v. T Adinarayana Shetty, (1959) Supp (1) SCR 404 = (AIR 1959 SC 429) Relied upon.

AIR 1970 N. S. C. 3 (V 57)

BHARGAVA, J. (HEGDE, J. concurring) Mohd. Shafi & Mohd. Yakub v. State of Jammu & Kashmir.

Writ Petition No. 183 of 1968, D/- 17-10-1969.

Preventive Detention Act.

Sections 11-A(1) & 13(2).

Jammu & Kashmir Preventive Detention Act, 1964, as amended by Act 8 of 1967.

Sections 13(1) & 14(2)—Fresh order of extension of detention only on new grounds — Petitioner in jail at the time of fresh order—No fresh grounds proved.

Jammu & Kashmir Preventive Detention Act, 1964, as amended by Act 8 of 1967 — Section 8(1) — Communication of grounds to the detenu within 10 days — Requirement not complied with.

Petitioner No. 2 was arrested under the Defence of India Rules on 3rd January 1968. While in jail, the said order was revoked and a new detention order under the J. & K. Preventive Detention Act was passed on 20th of August, 1968.

Held, petitioner No. 2 was in jail under detention and was incapable of committing any prejudicial activities calling for his detention nor was it suggested that his activities in jail constituted any fresh justification for the order. Under Sections 11-A and 13(2) of the Preventive Detention Act which are similar to Sections 13(1) and 14(2) of the Jammu & Kashmir Preventive Detention Act, it is held that the fresh order of detention could be made only if the fresh grounds come into existence after the expiry or revocation of the earlier order of detention.

Hadibandu Das v. The District Magistrate of Cuttack, Civil Application No. 1210 of 1968, D/- 22nd April/2nd May, 1968 and Kshetra Gogoi v. The State of Assam, writ petition No. 211 of 1969 D/- September 19, 1969, Relied upon.

The detention of petitioner No. 2 was held to be illegal. Petitioner No. 1 challenged the detention on the ground that

the grounds of detention were not communicated to him within 10 days as required by Section 8 of J. & K. Preventive Detention Act. On behalf of the State, no affidavit was sworn in to the effect that the grounds were served on the petitioner within 10 days. The files on which the original notings were made were also not produced before the Court.

Held, it was not established that the grounds were served on petitioner No. 1 within the required period. Detention held illegal.

AIR 1970 N. S. C. 4 (V 57)

HEGDE, J. (SHAH, J. concurring)

Oudh Sugar Mills Etc. v. Union of India & others.

Civil Appeals Nos. 1530 to 1532 of 1969 D/- 17-10-1969.

Constitution of India, Article 19(1)(f).

Reasonable restriction on right to carry on trade through executive order. Time limit for clearance of 40% quota under the Sugar Control Act prescribed by Government — Held unreasonable.

Essential Commodities Act; Sugar (Control) Order, 1966, Clauses (4) and (5).

Under the Sugar policy announced by the Food & Agricultural Ministry on August 16, 1967, it was ordered that 60% of the sugar produced by the factory for a particular period will be procured at fixed levy price and the remaining 40% could be sold by the factories according to the free market price. The limitation of time for clearance of 40% quota fixed by the said policy statement was 30 days. However, the appellant was given only 26 days. The appellant could not actually put the sugar in the open market within the said period due to non-availability of railway wagons, although immediately after the receipt of the order from the Government, the appellant had entered into contracts for the sale of sugar. The appellant applied for the extension of time which was rejected by the Government.

Held, it was an unreasonable restriction in not permitting the appellant any extension of time when the circumstances under which he could not comply the order were beyond his control. The authorities had acted mechanically. 26 days period given to the appellant for clearance was not reasonable.

Not only the law restricting the freedom should be reasonable but the orders made on the basis of law should also be reasonable. The right to freedom of trade can be restricted only by law considered by the courts as reasonable under the circumstances.

AIR 1970 N. S. C. 5 (V 57)

HEGDE, J. (SHAH, J. concurring)

Dewan Singh v. Champat Singh & others.

Civil Appeal No. 1369 of 1966, D/- 17-10-1969.

Constitution of India, Article 136:

Discretion of the Court—Just order of the High Court upheld.

Arbitration Act:

Arbitration proceedings — Quasi judicial — Award based on personal knowledge without giving opportunity to parties bad in law — Implied term of arbitration in keeping with law.

Indian Limitation Act — Article 158:

Absence of notice of filing the award — Defendant's objections held to be within time.

The Arbitration agreement gave the Panchas and Surpanchas of the village wide powers regarding the tenancy rights of persons and compensation payable stating that whatever decision the Panchas would give will be final and acceptable to the parties. The Arbitrators stated in the award "we gave our consideration to the entire dispute which is in full knowledge of us the Panchas."

Held, the award based on the personal knowledge without giving particulars to the parties was illegal. The proceedings before the arbitrators are quasi-judicial proceedings. They must be conducted in accordance with the principle of natural justice. Arbitration is a reference of a dispute for hearing in a judicial manner. It is an implied term of the arbitration agreement that the Arbitrators must decide the dispute in accordance with the ordinary law.

The Court did not find it necessary to consider the appellant's contention that the High Court was not competent under Section 115 to decide the scope of the arbitration agreement, so as to examine whether the dispute was covered by arbitration agreement or not.

Held, the Court was otherwise satisfied that the order was eminently just and under the discretionary powers in Article 136 of the Constitution, no interference with the High Court's decision was called for.

There was no proof that the notice of filing the award was given to the defendants by plaintiff. The award was not filed along with the plaint.

Held, the objection by the defendant cannot be said to be barred by Article 158 of the Limitation Act, 1908.

AIR 1970 N. S. C. 6 (V 57)

SIKRI, J. (MITTER & JAGANMOHAN REDDY, JJ. concurring)

Lala Ram v. Hari Ram.

Cri. App. No. 191 of 1967 D/- 17-10-1969.
Criminal Procedure Code.

Section 417, sub-sections (3) & (4) — Appeal against acquittal with the Special Leave of the High Court — 60 days period prescribed — Whether period of limitation for the purposes of Section 12 (2) of the Limitation Act.

— Indian Limitation Act.

Section 12(2) — Exclusion of the period for obtaining copies applicable to Section 417(3) & (4) of Cr. P. C.

Criminal Procedure Code.

Section 561-A — Inherent powers.

Probation of Offenders Act.

Sections 3, 4 and 6 — No good proof of age.

It was claimed by the applicant that two days were necessary for obtaining a certified copy of the order of the Magistrate for filing an application under Section 417(3) of the Criminal Procedure Code and the applicant was entitled to deduct these two days. With the exclusion of two days, the application was within time. The question for the decision was whether the period of 60 days prescribed under Section 417(3) was the period of limitation so as to attract the provisions of Section 12(2) of the Indian Limitation Act.

Held, section 417(4) itself prescribes the period of limitation for an application to be made under Section 417. It was not found necessary for the Legislature to amend the Limitation Act and to insert an Article dealing with the applications under Section 417(3), Cr. P. C., as it was open to it to prescribe the period of limitation in the Code itself.

The word "entertain" under Section 417(4) means filed or received by the Court and it has no reference to actual hearing of the application for leave to appeal as contended by the appellant. The appellant's contention cannot be accepted because the result would be that the application for leave would be barred because the applications have not been put up for hearing before the High Court within 60 days of the order of acquittal.

Anjana Bai v. Yashwantrao Daulatrao Dudha, 1LR (1961) Bombay page 135 = (AIR 1961 Bom 154) = 1961 (1) Cri LJ 637 (FB) cited with approval.

No good proof of the age of the appellant was produced although he was given an opportunity at a very late stage in the High Court proceedings. He was thus not entitled to the benefit of the Probation of Offenders Act.

AIR 1970 N. S. C. 7 (V 57)

SHAH, J. (HEGDE, J. concurring)

Commissioner of Hindu Religious & Charitable Endowments, Mysore v. U. Krishna Rao and others.

(Civil Appeal No. 2312 of 1966, D/- 17-10-1969.)

The Madras Religious & Charitable Endowments Act (Act XXII of 1954).

Section 76 (1)—Whether rules for contribution for the services rendered by the State should be issued separately for each religious establishment — Held not necessary.

The Madras Religious & Charitable Endowments Act (Act XXII of 1954):

Section 76(2)—"determination" of audit fee.

The orders issued by the Assistant Commissioner, Religious Endowments, Mysore, calling upon the respondents to pay the arrears of contributions under S. 76(1) and audit fee under Sec. 76(2) of the Madras Religious and Charitable Endowments Act were struck down by the Mysore High Court as being illegal. The Mysore High Court relied upon its own judgment in *Devraj Shenoy v. State of Mysore* (1960-38 Mysore LJ 245) and held that since a separate rule was not framed for each individual religious establishment in matters of contributions, the demand notice for the contribution was illegal. The High Court also held that there was no proper determination of the audit fee as envisaged by Section 76(2) and, therefore, the demand was bad and illegal.

Held, the High Court proceeded on the wrong assumption that under Section 76(1) read with Section 100 of the Act, it was necessary that individual rules should be framed for the purposes of contribution for each religious establishment. The said holding of the High Court based on the concession by the Advocate General in the *Devraj Case*, (supra) was contrary to law.

Under Section 76(1) there must be a correlation between the expenses incurred by the authority levying the fee for generally providing the services in the aggregate of the levy from persons who are to be made subject thereto. The correlation to the services need not be to each individual establishment. *H. H. Sudhindra Thirtha Swamiar v. Commissioner for Hindu Religious & Charitable Endowments, Mysore*, AIR 1963 SC 966 Relied upon.

The corollary of the above proposition is that there may be general rules prescribing the levy of fee under the Act. Such rules were framed in 1955 and governed the contribution. —

If the services are provided assuming that a certain religious establishment either does not need the services or does not obtain the benefit, of the services, the contribution would still be recoverable.

The 1955 rules were not rendered inoperative when the Mysore High Court struck down certain provisions of the said Act in the Devraj case.

The High Court's finding on the audit fee under Section 76(2) was wrong as the only contention of the respondents was that the rate of fee was excessive. The High Court came to the conclusion that there was no proper determination of the fee without considering the reasonable cost in making the effective audit and the actual rate charged.

Remanded to the High Court for determination according to law, laid down.

AIR 1970 N. S. C. 8 (V 57)

RAMSWAMY, J. (DUA, J. concurring)

State of Andhra Pradesh v. I. V. S. Prasad Rao & others.

Criminal Appeal No. 220(N) of 1967, D/- 27-10-1967.

Constitution of India.

Article 136 — Interference with the findings of fact — Findings perverse for want of consideration of the circumstantial evidence.

Indian Evidence Act.

Circumstantial evidence — Cumulative effect of all the circumstances should be considered by the Court.

The accused who were convicted by the trial Court for the offence under Section 120B, I. P. C. section 420, I. P. C. and Section 419, I. P. C., were all acquitted by the High Court. A charge against the accused was that they conspired to cheat the Bank in which they were working by encashing the forged credit advice card (similar to demand draft). The evidence was wholly circumstantial. It was established that accused no. 4 was in the habit of practising the signature of the Secretary and the Manager of the Bank. The Advice Card was typed by accused no. 2. Accused Nos. 1 and 2 went to another branch of the bank, that accused nos. 3 and 1 forced the Clerk, Shroff, of the bank to part with the money, although he pointed out the irregularities. Substantial amounts were recovered from the house of accused. Accused No. 3 was identified and the Handwriting Expert opined that the debit slip was in the handwriting of accused No. 3.

Held, the High Court's finding was perverse as the circumstantial evidence was not considered by the High Court. It was a fit case to set aside the findings of the High Court. The Supreme Court

interferes under Article 136 where there is substantial and grave injustice or where there are exceptional and special circumstances.

It is settled law that before conviction is based solely on circumstantial evidence it must be ascertained that it is conclusive of the guilt of the accused, and that it is incapable of explanation of any hypothesis consistent with the innocence of the accused. It is not necessary that every hypothesis suggested by the accused should be met by the prosecution; it is also not necessary that every fact must establish the guilt of the accused. The Court must look to the total cumulative effect of the proved facts.

The judgment and order of the High Court was set aside and the conviction upheld.

AIR 1970 N. S. C. 9 (V 57)

RAMASWAMY, J. (DUA, J. concurring):
M/s. Tatanagar Foundry Company v. Their Workmen.

Civil Appeal No. 697 of 1968, D/- 27-10-1969.

Industrial Disputes Act.

"Closure" — Circumstances showed that it was not a lock out.

Industrial Disputes Act.

Section 25 (FFF) — Compensation — Whether closure was due to unavoidable circumstances beyond the control of the employer.

Held, closure was unavoidable — Compensation payable under Section 25 (F).

On a reference to the Industrial Tribunal regarding the closure of the appellant factory, the Tribunal held that the closure of the Jamshedpur business of the appellant was not a closure, but a lock-out in the disguise of closure and directed the re-instatement of the workmen with full wages for the period they were put out of employment.

Held, in closure the employer does not merely close down the place of business, but he closes the business itself finally and irrevocably. Lock-out on the other hand indicates the closure of the place of business and not the closure of the business itself.

Management of Express Newspapers Ltd. v. Workers and Staff Employed under it. (1963) 3 SCR 540 = (AIR 1963 SC 559).

The closure is to be genuine and bona fide in the sense that it should be a closure in fact and not a mere pretence of closure.

T. District Labour Association v. Its Employees (1960) 3 SCR 207 = (AIR 1960 SC 815).

The motive behind the closure is immaterial and what is to be seen is whether it is effective one.

Andhra Prabha Limited v. Secretary, Madras Union of Journalists, (1967) 3 SCR 901 = (AIR 1967 SC 1869); Kalanga Tubes Ltd. v. Their Workmen, AIR 1969 SC 90.

Considering the totality of the facts and circumstances, it was held that the closure of appellant's factory was really closure and was not a lock-out.

Held, the closure was not due to unavoidable circumstances. The financial condition of the appellant, non-availability of orders for supply of goods, non-co-operation from the workmen were not sufficient grounds for the closure. Held, compensation under Section 25(F) was payable.

AIR 1970 N. S. C. 10 (V 57)

RAMASWAMY, J. (DUA, J concurring)
M/s Naulakha and Sons v. Shri Ramanyadas & others.

Civil Appeals Nos. 1085 and 1086 of 1967, D/- 27-10-1969.

Indian Companies Act, 1956.

Companies (Court) Rules, 1959—Court's discretion in the matters of sale — Court must satisfy that, auction fetches reasonable price in terms of the market price and that no prejudice was caused to the company and creditors — Proper publicity of sale — Held, there was no proper publicity and the discretion was not properly exercised.

On request from the Liquidator, the Company Judge of Andhra Pradesh High Court appointed 3 Commissioners for the sale of a part of the immovable property of the company under liquidation. One of the conditions was that the proclamation of sale was to be advertised twice in each of the five leading dailies, and the proclamation was to be printed and distributed to the business houses for ascertaining their demands. The Commissioner published the proclamation in the 4 leading dailies. It was not published in one daily newspaper. There were two insertions in two dailies and one insertion in the other two dailies. Appellant was the only bidder at the relevant date. Before the final confirmation of sale by the Court, one Gopaladas informed the Court that he was interested in the purchase of the machinery and there was no adequate publicity of the original sale. The company Judge then had an auction in the Court between the appellant and Gopal Dass. The appellant's bid was accepted as it was high up. Before the confirmation of this sale by the Court, one Padam Chand informed the Court that he was interested in the sale and was ready

to offer higher price than the appellant. His application was rejected by the Company Judge. In the appeal to the Division Bench, the sale in favour of the appellant was set aside.

The question before the Supreme Court was whether the Company Judge had exercised his discretion properly under R 273 of the Companies (Court) Rules, 1959, in confirming the sale in favour of the appellant.

Held, in every case it is the duty of the Court to satisfy itself that having regard to the market value of the property, the price offered was reasonable. Unless the same was ascertained, the confirmation of sale could not be a proper exercise of judicial discretion.

The discretion must be exercised by the Court in the interest of the company and the creditors as well.

Held, there was no proper publicity and there was lack of opportunity for the public to take part in the auction. The acceptance of the highest bid was not a sound exercise of discretion. The price accepted was not adequate price. The appeal was dismissed.

Gordhan Dass Chuni Lal v. T. Shri-man Kanthimathinatha Pillai, AIR 1921 Madras 286, Rathanaswamy Pillai v. Sabapathi Pillai, AIR 1925 Mad 318, S. Soundarajan v. Khakha Mahmud Ismail Saheb, AIR 1940 Mad 42 and A. Subbaraya Mudaliar v. K. Soundarajan, AIR 1951 Mad 986 cited with approval.

AIR 1970 N. S. C. 11 (V 57)

HEGDE, J. (SHAH, J. concurring)

State of U. P. v. Om Prakash Gupta.

Civil Appeal No. 1731 of 1967, D/- 28-10-1969.

Constitution of India

Article 311.

Government of India Act, 1935.

Section 240 — Departmental enquiry — What principles of natural justice apply depends on facts of each case — Guilt based on the statements of the respondents — Refusal of right to cross-examine witnesses not of avail — Furnishing a summary of the report of the disciplinary authority where the delinquent does not object at the earlier stage, held, enough compliance with principles of natural justice — No evidence adduced to show that the delinquent was dismissed by the authority subordinate to the appointing authority.

The respondent was the member of U. P. Civil Service. The charges against him comprised of several instances where he had issued warrants for arrest and production before him of girls under sec-

tion 100 of the Criminal Procedure Code and then calling them at his place or detaining them for immoral purposes. After the enquiry, the charges were held to be proved and the Deputy Commissioner of the Division removed him from service. In the civil suit filed by the respondent against his alleged wrongful dismissal, the trial Court held that charge No. 1 in which there was a positive evidence of the detention of a girl for immoral purposes was proved and held that the dismissal was justified. The High Court set aside the dismissal on various grounds of non-compliance with principles of natural justice. The High Court further held that the respondent was not dismissed by the appointing authority and that the enquiry officer had not recorded his findings on all the charges.

Held, the respondent's explanation that the girl in question was a minor and therefore, she could not be handed over to any one was disbelieved. Instead of sending her to Medical Officer, for examination the course adopted by the respondent was extraordinary and not capable of any innocent explanation. On his own admissions, the only reasonable conclusion that can be drawn was that the respondent was unworthy of holding any responsible post. The gravity of the offence of the respondent under the 1st charge is such as to merit his dismissal from the service. If the court is satisfied that the findings in the disciplinary enquiry regarding substantial misdemeanour and the punishment imposed are legal and correct, the Courts need not look into other charges.

State of Orissa v. Bidya Bhushan Mohapatra (1963) Supp. 1. S. C. R. 648 = (AIR 1963 SC 779) Relied upon.

Natural justice and reasonable opportunity depend on the facts of each case. Courts examine whether there was any deflection of the course of justice by non-observance of a certain principle. Denial of the opportunity to cross-examine a witness in case where the guilt was based on the admission of the respondent was not denial of the opportunity to plead his innocence. Similarly, a summary of the report of the enquiry officer which is not objected to at the earlier stage does not violate principle of natural justice.

Held, further, that no plea was taken by the respondent in the plaint that the enquiry officer had no lawful authority, nor was it averred or ruled that the Governor was the appointing authority and not the Chief Secretary. The plea that the statements of certain witnesses were recorded behind their back did not merit any consideration as the statements were shown to the respondent, he was permitted to take down notes and to cross-examine the witnesses in respect of those

statements. These mistakes do not vitiate the enquiry.

State of Mysore v. S. S. Makapur, (1963) 2 S. C. R. 943 = (AIR 1963 SC 375), Relied upon.

AIR 1970 N. S. C. 12 (V 57)

RAMASWAMY, J. (SHAH AND GROVER, JJ., concurring)

Sri Rajah Velugoti Kumara Krishna Yachendra Varu and others v. Sri Rajah Velugoti Sarvagna Kumara Krishna Yachendra Varu and Ors.

Civil Appeal No. 2113 of 1966, D/- 28-10-1969.

Madras Impartible Estates Act, 1904:

Madras Estates (Abolition & Conversion into Ryotwari) Act, 1948 — What estates are abolished under the Abolition Act — Abolition Act Section 66 — Word "Estate" denotes only the estate governed by the Permanent Settlement Regulation and Estates Lands Act, and not any other part of impartible zamindari.

Impartible Estates Act, 1904, Section 9, right of maintenance to junior members of family — No coparcenary rights.

Impartible estate — Venkatagiri estate of Madras treated impartible by custom and not by agreement recognised by Impartible Estates Act, 1904.

The plaintiffs Nos. 1 to 4 representing the junior members of the zamindar family of Venkatagiri zamindari, Madras, claimed share by way of coparcenary right in certain immovable property appurtenant to the principal Venkatagiri estate, on the ground that after the abolition of the principal estate by the Abolition Act of 1948, the appurtenant properties had acquired the character of a partible joint Hindu family property. In the alternative, they claimed the right to maintenance under section 6 of the Impartible Estates Act.

Held, the Venkatagiri Estate was an impartible estate by custom and not by mere agreement recognised by the Impartible Estates Act, 1904, as claimed by the plaintiffs.

Gopalakrishna v. Sarvagna Krishna, AIR 1955 Andhra 264, Naragunty Luchmedavama v. Vengama Naidoo, (1861-63) 9 Moo I. A. 66 (PC), Venkata Mahipati Rama Krishna Rao v. Court of Wards, (1899) I. L. R. 22 Mad 383 (PC), and Pushavathi Vijayaram Gajapathi Raj v. Pushavathi Visweswar Gajapathi Raj, AIR 1964 SC 118, Relied upon.

2. The properties claimed by the plaintiffs had not become the joint family partible properties by virtue of the Abolition Act. They still retained the charac-

ter of an Impartible Estate as the word "Estate" in section 66 of the Abolition Act denotes only the estate governed by the Permanent Settlement Regulation and the Estates Lands Act, and not any other part of impartible zamindari. The custom of impartibility had out-lived the legislation abolishing the estates.

Impartible ancestral joint family estate is clothed with the incident of self-acquired and separate property. The only joint family property incident that is retained by such property is the right of survivorship.

C. I. T. Punjab v. D. Krishna Kishore, AIR 1941 PC 120 and Krishna Yachendra Bahadur v. Rajeswara Rao, AIR 1942 PC 3, Relied upon.

Held, the plaintiffs are not entitled to claim any share by way of coparcenary interest.

3. Held, the plaintiffs were entitled to maintenance out of, the suit property under section 9 of the Impartible Estates Act, 1904.

AIR 1970 N. S. C. 13 (V 57)
RAY, J. (SHAH, SHELAT, VAIDIALINGAM, HEGDE, JJ. concurring)
A. K. K. Nambiar v. Union of India & Another.

Civil Appeal No. 1406 of 1969, D/- 28 10-1969.

Civil Services — All India Services (Appeal & Discipline) Rules, 1955.

Rule 7(1) — Suspension when the departmental proceedings are started — Rule 7(3) — Suspension where criminal investigation or prosecution is started — Held, suspension was under Rule 7(3) and not Rule 7 (1).

Mala fides—Affidavits without verification are not admissible in evidence—Held, no mala fides were alleged or proved against Central Government who had suspended the appellant.

Supreme Court Practice & Procedure.

Affidavit — Verification obligatory.

The appellant had challenged his suspension on the ground that he was suspended before starting of any departmental proceeding under Rule 7 (1) of the All India Services (Appeal & Discipline) Rules, 1955 by the Central Government. The appellant belonged to the Indian Police Service and at the relevant time was working as the Inspector General of Police of the State of Andhra Pradesh. The suspension order was also challenged on the ground of mala fides. It was alleged that the Chief Minister of Andhra Pradesh was on hostile terms with the appellant and the Central Government had issued the suspension order as advised by the Chief Minister without application of their mind.

Held, on the basis of the copy of the First Information Report (in which the appellant was charged with offences under Prevention of Corruption Act, 1947 and the time of occurrence was the period between 1960 and 1967) produced by the Solicitor-General that the suspension was under Rule 7 (3) as it was done when the criminal investigations and proceedings were started. The suspension was not under Rule 7 (1).

There were no allegations of mala fides made against any particular officer of the Government of India. The only allegation was against the Chief Minister of Andhra Pradesh. The affidavits did not contain any verification of the affidavit and, therefore, inadmissible. The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for the allegations.

AIR 1970 N. S. C. 14 (V 57)

SHELAT, J. (SHAH, VAIDIALINGAM, HEGDE, RAY, JJ. concurring)

Shri Mool Chand Odhavji v. Rajkot Borough Municipality.

Civil Appeal No. 542 of 1966, D/- 28-10-1969.

Saurashtra Terminal Tax Octroi Ordinance (47 of 1949).

Bombay Municipal Boroughs Act, 1925 in its application to the State of Saurashtra — Collection of octroi duty by the State Government and distribution of the same to the towns and cities till the time the Municipalities are established and they frame their own rules for the purposes of the levy—Levy under the Ordinance was valid even after the Municipalities were established, but where the Municipal rules were held illegal by the Court.

The Saurashtra Ordinance of 1949 was issued with an object of the State Government collecting the octroi and distributing it to the towns and cities till the Municipality framed their own rules for the levy of octroi. The Rajkot Borough Municipality framed its rules. The levy of octroi was challenged by the appellant on the ground that the Rajkot rules and bye-laws were illegal. The trial Court held that the said bye-laws and rules of Rajkot Municipality were illegal for non-compliance with section 61 (1) and section 75 and section 77 of the Bombay Municipal Boroughs Act. The trial Court further held that the levy was valid under the Ordinance of 1949. In the Supreme Court, the legality of levy was challenged on the ground that because of the Notification of the State Government deleting Rajkot Borough Municipality from the application of the Ordinance of

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Supreme Court

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(V 57 C 1)

(From Bombay: (1965) 67 Bom LR 690)

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

Shankar Ramchandra Abhyankar, Appellant v. Krishnaji Dattatraya Bapat, Respondent.

Civil Appeal No. 870 of 1966, D/- 18-4-1969.

Constitution of India, Arts. 226 and 227 — Dismissal of revision against order, by High Court — Order merges with order made in revision — It cannot thereafter be challenged under the Articles (1965) 67 Bom LR 690, Reversed; (1956) 58 Bom LR 344, Overruled — (Civil P. C. (1908), Ss. 96, 115 and 38) — (Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 29).

Where, on its revisional jurisdiction being invoked against the order of the appellate Court under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the High Court dismisses the revision, after hearing both the parties, the order of the appellate Court becomes merged with the order made in revision, and, thereafter, the appellate order cannot be challenged or attacked by another set of proceedings in the High Court under Art. 226 or 227 of the Constitution. The principle of merger of orders of inferior Courts would not become affected or inapplicable by making any distinction between a petition for revision and an appeal. (1965) 67 Bom LR 690, Reversed;

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(1956) 58 Bom LR 344, Overruled; AIR 1962 SC 1513 & AIR 1955 SC 638, Rel. on. (Para 6)

The right of appeal is one of entering a superior Court and invoking its aid and interposition to redress the error of the Court below. Two things which are required to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. When the aid of the High Court is invoked on the revisional side it is done because it is a superior Court and it can interfere for the purpose of rectifying the error of the Court below. Section 115 of the Code of Civil Procedure circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only one of the modes of exercising power conferred by the Statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider, and larger sense. AIR 1932 PC 165 & AIR 1926 PC 22 & AIR 1937 Mad 385 (FB) & (1911) 13 Cal LJ 90 & (1864) 10 HLC 704 & (1898) ILR 22 Mad 68 (FB), Rel. on. (Paras 5, 6)

Further even on the assumption that the order of the appellate Court had not merged in the order which disposed of the revision petition, a writ petition ought not to be entertained, by the High Court when the petitioner had already chosen the remedy under Sec. 115 of the Code of Civil Procedure. If there are two modes of invoking the jurisdiction of the High Court and one of those modes has been chosen and exhausted it

would not be a proper and sound exercise of discretion to grant relief in the other set of proceedings in respect of the same order of the subordinate Court. The refusal to grant relief in such circumstances would be in consonance with the anxiety of the Court to prevent abuse of process as also to respect and accord finality to its own decisions: (1965) 67 Bom LR 690, Reversed; AIR 1961 SC 1703, Rel. on. (Para 8)

Cases Referred: Chronological Paras

(1962) AIR 1962 SC 1513 (V 49)=

(1992) Supp 3 SCR 906, Madan Gopal Rangta v. Secy. to the Govt. of Orissa 4

(1961) AIR 1961 SC 1703 (V 48)=

(1962) 2 SCR 276, Chandhi Prasad Chokhani v. State of Bihar 7

(1956) 58 Bom LR 344 = ILR (1956)

Bom 442, K. B. Sipahimalani v. Fida-hussein Vallabhoy 2, 4

(1955) AIR 1955 SC 633 (V 42)=

1955 Cri LJ 1410, U. J. S. Chopra v. State of Bombay 7

(1937) AIR 1937 Mad 385 (V 24)=

ILR (1937) Mad 616 (FB), P. P. P. Chidambara Nadar v. C. P. A. Rama Nadar 5

(1932) AIR 1932 PC 165 (V 19)=59

Ind App 283, Nagendra Nath Dey v. Suresh Chandra Dey 5

(1926) AIR 1926 PC 22 (V 13)=53

Ind App 74, Raja of Ramnand v. Kamid Rowthen 5

(1911) 13 Cal LJ 90=15 Cal WN

848, Secy. of State for India in Council v. British India Steam Navigation Co. 5

(1898) ILR 22 Mad 68 = 8 Mad LJ

231 (FB), Chappan v. Moidin 5

(1864) 10 HLC 704=10 LT 434,

Attorney General v. Sillem 5

Mr. S. S. Shukla Advocate, for Appellant; M/s. M. C. Bhandare, K. Rajendra Chaudhuri and K. R. Chaudhuri, Advocates, for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave from a judgment of the Division Bench of the Bombay High Court. The only question for decision is whether the High Court could interfere, under Arts. 226 and 227 of the Constitution with the order of the appellate court in proceedings under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, hereinafter called the "Act", when a petition for revision under Section 115, Civil Procedure Code, against the same order had

been previously dismissed by a Single Judge of that Court.

2. The appellant is the owner of a house in Poona. The respondent, who was a teacher, was the tenant of a block of four rooms on the first floor of the house. In 1958 he was transferred to another town Wai where he was allotted suitable residential accommodation. His son, however, stayed on in Poona as he was studying there. The appellant filed a suit in the Court of Judge, Small Causes, under the provisions of the Act for possession of the suit premises, inter alia, on the ground that the respondent had acquired suitable accommodation elsewhere. The position taken up by the respondent was that his son was required to stay on in Poona and for that reason it could not be said that he had acquired suitable residence at Wai. Moreover he had gone away from Poona only temporarily and on his return the premises would be required for his own use. The trial Court held that only a part of the premises which were required by the son should be vacated. It granted a decree for possession of two out of four rooms and directed proportionate reduction of the rent. Both sides filed appeals in the Court of the District Judge. The Extra Assistant Judge who disposed them of was of the view that the Court was not empowered to bifurcate the premises. It was either suitable for the whole family or it was not suitable. But he affirmed the decree on the ground that the order of the trial Court was an equitable one. The respondent preferred a petition for revision under Section 115 of the Code of Civil Procedure before the High Court. A learned Single Judge who heard the petition dismissed it as he was not satisfied that the appellate Court had acted in the exercise of its jurisdiction illegally or with material irregularity. The respondent moved a petition under Articles 226 and 227 of the Constitution challenging the same order of the appellate Court. Following a decision of a Full Bench in K. B. Sipahimalani v. Fida-hussein Vallabhoy, (1956) 56 Bom LR 344 the Division Bench which heard the writ petition held that in spite of the dismissal of the petition by the learned Single Judge there could be interference under Articles 226 and 227 of the Constitution on a proper case being made out. After going into the merits the bench expressed the view that the respondent had not acquired an alternative suitable residence. The Courts below were, therefore, wrong in coming to the contrary conclusion. As

Section 13 (1) (1) of the Act had been misconstrued and the error was apparent on the record the orders of the Courts below were set aside.

3. Now as is well known Section 115 of the Civil Procedure Code empowers the High Court to call for the record of any case which has been decided by any Court subordinate to it and in which no appeal lies to it. It can interfere if the subordinate Court appears to have exercised the jurisdiction not vested in it by law or to have failed to exercise the jurisdiction so vested or to have acted in the exercise of its jurisdiction illegally or with material irregularity. The limits of the jurisdiction of the High Court under this section are well defined by a long course of judicial decisions. If the revisional jurisdiction is invoked and both parties are heard and an order is made the question is whether the order of the subordinate Court has become merged in the order of the High Court. If it has got merged and the order is only of the High Court, the order of the Subordinate Court cannot be challenged or attacked by another set of proceedings in the High Court, namely, by means of a petition under Article 226 or 227 of the Constitution. It is only if by dismissal of the revision petition the order of the Subordinate Court has not become merged in that of the High Court that it may be open to a party to invoke the extraordinary writ jurisdiction of that Court. There again the question will arise whether it would be right and proper for the High Court to interfere with an order of a Subordinate Court in a writ petition when a petition for revision under S. 115, Civil Procedure Code, against the same order has been dismissed. Such a consideration will also enter into the exercise of discretion in a petition under Article 226 or 227.

4. The Bombay High Court in *K. B. Sipahimalani's case*, (1956) 58 Bom LR 344 (supra) made a distinction between an appellate jurisdiction and a revisional jurisdiction. A right of appeal is a vested right and an appeal is a continuation or a rehearing of the suit. A revision, however, is not a continuation or a rehearing of the suit nor is it obligatory upon the revisional Court to interfere with the order even though the order may be improper or illegal. If the revisional Court interferes the order of the lower Court does not merge in the order passed by a revisional Court but the order of the

revisional Court simply sets aside or modifies the order of the lower Court. It was this argument which mainly prevailed before the Bombay bench. It would appear that this Court has taken a view which runs counter to that of the Bombay High Court. Although the case of *Madan Lal Rangta v. Secy. to the Government of Orissa*, (1962) Supp 3 SCR 906=(AIR 1962 SC 1513) was not one which had been decided under Section 115 of the Civil Procedure Code but the ratio of that decision is apposite. The State Government of Orissa had rejected the application of the appellant there who had applied for grant of a mineral lease. He made an application for review to the Central Government under Rule 57 of the Mineral Concession Rules which was rejected. He moved the High Court under Article 226 of the Constitution which was also dismissed. The appellant came up by special leave to this Court. His main contention was that the Central Government had merely dismissed the review petition and the effective order rejecting his application for the mining lease was that of the State Government. The High Court, thus, had jurisdiction to grant a writ under Article 226. The contention was negatived and it was held that the High Court was right in taking the view that it had no jurisdiction to issue a writ as the final order was that of the Central Government which was not within its territorial jurisdiction. The ratio of this decision is that it was the order of the Central Government dismissing the review petition which was the final order into which the order of the State Government had merged.

5. It would appear that their Lordships of the Privy Council regarded the revisional jurisdiction to be a part and parcel of the appellate jurisdiction of the High Court. This is what was said in *Nagendra Nath Dey v. Suresh Chandra Dey*, 59 Ind App 283 at p. 287=(AIR 1932 PC 165 at p. 167):

"There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an Appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptance of the term. . ." Similarly in *Raja of Ramnand v. Kamid Rowthen*, 53 Ind App 74=(AIR 1926 PC 22) a civil revision petition was considered to be an appropriate form of appeal from the judgment in a suit of small causes nature. A Full Bench of the Madras

High Court in *P. P. P. Chidambara Nadar v. C. P. A. Rama Nadar*, AIR 1937 Mad 385 had to decide whether with reference to Article 182 (2) of the Limitation Act 1908 the term "appeal" was used in a restrictive sense so as to exclude revision petitions and the expression "appellate Court" was to be confined to a Court exercising appellate, as opposed to, revisional powers. After an exhaustive examination of the case law including the decisions of the Privy Council mentioned above the Full Bench expressed the view that Article 182 (2) applied to civil revisions as well and not only to appeals in the narrow sense of that term as used in the Civil Procedure Code. In *Secretary of State for India in Council v. British India Steam Navigation Company*, (1911) 13 Cal LJ 90 an order passed by the High Court in exercise of its revisional jurisdiction under Section 115, Code of Civil Procedure, was held to be an order made or passed in appeal within the meaning of Section 39 of the Letters Patent. Mookerji, J., who delivered the judgment of the Division Bench referred to the observations of Lord Westbury in *Attorney General v. Sillem*, (1864) 10 HLC 704 and of Subramania Ayyar, J., in *Chappan v. Moidin*, (1898) ILR 22 Mad 68 at p. 80 (FB) on the true nature of the right of appeal. Such a right was one of entering a superior Court and invoking its aid and interposition to redress the error of the Court below. Two things which were required to constitute appellate jurisdiction were the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. In the well known work of Story on Constitution (of United States) Vol. 2, Article 1761, it is stated that the essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. The appellate jurisdiction may be exercised in a variety of forms and, indeed, in any form in which the legislature may choose to prescribe. According to Article 1762 the most usual modes of exercising appellate jurisdiction, at least those which are most known in the United States, are by a writ of error, or by an appeal, or by some process of removal of a suit from an inferior tribunal. An appeal is a process of civil law origin and removes a cause, entirely subjecting the fact as well as the law, to a review and a retrial. A writ of error is a process of common law origin, and it removes nothing for re-exa-

mination but the law. The former mode is usually adopted in cases of equity and admiralty jurisdiction; the latter, in suits at common law tried by a jury.

6. Now when the aid of the High Court is invoked on the revisional side it is done because it is a superior Court and it can interfere for the purpose of rectifying the error of the Court below. Section 115 of the Code of Civil Procedure circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only one of the modes of exercising power conferred by the Statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. We do not therefore, consider that the principle of merger of orders of inferior Courts in those of superior Courts would be affected or would become inapplicable by making a distinction between a petition for revision and an appeal.

7. It may be useful to refer to certain other decisions which by analogy can be of some assistance in deciding the point before us. In *U. J. S. Chopra v. State of Bombay*, AIR 1955 SC 633 the principle of merger was considered with reference to Section 439 of the Criminal Procedure Code which confers revisional jurisdiction on the High Court. In the majority judgment it was held, *inter alia*, that a judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing, in the presence of both the parties would replace the judgment of the lower Court thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the Court below. In *Chandi Prasad Chokhani v. The State of Bihar*, (1962) 2 SCR 276=(AIR 1961 SC 1708) it was said that save in exceptional and special circumstances this Court would not exercise its power under Article 136 in such a way as to by-pass the High Court and ignore the latter's decision which had become final and binding by entertaining an appeal directly from orders of a Tribunal. Such exercise of power would be particularly inadvisable in a case where the result might lead to a conflict of decisions of two Courts of competent jurisdiction. In our opinion the course which was followed by the High Court, in the present case, is certainly one which leads

to a conflict of decisions of the same Court.

8. Even on the assumption that the order of the appellate Court had not merged in the order of the single judge who had disposed of the revision petition we are of the view that a writ petition ought not to have been entertained by the High Court when the respondent had already chosen the remedy under Section 115 of the Code of Civil Procedure. If there are two modes of invoking the jurisdiction of the High Court and one of those modes has been chosen and exhausted it would not be a proper and sound exercise of discretion to grant relief in the other set of proceedings in respect of the same order of the Subordinate Court. The refusal to grant relief in such circumstances would be in consonance with the anxiety of the Court to prevent abuse of process as also to respect and accord finality to its own decisions.

9. In the result the appeal is allowed and the judgment of the division bench of the High Court is hereby set aside. The appellant shall be entitled to costs in this Court.

Appeal allowed.

AIR 1970 SUPREME COURT 5 (V 57 C 2)

(From Punjab)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

Amrit Sagar Gupta and others, Appellants v. Sudesh Behari Lal and others, Respondents.

Civil Appeal No. 349 of 1966, D/- 13-3-1969.

Civil P. C. (1908), Sec. 11 — Decree against manager — In order to operate as res judicata pleadings need not state that person is suing or being sued as a manager — It is sufficient if person is suing or being sued in the capacity as a manager — R. F. A. No. 164-C of 1963, D/- 17-12-1963 (Punj), Reversed.

It is not necessary, in order that a decree against the manager may operate as res judicata against coparceners who were not parties to the suit that the plaint or

* (R. F. A. No. 164-C of 1963, D/- 17-12-1963 — Punj at Delhi)

written statement should state in express terms that he is suing as manager or is being sued as a manager. It is sufficient if the manager was in fact suing or being sued as representing the whole family. The suit by or against the manager will be deemed to be one brought by him or against him as representing the family if the circumstances of the case show that he is the manager of the family and the property involved in the suit is family property. It is not necessary, where the manager is the plaintiff, that the plaint should state in distinct terms that he is suing as manager or where he is the defendant that he is being sued as manager. A Karta can represent the family effectively in a proceeding though he is not named as such. AIR 1929 Pat 741 & AIR 1931 Lah 559 & AIR 1927 Oudh 27 & AIR 1927 Cal 870 & AIR 1941 Bom 385 & AIR 1937 Mad 610 (FB), Rel. on. (Paras 6, 7)

Cases Referred: Chronological Paras

- (1950) AIR 1950 Ori 140 (V 37)=
ILR (1950) Cut 120, Mani Sahoo
v. Lokanath Misra 7
- (1941) AIR 1941 Bom 385 (V 28)=
ILR (1941) Bom 682, Mulgund
Co-operative Credit Society v.
Shidlingappa Ishwarappa 7
- (1937) AIR 1937 Mad 610 (V 24)=
ILR (1937) Mad 880 (FB), Ven-
katanarayana v. Somaraju 7
- (1931) AIR 1931 Lah 559 (V 18)=
ILR 12 Lah 428, Ram Kishan v.
Ganga Ram 6
- (1929) AIR 1929 Pat 741 (V 16)=
ILR 8 Pat 788, Lalchand v. Sheo-
gobind 6
- (1927) AIR 1927 Cal 870 (V 14)=
ILR 55 Cal 210, Surendra Nathi
v. Sambhunath 6
- (1927) AIR 1927 Oudh 27 (V 14)=
ILR 2 Luck 288, Pirthipal Singh
v. Rameshwar 6

Mr. S. V. Gupte, Senior Advocate (Mr. A. N. Goyal, Advocate, with him), for Appellants; (Mr. C. B. Agarwala, Senior Advocate (Mr. S. H. K. Puri and B. N. Kripal Advocates, with him), for Respondent No. 1.

The following judgment of the Court was delivered by

HEGDE, J.: The only question that arises for decision in this appeal by special leave is whether the suit from which this appeal has arisen is barred by res judicata in view of the decision in Civil Suit No. 15 of 1943. The trial Court answered that question in the affirmative but

the High Court has taken a contrary view. Hence this appeal.

2. The facts of the case leading up to this appeal, briefly stated, are as follows:

3. One Krishen Gopal had lease-hold rights in the suit properties. After the death of the aforesaid Krishen Gopal dispute arose between Jawala Prashad, the father of the appellants and Banwari Lal Verma, the father of the respondents as to the title of the suit properties. Each one of them claimed that those properties had been gifted to him by Krishen Gopal. As a result of this dispute Jawala Prashad instituted on January 20, 1943, Civil Suit No. 15 of 1943 against Banwari Lal Verma claiming possession of the suit properties on the strength of the alleged gift in his favour. In defence Banwari Lal Verma pleaded that those properties had been gifted to him by Krishen Gopal. The principal issue that arose for decision in that suit was whether the suit properties had been gifted to Jawala Prashad or Banwari Lal Verma. The trial Court dismissed the suit but in appeal the decree of the trial Court was reversed and the suit was decreed as prayed for. That decision was confirmed by the High Court and thereafter by this Court in Civil Appeal No. 164 of 1953. After the decision of this Court Banwari Lal Verma made various applications to this Court asking for reliefs which if they had been granted, would have practically nullified the effect of the decree but those applications were rejected by this Court. Thereafter efforts appear to have been made to obstruct the execution of the decree in diverse ways. When every one of those efforts failed Rangil Lal Verma, the eldest son of Banwari Lal Verma filed a suit praying for a declaration that the suit properties belonged to his joint family consisting of Banwari Lal Verma and his sons. This suit was dismissed for non-prosecution. It is only thereafter the present suit has been filed by one of the sons of Banwari Lal Verma claiming partition in the suit properties on the allegation that the same had been gifted by Krishen Gopal to his joint family.

4. The gift put forward by the plaintiff is said to have been made in 1928. Admittedly at that time all the sons of Banwari Lal Verma were minors (see the affidavit filed in this Court by Rangil Lal on behalf of the plaintiff, on February 26, 1969). Therefore naturally the gift if true could have been accepted only by Banwari Lal Verma who was the Karta of the

family at that time. It was not even urged that Banwari Lal Verma did not safeguard the interest of his family while contesting the previous suit. Further it is not the case of the respondents that there was any conflict of interest between Banwari Lal Verma and his sons. The facts disclosed make it obvious that Banwari Lal Verma and after his death his sons are availing themselves of every possible loophole in our judicial system to delay, if not defeat the course of justice. The effort is one and continuous. The suit from which this appeal has arisen is a clear abuse of judicial process. It is in this setting that we have to see whether the decision in Civil Suit No. 15 of 1943 operates as *res judicata* in the present case.

5. In the Civil Suit No. 15 of 1943, there was no room for controversy as to whether the alleged gift was in favour of Banwari Lal Verma in his individual capacity or in his favour as Karta of his family. Therein the controversy was whether the suit properties had been gifted to Jawala Prasad or Banwari Lal Verma. As seen earlier, Banwari Lal Verma pleaded that they had been gifted in his favour. He did not make it clear nor was it necessary for him to do so in that suit as to whether they were gifted to him as the Karta of the family or in his individual capacity. The properties that were in dispute in the former suit as well as in the present suit are identical properties. It cannot be disputed that Banwari Lal Verma by himself could have represented his family in that suit. That suit must be deemed to have been instituted against Banwari Lal Verma in that capacity in which he claimed title to it. If his claim in that suit is understood to have been made on behalf of his family then he must be deemed to have been sued therein as the Karta of his family. It was for Banwari Lal Verma to make clear the capacity in which he was defending the suit. That being so we fail to appreciate the conclusion of the High Court that the decision in the previous suit does not operate as *res judicata* in the present suit.

6. It is not necessary, in order that a decree against the manager may operate as *res judicata* against coparceners who were not parties to the suit that the plaintiff or written statement should state in express terms that he is suing as manager or is being sued as a manager. It is sufficient if the manager was in fact suing or being sued as representing the whole

family see Lalchand v. Sheogobind, ILR 8 Pat 788=(AIR 1929 Pat 741); Ram Kishan v. Ganga Ram, ILR 12 Lah 428=(AIR 1931 Lah 559); Pirthipal Singh v. Rameshwar, ILR 2 Luck 288=(AIR 1927 Oudh 27); Surendranath v. Sambhunath, ILR 55 Cal 210 = (AIR 1927 Cal 870).

7. The suit by or against the manager will be deemed to be one brought by him or against him as representing the family if the circumstances of the case show that he is the manager of the family and the property involved in the suit is family property, see Mulgund Co-operative Credit Society v. Shidlingappa Ishwarappa, ILR (1941) Bom 682=(AIR 1941 Bom 385). See also Venkatanarayana v. Somaraju, AIR 1937 Mad 610 (FB). It is not necessary, where the manager is the plaintiff, that the plaint should state in distinct terms that he is suing as manager or where he is the defendant that he is being sued as manager. A Karta can represent the family effectively in a proceeding though he is not named as such, see Mani Sahoo v. Lokanath Mishra, AIR 1950 Ori 140.

8. For the reasons mentioned above this appeal is allowed and the judgment and decree of the High Court is set aside and that of the trial Court restored. The respondent shall pay the costs of the appellants in all the Courts.

Appeal allowed.

AIR 1970 SUPREME COURT 7 (V 57 C 3)

(From Punjab: 1966 Cri LJ 734)

J. C. SHAH, S. M. SIKRI AND
V. RAMASWAMI, JJ.

Municipal Corporation of Delhi, Appellant v. Jagdish Lal and another, Respondents.

Criminal Appeal No. 8 of 1966, D/- 27-5-1969.

(A) Delhi Municipal Corporation Act (1957), S. 476 (1) (h) — Expression "other legal proceedings" in S. 476 (1) (h) includes power to institute complaint before Magistrate — Power can be exercised only by the Commissioner — Act contains no provision which confers the power on any one else. AIR 1960 SC 576 & AIR 1936 PC 253 (2), Rel. on.

(Para 3)

(B) Criminal P. C. (1898), S. 417 (3) — "Complainant" — Prosecution under S. 20,

Prevention of Food Adulteration Act — Offence committed within the Delhi Municipal Corporation area — Complaint can be filed either by the Municipal Corporation or by a person authorised by it in that behalf by a general or special order — Municipal prosecutor authorised by resolution of Municipal Corporation to file complaint — In filing the complaint he acts only in a representative capacity and the municipal corporation is the complainant within the meaning of S. 417 (3), Criminal P. C. — Qui per alium facit per seipsum facere videtur (he who does an act through another is deemed in law to do it himself) — Hence petition for special leave for filing appeal against acquittal of accused and the appeal petition filed by the Municipal Corporation is properly instituted: 1966 Cri LJ 734 (Pun), Reversed — (Prevention of Food Adulteration Act (1954), S. 20 (1)) — (Civil P. C. (1908), Preamble — Maxims — Qui per alium facit per seipsum facere videtur) — (Contract Act (1872), S. 226 — Complaint filed by Municipal prosecutor on authority of resolution of Municipal Corporation — Complainant is Municipal Corporation). (Para 4)

Cases Referred: Chronological Paras (1960) AIR 1960 SC 576 (V 47)=

1960-2 SCR 739=1960 Cri LJ 752,

Ballabhdas Agarwala v. J. C.

Chakravarty

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(1936) AIR 1936 PC 253 (2) (V 23)=

63 Ind App 372, Nazir Ahmad v.

Kin, Emperor

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Mr. Bishan Narain, Senior Advocate (M/s. K. K. Raizada and A. G. Ratnaparkhi, Advocates, with him), for Appellant; Mr. Sardar Bahadur and Miss Yougindra Khushalani, Advocates, for Respondent No. 1; Mr. R. N. Sachthey, Advocate, for Respondent No. 2.

The following Judgment of the Court was delivered by

RAMASWAMI, J.: On August 29, 1960, Shri Sham Sunder Mathur, Municipal prosecutor of the Delhi Municipal Corporation filed a complaint in the Court of Magistrate First Class against the respondent, Jagdishlal under Section 7 read with Section 16 of the Prevention of Food Adulteration Act, 1954 (37 of 1954). In the said complaint Shri Sham Sunder Mathur said that he was competent to file the complaint under Section 20 of the aforesaid Act in accordance with a resolution passed by the Corporation in its meeting held on December 23, 1958. By his order dated April 30, 1962 the learned

Magistrate acquitted the respondent. The Delhi Municipal Corporation made an application to the High Court asking for special leave under Section 417 of the Code of Criminal Procedure to appeal against the order of acquittal. The application was granted on September 3, 1962. When the appeal came up for bearing a preliminary objection was raised on behalf of the respondent that the only person competent to file the appeal was the complainant, Shri Sham Sundar Mathur. But the leave application was not filed by him and, therefore, the Municipal Corporation was not competent to prosecute the appeal. It was contended that only the complainant was competent to present an application for special leave under Section 417 (3) of the Code of Criminal Procedure. As the complainant in this case was Shri Sham Sudar Mathur the appeal could not be filed by the Delhi Municipal Corporation. The High Court upheld the preliminary objection of the respondent and dismissed the appeal by its order dated April 29, 1963. This appeal is brought by special leave on behalf of the Delhi Municipal Corporation against the judgment of the High Court dated April 29, 1963 in Cri. A. No. 163-D of 1962.

2. Section 20 of the Prevention of Food Adulteration Act, 1954 states:

"(1) No prosecution for an offence under this Act shall be instituted except by, or with the written consent of, the Central Government or the State Government or a local authority or a person authorised in this behalf, by general or special order, by the Central Government or the State Government or a local authority:

Provided that a prosecution for an offence under this Act may be instituted by a purchaser referred to in Section 12, if he produces in Court a copy of the report of the public analyst along with the complaint.

Section 417, sub-sections (1), (2) and (3) of the Code of Criminal Procedure after its amendment by Act 26 of 1955 provide:

"(1) Subject to the provisions of sub-section (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

(2) If such an order of acquittal is passed in any case in which the offence has

been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (XXXV of 1946), the Central Government may also direct the Public Prosecutor to present an appeal to the High Court from the order of acquittal.

(3) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

3. The principal question to be determined is whether the complaint dated August 29, 1960 was instituted by the Delhi Municipal Corporation. It is argued on behalf of the respondent that the complaint petition was not made and signed by the person competent under the Delhi Municipal Corporation Act, 1957 to exercise powers of the Corporation in the matter of institution of legal proceedings. In our opinion there is substance in this contention. The only provision under the Delhi Municipal Corporation Act, 1957, which confers powers to institute legal proceedings is Section 476 (1) (h) which states:

"(1) The Commissioner may—

(h) institute and prosecute any suit or other legal proceeding, or with the approval of the Standing Committee withdraw from or compromise any suit or any claim for any sum not exceeding five hundred rupees which has been instituted or made in the name of the Corporation or of the Commissioner;

It is clear that the phrase "other legal proceedings" includes the power to institute a complaint before a Magistrate and hence it is the Commissioner alone who could exercise the power as there is no other provision in the Act which confers such power on anyone else. This view is supported by the decision of this Court in *Ballaivas Agarwala v. J. C. Chakravarty*, 1960-2 SCR 739=(AIR 1960 SC 576) in which it was pointed out that a complaint under the Calcutta Municipal Act, 1923 as applied to the Municipality of Howrah, would only be filed by the authorities mentioned therein and not by an ordinary citizen. Section 537 of that Act provided that the Commissioners may institute, defend or withdraw from legal proceedings under the Act; under Sec-

tion 12 the Commissioners can delegate their functions to the Chairman, and the Chairman may in his turn delegate the same to the Vice-Chairman or to any municipal officer. It was observed in that case that the machinery provided in the Act must be followed in enforcing its provisions, and it was against the tenor and scheme of the Act to hold that Section 537 was merely enabling in nature. The principle invoked in that case was that adopted by the Privy Council in *Nazir Ahmad v. King Emperor*, 63 Ind App 372 at p. 381=(AIR 1936 PC 253 (2) at p. 257) viz.: that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. It was, therefore, held that if a legal proceeding was instituted under the Municipal Act in question; it must be done in accordance with the provisions of the Act and not otherwise.

4. But the question presented for determination in the present appeal is somewhat different. Under Section 20 of Act 37 of 1954 the prosecution for the offence may be instituted either (a) by the Central Government or the State Government or a local authority or (b) a person authorised in that behalf by general or special order by the Central Government or the State Government or a local authority. Section 2 (vii) of Act 37 of 1954 defines a "local authority" to mean "in the case of a local area which is a municipality, the municipal board or municipal corporation". A complaint under Section 20 of the Act may, therefore, be instituted either by the Municipal Corporation or by a person authorised in its behalf by general or special order by the Municipal Corporation. The Resolution of the Delhi Municipal Corporation dated December 23, 1958 reads as follows:—

"SUBJECT: Authorising the Municipal Prosecutor and the Assistant Municipal Prosecutor to launch Prosecutions under Section 20 of the Prevention of Food Adulteration Act, 1954.

The area under the jurisdiction of the Delhi Municipal Corporation has been declared a 'local area' under Section 2 (vii) of the Prevention of Food Adulteration Act, vide Chief Commissioner's Notification No. F.32 (30)/58-M and PH (i), dated 13th June, 1958 published in the Delhi Gazette (Part IV) dated 26th June, 1958 and consequently the Municipal Corporation of Delhi is the Local Authority for that area within the meaning of Section 2 (vii) of the said Act.

Section 20 of the Prevention of Food Adulteration Act, 1954 contemplates the appointment of persons who shall be authorised to institute prosecutions under this Act by the Local Authority concerned.

Shri Sham Sunder Mathur, M.A., LL.B., Municipal Prosecutor and Shri Bankey Behari Tawkey, Assistant Municipal Prosecutor were authorised by the erstwhile Delhi Municipal Committee under the above section.

"Shri Vijay Kumar Malhotra moved the following resolution, which was seconded by Shri Prem Sagar Gupta:

Resolved that the recommendations of the Commissioner vide letter No. 139/Legal/58, dated 1st December, 1958, regarding authorising the Municipal Prosecutor and the Assistant Municipal Prosecutor to launch prosecutions under Section 20 of the Prevention of Food Adulteration Act, 1954 be approved.

The resolution was carried."

In the present case Shri Sham Sunder Mathur, Municipal Prosecutor filed the complaint under Section 20 of Act 37 of 1954 under the authority given to him by the resolution of the Municipal Corporation. Since the Municipal Corporation, Delhi is a local authority within the meaning of Section 20 of Act 37 of 1954 and since it conferred authority on the Municipal Prosecutor the complaint was properly filed by Sham Sunder Mathur. The question is whether the Delhi Municipal Corporation or Shri Mathur was the complainant within the meaning of Section 417 (3) of the Code of Criminal Procedure. It was argued on behalf of the respondent that the complainant was Shri Sham Sunder Mathur, the Municipal Prosecutor and the Delhi Municipal Corporation was not competent to make an application for special leave under Section 417 (3), Cr. P. C. We are unable to accept this argument as correct. It is true that Shri Sham Sunder Mathur filed the complaint petition on August 20, 1960. But in filing the complaint Shri Mathur was not acting on his own personal behalf but was acting as an agent authorised by the Delhi Municipal Corporation to file the complaint. It must, therefore, be deemed in the contemplation of law that the Delhi Municipal Corporation was the complainant in the case. The maxim *qui per alium facit per seipsum facere videtur* (he who does an act through another is deemed in law to do it himself) illustrates the general doctrine on which the law relating to the

rights and liabilities of principal and agent depends. We are, therefore, of opinion that Shri Mathur was only acting in a representative capacity and that the Delhi Municipal Corporation was the complainant within the meaning of Section 417 (3) of the Code of Criminal Procedure and the petition for special leave and the appeal petition were properly instituted by the Delhi Municipal Corporation. For these reasons we allow the appeal, set aside the judgment of the High Court dated April 9, 1965 and direct that the appeal should be remanded to the High Court for being heard afresh and disposed of according to law.

Appeal allowed.

AIR 1970 SUPREME COURT 10
(V 57 C 4)

(From Madras: (1965) 55 ITR 147)

**J. C. SHAH, V. RAMASWAMI AND
A. N. CROVER, JJ.**

V. D. M. RM. M. RM. Muthiah Chettiar (In all the Appeals), Appellant v. **Commissioner of Income-tax, Madras**, (In all the Appeals), Respondent.

Civil Appeals Nos. 1457 to 1459 of 1968, D/- 14-2-1969.

(A) Income-tax Act (1922), Ss. 34 (1) (a), 16 (3) (a) (ii) and 25 (5) — Assessee partner having minors admitted to partnership firm — Fact not disclosed by assessee — No obligation on tax payer to disclose income liable to assessment — Proceeding under S. 34 (1) (a) cannot be commenced — (1965) 55 ITR 147 (Mad), Reversed.

The assessee had three minor sons who were entitled to the benefits of a partnership in which the assessee was a partner. He submitted his returns without disclosing the fact that the minors were his sons or that they had been admitted to the partnership. Separate returns were filed by the minor sons through the wife of the assessee as their guardian. The Income-tax Officer held that the income of the sons of the assessee which should have been included under Sec. 16 (3) (a) (ii) of the Act had escaped assessment in assessee's hands and he brought that income to tax:

Held, that Sec. 16 (3) imposed an obligation upon the Income-tax Officer to compute the total income of any indivi-

dual for the purpose of assessment by including the items of income set out in cls. (a) (i) to (iv) and (b), but thereby no obligation was imposed upon the tax-payer to disclose the income liable to be included in his assessment under S. 16 (3). For failing or omitting to disclose that income proceedings for reassessment could not therefore be commenced under S. 34 (1) (a). Section 22 (5) required the assessee to furnish particulars of the names and shares of his partners, but imposed no obligation to mention or set out the income of the nature mentioned in Sec. 16 (3). Further in the relevant years there being no head in the form under which income liable to be assessed to tax under S. 16 (3) (a) and (b) could be disclosed, no proceedings under S. 34 (1) (a) could be taken. (1965) 55 ITR 147 (Mad), Reversed. (Para 11)

(B) Income-tax Act (1922), S. 16 (3) — Assessee partner in firm — Minor sons of assessee also partners — Separate returns filed by minor sons through assessee's wife as guardian.

Held, that the inclusion of the share income of the minor son in the income of the assessee by invoking the provisions of S. 16 (3) of the Act was valid in law. AIR 1969 SC 888, Applied. (Para 8)

(C) Income-tax Act (1922), S. 34 (1) (b) — Reopening of assessment on information received and not as a result of change of opinion — Order of reassessment made well within four years from the last day of year of assessment — Notice under Section held was competently issued by the Income-tax Officer. (Para 13)

Cases Referred: Chronological Para
(1969) AIR 1969 SC 888 (V 56)=

C. A. No. 1374 of 1967, D/- 4-9
1968, E. R. Nagappa v. Commr.
of Income-tax, Mysore 8

Mr. M. C. Chagla, Senior Advocate (Mr. T. A. Ramachandran, Advocate, with him), for Appellant (In all the Appeals); **M/s. S. K. Aiyar and B. D. Sharma**, Advocates, for Respondent (In all the Appeals).

The following judgment of the Court was delivered by

SHAH, J.: Ramanathan Chettiar, his son Muthiah Chettiar — called hereinafter for the sake of brevity, Muthiah — and Ramanathan, Annamalai and Alagappan, sons of Muthiah, constituted a Hindu undivided family. The family owned a 3/5th share in **M. RM. S. Firm**, Seramban in Malaya. The firm was assessed under the Indian Income-tax Act, 1922, in the status of a

firm resident within the taxable territories. On September 16, 1950, Muthiah separated from the family taking his 1/5th share in the M. RM. S. Firm. On April 13, 1951 the status of the family became completely disrupted and the three sons of Muthiah took in equal shares the remaining 2/5th share — the grandfather Ramanathan taking no share in the M. RM. S. Firm.

2. For the assessment year 1952-53 Muthiah submitted a return of his income as an individual and stated under the head business income "Kindly ascertain his (assessee's) share of profit and remittances from the Income-tax Officer, Second Additional Circle — I, Karaigudi, in F. 6098-M/1952-53". In Part III of the return Muthiah supplied the following information about his partners:

Name and address of the firm	Name of each partner including assessee	Share
Messrs. R. RM. S. Firm Seramban, F. M. S.	1. Assessee (Muthian Chettiar).	60/303
	2. VD. M. RM. M. RM. M. Ramanathan Chettiar (minor)	40/303
	3. VD. M. RM. M. RM. M. Alagappan Chettiar (minor)	40/303
	4. VD. M. RM. M. RM. M. Annamalai Chettiar (minor)	40/303
	5. C. P. R.	60/303
	6. M. S. S.	60/303
	7. Charity.	3/303

For the assessment year 1953-54 in column 3 in Section B of the return Muthiah stated: "Kindly ascertain the remittances from the Income-tax Officer, Fifth Additional, Karaikudi in F. 6098-m", and at p. 3 of the return in column 3 of Sec. F it was stated:

"Assessee has 60/303 share in Messrs. M. RM. S. Joint Seramban (Malaya). Kindly ascertain share of profit or loss from the Income-tax Officer, Fifth Additional, Karaikudi in F. 6098."

In Part III of the return he set out the names of the partners as were mentioned in the return for 1952-53. Against the names of Ramanathan Chettiar, Alagappan Chettiar and Annamalai Chettiar it was not disclosed that they were minors.

3. For the assessment year 1954-55 at the foot of page 1 of the return Muthiah stated:

"The assessee has a remittance of Rs. 6,188-12-0 from R. RM. S. Firm Seramban. His share of income may be taken from the firm's file.",

and in Part III the names of seven partners as mentioned in 1952-53 return were set out—Ramanathan, Alagappan, Annamalai were not shown as minors.

4. Ramanathan, Alagappan and Annamalai—the three minor sons of Muthiah represented by their mother and guardian also filed returns of their respective income for the years 1952-53, 1953-54 and 1954-55 and disclosed therein their shares in

the profit from the 2/5th share in the M. RM. S. Firm.

5. For the assessment years 1952-53, 1953-54 and 1954-55 the Income-tax officer completed the assessments separately on the firm, on Muthiah as an individual and on the three minors represented by their mother and guardian. Muthiah was assessed in respect of his share in the income of the firm and from other sources. In his returns Muthiah had not disclosed the shares received by his minor sons and the Income-tax Officer did not in making the assessments include shares of the minors from the firm under S. 16 (3) (a) (ii) of the Indian Income-tax Act, 1922. The Income-tax Officer issued notices of reassessment to Muthiah under S. 34 (1) (a) of the Income-tax Act, 1922, for the years 1952-53 and 1953-54 and under S. 34 (1)(b) for the year 1954-55. Muthiah filed returns under protest declaring the same income as originally assessed. In the view of the Income-tax Officer Muthiah had not furnished in Part III Clause (c) of the return full facts regarding the other parties and in column 2 he had merely disclosed that Ramanathan, Alagappan and Annamalai were minors: that "information was not full in the sense that he had not stated that they were minor sons" of Muthiah. Accordingly the Income-tax Officer held that the income of the sons of Muthiah which should have been included under Section 16 (3) (a) (ii) of the Income-tax Act had escaped assessment

in Muthiah's hands and he brought that income to tax.

6. The Appellate Assistant Commissioner confirmed the order made by the Income-tax Officer. In appeal to the Tribunal it was contended by Muthiah that he had fully and truly disclosed all the particulars he was required to disclose in the returns of his income for the three years in question, and "Section 34 (1) (a) had no application to the assessment years 1952-53 and 1953-54 and for 1954-55 the re-opening was based only on a change of opinion." Muthiah also contended that Section 40 of the Income-tax Act was mandatory and since the Income-tax Officer had made separate assessments on the minors represented by their mother, no further assessment under Section 16 (3) could be made, the two sections being mutually exclusive.

7. The Tribunal observed that for the first two years Section 34 (1) (a) applied, that in respect of the year 1954-55 there was no change of opinion but the assessment was made on information received within the meaning of Section 34 (1) (b) of the Income-tax Act and that separate assessment of the minors did not stop the Income-tax Officer from assessing the income received by the minor sons in the hands of Muthiah. The Appellate Tribunal accordingly confirmed the order of the Appellate Assistant Commissioner.

8. At the instance of Muthiah the following questions were referred to the High Court of Madras:

(i) Whether on the facts and in the circumstances of the case, the reassessment made on the assessee under Sec. 34 of the Act is invalid in law for 1952-53 to 1954-55?

(ii) Whether on the facts and in the circumstances of the case, the inclusion of the share income of the minor in the hands of the assessee by invoking the provisions of Section 16(3) of the Act is valid in law notwithstanding that an assessment is made on the minor represented by his guardian?

The answer to the second question must, in view of the recent judgment of this Court in *C. R. Nagappa v. Commissioner of Income-tax, Mysore*, C. A. No. 1374 of 1967, D/- 4-9-1968 = (AIR 1969 SC 888), be in the affirmative.

9. In considering the first question it is necessary to refer to certain provisions of the Income-tax Act, 1922. By Sec. 3 the total income of the previous year of every individual, Hindu undivided family,

company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually was charged to tax for that year in accordance with, and subject to the provisions of the Act at any rate or rates prescribed by the Finance Act. "Total income" was defined in Section 2 (15) as meaning "total amount of income, profits and gains referred to in sub-section (1) of Section 4 computed in the manner laid down in this Act." Section 4 (1) set out the method of computation of total income: it enacted:

"(1) Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which—

(a) are received or are deemed to be received in the taxable territories in such year by or on behalf of such person, or

(b) if such person is resident in the taxable territories during such years,—

(i) accrue or arise or are deemed to accrue or arise to him in the taxable territories during such year, or

Section 22 by sub-section (1) required the Income-tax Officer to give notice by publication in the press in the prescribed manner, requiring every person whose total income during the previous year exceeds the maximum exempt from tax, to furnish a return in the prescribed form, setting forth his total income. Sub-section (2) authorised the Income-tax Officer to serve a notice upon a person whose income in the opinion of the Income-tax Officer exceeded the minimum free from tax. Section 23 dealt with the assessment. It conferred power upon the Income-tax Officer to assess the total income of the assessee and to determine the sum payable by him on the basis of such return submitted by him. Rule 19 framed under Section 59 of the Income-tax Act, 1922, required the assessee to make a return in the form prescribed thereunder, and in Form A applicable to an individual or a Hindu undivided family or an association of persons there was no clause which required disclosure of income of any person other than the income of the assessee, which was liable to be included in his total income. The Act and the Rules accordingly imposed no obligation upon the assessee to disclose to the Income-tax Officer in his return information relating to income of any other person by law taxable in his hands.

10. But Section 16 sub-section (3) provided that in computing the total income of any individual for the purpose of assessment there shall be included the Classes of income mentioned in Clauses (a) and (b). Sub-sections (3) (a) (ii) in so far as it is material, provided:

"In computing the total income of any individual for the purpose of assessment, there shall be included—

(a) so much of the income of a wife or minor child of such individual as arises directly or indirectly—

(i) * * *

(ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner;"

The assessee was bound to disclose under Section 22(5) the names and addresses of his partners, if any, engaged in business, profession or vocation together with the location and style of the principal place and branches thereof and the extent of the shares of all such partners in the profits of the business, profession or vocation and any branches thereof, but the assessee was not required in making a return to disclose that any income was received by his wife or minor child admitted to the benefits of partnership of a firm of which he was a partner.

11. Counsel for the Commissioner contended that in the forms of returns prescribed in the "Notes of Guidance" for drawing up the return were printed, and thereby the assessee was informed that he had to disclose the income received by his wife and minor children from a firm of which the assessee was a partner. Counsel has however not placed before the Court the forms of return in vogue in the relevant year of assessment. In the Income Tax Manual published under the authority of the Central Government in 1945 under Cl. (3) printed at p. 185 the assessee is advised to include in the return under the appropriate head certain classes of income which are liable to be included in the assessment of an individual under Section 16, and income liable to be taxed under Sections 41D, 44E and 44F. This instruction was repeated in the Manual Parts II and III at pp. 344 and 345 in the 10th Edition published in 1950. But in the 11th Edition of the Manual published in 1954 no such instructions were printed. About the date on which the instructions were deleted Counsel for the Commissioner was unable to give any information. Assuming that there were instructions printed in the Forms of return in the

relevant years, in the absence of any head under which the income of the wife or a minor child of a partner whose wife or a minor child was a partner in the same firm, could be shown, by not showing that income the tax-payer cannot be deemed to have failed or omitted to disclose fully and truly all material facts necessary for his assessment. Section 16(3) imposes an obligation upon the Income-tax officer to compute the total income of any individual for the purpose of assessment by including the items of income set out in Cls. (a) (i) to (iv) and (b), but thereby no obligation is imposed upon the tax-payer to disclose the income liable to be included in his assessment under Section 16(3). For failing or omitting to disclose that income proceedings for reassessment cannot therefore be commenced under Section 34(1) (a). Section 22(5) required the assessee to furnish particulars of the names and shares of his partners, but imposed no obligation to mention or set out the income of the nature mentioned in Section 16(3). In the relevant years there was no head in the form under which income liable to be assessed to tax under Section 16(3) (a) and (b) could be disclosed.

12. We are in the circumstances unable to agree with the High Court that Section 34 imposed an obligation upon the assessee to disclose all income includible in his assessment by reason of S. 16 (3)(a) (ii). Section 34 (1) (a) sets out the conditions in which the power may be exercised: it did not give rise to an obligation to disclose information which enabled the Income-tax Officer to exercise the power under Section 16(3)(a)(ii), nor had the use of the expression "necessary for his assessment" in S. 34 (1) (a) to that effect.

13. The High Court did not consider the question whether in the year 1954-55 the notice under Section 34(1)(b) was properly issued against Muthiah. The Tribunal in their judgment observed:

"There is no basis for the argument that the Income-tax Officer had only changed his opinion and re-opened the assessment."

We agree with that view. The order of re-assessment was made well within four years from the date of the last day of the year of assessment 1954-55. The notice was therefore competently issued by the Income-tax Officer.

14. The order passed by the High Court, insofar as it relates to the years 1952-53 and 1953-1954 is set aside and the answer in the negative is recorded. For

the year 1954-55 the answer recorded by the High Court is confirmed. There will be no order as to costs throughout.

Order accordingly.

AIR 1970 SUPREME COURT 14 (V 57 C 5)

(From Andhra Pradesh- AIR 1965 Andhra Pra 447)

J. C. SHAH, V. RAMASWAMI AND A. N. CROVER, JJ.

N. V. Narendranath, Appellant v. Commissioner of Wealth Tax, Andhra Pradesh (In all the appeals), Respondent.

Civil Appeals Nos. 1477 to 1479 of 1968, D/- 7-3-1969.

(A) Wealth Tax Act (1957), Section 3 — Expression "Hindu Undivided family" is synonymous with Hindu joint family — Existence of two male members is not a condition for formation of Hindu Undivided family as a taxing unit.

The expression "Hindu Undivided Family" in the Wealth Tax Act is used in the sense in which a Hindu joint family is understood in the personal law of Hindus. Under the Hindu system of law a joint family may consist of a single male member and his wife and daughters and there is nothing in the scheme of the Wealth Tax Act to suggest that a Hindu Undivided Family as an assessable unit must consist of at least two male members. (Para 4)

(B) Hindu Law — Joint family and Coparcenary — Distinction.

A Hindu joint family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters. A Hindu Coparcenary is a much narrower body than the Hindu joint family; it includes only those persons who acquire by birth an interest in the joint or coparcenary property, these being the sons, grandsons and great-grandsons of the holder of the joint property for the time being. AIR 1937 PC 36, Rel. on. (Para 4)

(C) Wealth Tax Act (1957), Sections 3 and 5 — Assessment as Hindu Undivided family — Determination of status — Considerations. AIR 1965 Andhra Pra 447, Reversed.

When a coparcener having a wife and two minor daughters and no son receives his share of the joint family properties on partition, such property in the hands of the coparcener belongs to the Hindu Un-

divided Family of himself, his wife and minor daughters and cannot be assessed as his individual property. AIR 1965 Andhra Pra 447, Reversed; AIR 1966 SC 1523, Foll.; 1957 AC 540, Rel. on; AIR 1935 Bom 412 and AIR 1937 PC 36 and AIR 1937 PC 239 and (1953) 55 CNLR 496, Ref.; AIR 1966 SC 984, Dist.

(Para 9)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 984 (V 53) = 1966-60 ITR 36, T. S. Srinivasan v. Commr. of Income-tax, Madras 10

(1966) AIR 1966 SC 1523 (V 53) = 1966-60 ITR 293, Cowli Buddanna v. Commr. of Income Tax, Mysore 8, 9

(1957) 1957 AC 540 = 1957-3 WLR 304, Attorney General of Ceylon v. A. R. Arunachalam Chettiar (No. 2) 7, 8, 9

(1953) 55 CNLR 496 (1937) AIR 1937 PC 36 (V 24) = 1937-5 ITR 90, Kalyanji Vithaldas v. Commr. of Income Tax, Bengal 4, 5, 6, 8

(1937) AIR 1937 PC 239 (V 24) = 1937-5 ITR 416, Commr. of Income Tax, Bombay v. A. P. Swamy Comedalli 6, 8

(1935) AIR 1935 Bom 412 (V 22) = 1935-3 ITR 367, Commr. of Income Tax v. Comedalli Lakshminarayan 6, 8

Mr. S. T. Desai, Senior Advocate (Mr. K. Jayaram, Advocate with him), for Appellant (In all the Appeals), Mr. D. Narasaraaju, Senior Advocate (M/s. G. C. Sharma, R. N. Sachthey and B. D. Sharma Advocates with him), for Respondent (In all the Appeals).

The following Judgment of the Court was delivered by

RAMASWAMI, J.: These appeals are brought by certificate from the judgment of the Andhra Pradesh High Court dated 30th November, 1964 in Reference Case No. 49 of 1962.

2. N. V. Rangarao, the father of the appellant, was the holder of an impartible estate called the "Munogala Estate" in the Krishna District in the State of Andhra Pradesh. This estate was abolished under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, and compensation under section 45 of the Act was paid severally to the appellant, his father and his brothers. Other properties belonging to the joint family of the appellant, his father and brothers were also partitioned between them from time

to time. The assets forming the subject of reference to the High Court consisted of investments made from the compensation amount received by the appellant in securities, shares, etc. and also other assets such as deposits in Banks. The appellant filed returns for the assessment years 1957-58, 1958-59 and 1959-60 in the status of a Hindu Undivided family. The appellant's family during the material time consisted of himself, his wife and his two minor daughters and there was no other male member. The appellant claimed to be assessed in the status of a Hindu Undivided Family inasmuch as the wealth returned consisted of ancestral property received or deemed to have been received by him on partition with his father and brothers. The Wealth Tax Officer did not accept the contention of the appellant and assessed him as an individual for the assessment years 1957-58, 1958-59 and 1959-60. On appeal to the Appellate Assistant Commissioner of Wealth Tax the finding that he must be assessed as an individual was confirmed. The Income Tax Appellate Tribunal however on appeal by the appellant held that he should be assessed in the status of a Hindu Undivided Family. Thereupon, the Commissioner of Wealth Tax applied to the Tribunal to state a case to the High Court under Section 27 (1) of the Wealth Tax Act (Act No. 27 of 1957) (hereinafter called the Act). The Tribunal accordingly referred the following question of law for the opinion of the High Court:—

“Whether the status of the assessee was rightly determined as Hindu Undivided Family?”

The High Court disagreed with the view of the Appellate Tribunal and held that as the appellant's family did not have any other male coparcener all the assets forming the subject-matter of the returns filed by the appellant belonged to him as an individual and not to a Hindu Undivided Family. The High Court answered the question against the appellant and in favour of the Commissioner of Wealth Tax.

3. It is necessary at this stage to set out the relevant provisions of the Act as they stood at the material time:—

“Section 2. In this Act, unless the context otherwise requires—

(e) ‘assets’ includes property of every description, movable or immovable, but does not include—

(i) agricultural land and growing crops, grass or standing trees on such land;

(ii) any building owned or occupied by a cultivator or receiver of rent or revenue out of agricultural land;

(iii) animals;

(iv) a right to any annuity in any case where the terms and conditions relating thereto preclude the commutation of any portion thereof into a lump sum grant;

(v) any interest in property where the interest is available to an assessee for a period not exceeding six years;

(m) ‘net wealth’ means the amount by which the aggregate value computed in accordance with the provisions of this Act of all the assets, wherever located, belonging to the assessee on the valuation date, including assets required to be included in his net wealth as on that date under this Act, is in excess of the aggregate value of all the debts owed by the assessee on the valuation date other than,—

(i) debts which under Section 6 are not to be taken into account; and

(ii) debts which are secured on, or which have been incurred in relation to, any assets in respect of which wealth-tax is not payable under this Act.

Section 3: Charge of Wealth-tax: Subject to the other provisions contained in this Act, there shall be charged for every financial year commencing on and from the first day of April, 1957, a tax (hereinafter referred to as wealth-tax) in respect of every individual, Hindu Undivided Family and company at the rate or rates specified in the Schedule.

Section 5: Exemption in respect of certain assets:

(i) Wealth-tax shall not be payable by an assessee in respect of the following assets and such assets shall not be included in the net wealth of the assessee—

(ii) the interest of the assessee in the coparcenary property of any Hindu Undivided Family of which he is a member.”

4. Under Section 3 of the Wealth Tax Act not a Hindu coparcenary but a Hindu Undivided Family is one of the assessable legal entities. A Hindu joint family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters. A Hindu coparcenary is a much narrower body than the Hindu joint family; it includes only those persons who acquire by birth an interest in the joint or coparcenary property, these being the sons, grandsons

(and great-grandsons of the bolder of the joint property for the time being. In *Kalyanji Vithaldas v. Commissioner of Income Tax, Bengal, 1937-5 ITR 90 = (AIR 1937 PC 36)*, Sir George Rankin observed:

"The phrase 'Hindu Undivided Family' is used in the statute with reference, not to one school only of Hindu law, but to all schools; and their Lordships think it a mistake in method to begin by pasting over the wider phrase of the Act the words 'Hindu coparcenary', all the more that it is not possible to say on the face of the Act that no female can be a member." The first question involved in this case is whether the status of the appellant was that of a Hindu undivided family consisting of himself, his wife and his daughters. In our opinion, there is no warrant for the contention of the respondent that there must be at least two male members to form a Hindu Undivided Family as a taxable unit. The expression "Hindu Undivided Family" in the Wealth Tax Act is used in the sense in which a Hindu joint family is understood in the personal law of Hindus. Under the Hindu system of law a joint family may consist of a single male member and his wife and daughters and there is nothing in the scheme of the Wealth Tax Act to suggest that a Hindu Undivided Family as an assessable unit must consist of at least two male members.

5. The next question is whether the assets which came to the share of the appellant on partition ceased to bear the character of joint family properties and became the individual property in his hands. In this connection, a distinction must be drawn between two classes of cases where an assessee is sought to be assessed in respect of ancestral property held by him: (1) where property not originally joint is received by the assessee and the question has to be asked whether it has acquired the character of a joint family property in the hands of the assessee, and (2) where the property already impressed with the character of joint family property comes into the hands of the assessee as a single coparcener and the question required to be considered is whether it has retained the character of joint family property in the hands of the assessee or is converted into absolute property of the assessee. In *Kalyanji's case, 1937-5 ITR 90 = (AIR 1937 PC 36)* (supra) there were six appeals presented before the Judicial Committee by six partners of the firm of *M/s. Moolji Sicka and Co.,*

viz., Moolji, Purshottam, Kalyanji, Chaturbhuj, Kanji and Sewdas. Moolji, Purshottam and Kalyanji each had a son or sons from whom he was not divided. It was found by the appellate tribunal that the capital supplied by them to the partnership business belonged to them in their individual capacities and was their self-acquired property. Hence the income of the firm which had to be assessed to super-tax was the separate income of each of these partners. Chaturbhuj had a wife and daughter but no son. Kanji and Sewdas, sons of Moolji, were married men but neither had a son. It was found by the appellate tribunal that Chaturbhuj, Kanji and Sewdas had received by gift from Moolji their respective share capital in the firm that the share capital belonged to them in their individual capacities and was self-acquired. The question at issue was whether the existence of a son and a wife or a wife and a daughter made the income of the partners the income of the Hindu Undivided Family rather than the income of the individual partner. The Judicial Committee held that though the income was from an ancestral source, the fact that each partner had a wife or daughter did not make that income from ancestral source income of the Hindu Undivided Family of the partner, his wife and daughter.

6. Different considerations would be applicable, where property already impressed with the character of joint family property comes into the hands of a single coparcener. The question to be asked in such a case is whether the property retains the character of joint family property or whether it sheds the character of joint family property and becomes the absolute property of the single coparcener. In *Commissioner of Income Tax v. Gomedalli Lakshminarayan, 1935-3 ITR 367 = (AIR 1935 Bom 412)*, the property was ancestral in the hands of the father and the son had acquired an interest in it by birth. There was a subsisting Hindu Undivided Family during the life-time of the father and that family did not come to an end on his death. On these facts, the Bombay High Court held that the income received from the property was liable to super-tax as the income of the Hindu Undivided Family in the hands of the son who was the sole surviving male member of the Hindu Undivided Family in the year of assessment. The reasoning was that the property from which income accrued originally belonged to a Hindu Undivided Family and on the death of the

father it did not cease to be property of that Hindu Undivided Family but continued to belong to that Hindu Undivided Family and its income in the hands of the son was, therefore, assessable as income of the Hindu Undivided Family. There was a vital distinction between the facts of this case and the facts in Kalyanji's case, 1937-5 ITR 90 = (AIR 1937 PC 36) (supra). This distinction was not noticed by the Judicial Committee in Kalyanji's case, 1937-5 ITR 90 = (AIR 1937 PC 36) (supra) when it observed that the Bombay High Court "arrived too readily at the conclusion that the income was the income of the family". When Gomadalli's case, 1935-3 ITR 367 = (AIR 1935 Bom 412) (supra) was carried on appeal the Judicial Committee once again failed to notice the distinction and wrongly reversed the decision of the Bombay High Court holding that the facts of the case were not materially different from the facts in Kalyanji's case, 1937-5 ITR 90 = (AIR 1937 PC 36) (supra) [See the decision of the Judicial Committee in Commissioner of Income Tax, Bombay v. A. P. Swamy Gomedalli, 1937-5 ITR 416 = (AIR 1937 PC 239)].

7. The recent decision of the Judicial Committee in Attorney-General of Ceylon v. A. R. Arunachalam Chettiar, 1957 AC 540 is important. One Arunachalam—Nattukottai Chettiar—and his son constituted a joint family governed by the Mitakshara school of Hindu law. The father and son were domiciled in India and had trading and other interests in India, Ceylon and Far Eastern countries. The undivided son died in 1934 and Arunachalam became the sole surviving coparcener in the Hindu Undivided Family to which a number of female members belonged. Arunachalam died in 1938 shortly after the Estate Ordinance No. 1 of 1938 came into operation in Ceylon. By Section 73 of the Ordinance it was provided that property passing on the death of a member of the Hindu Undivided Family was exempt from payment of estate duty. On a claim to estate duty in respect of Arunachalam's estate in Ceylon, the Judicial Committee held that Arunachalam was at his death a member of the Hindu Undivided Family, the same undivided family of which his son, when alive, was a member and of which the continuity was preserved after Arunachalam's death by adoptions made by the widows of the family and since the undivided Hindu Family continued to persist, the property in the hands of Arunachalam as a single coparcener was

the property of the Hindu Undivided Family. The Judicial Committee observed at page 543 of the Report:—

".....though it may be correct to speak of him as the 'owner', yet it is still correct to describe that which he owns as the joint family property. For his ownership is such that upon the adoption of a son it assumes a different quality; it is such, too, that female members of the family (whose members may increase) have a right to maintenance out of it and in some circumstances to a charge for maintenance upon it. And these are incidents which arise, notwithstanding his so-called ownership, just because the property has been and has not ceased to be joint family property. Once again their Lordships quote from the judgment of Gratiaen, J., 1953-55 CNLR 496-501: 'To my mind it would make a mockery of the undivided family system if this temporary reduction of the coparcenary unit to a single individual were to convert what was previously joint property belonging to an undivided family into the separate property of the surviving coparcener'. To this it may be added that it would not appear reasonable to impart to the legislature the intention to discriminate, so long as the family itself subsists, between property in the hands of a single coparcener and that in the hands of two or more coparceners."

The Judicial Committee rejected the contention of the appellant that since a single coparcener had full power over the property held by him, he must be held to be the absolute owner and observed that fact that he possesses a large power of alienation:

".....appears to their Lordships to be an irrelevant consideration. Let it be assumed that his power of alienation is unassailable: that means no more than that he has in the circumstances the power to alienate joint family property. That is what it is until he alienates it and, if he does not alienate it, that is what it remains..... It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as 'joint property' of the undivided family". The basis of the decision was that the property which was the joint family property of the Hindu Undivided Family did not cease to be so because of the "temporary reduction of the coparcenary unit to

a single individual". The character of the property, viz. that it was the joint property of a Hindu Undivided Family remained the same.

8. The same principle was applied by this Court in Gowali Buddanna's case, 1966-60 ITR 293=(AIR 1966 SC 1523). In that case, one Buddappa, his wife, his two unmarried daughters and his unmarried son, Buddanna, were members of a Hindu Undivided Family. Buddappa died and after his death the question arose whether the income of the properties held by Buddanna as the sole surviving coparcener was assessable as the individual income of Buddanna or as the income of the Hindu Undivided Family. It was held by this Court that since the property which came into the hands of Buddanna as the sole surviving coparcener was originally joint family property, it did not cease to belong to the joint family and income from it was assessable in the hands of Buddanna as income of the Hindu Undivided Family. In the course of the judgment Shah, J. speaking for the Court examined the decision of the Judicial Committee in Kalyanji's case, 1937-5 ITR 90 = (AIR 1937 PC 36) and Comedalli's 1935-3 ITR 367 = (AIR 1935 Bom 412) (Supra) and pointed out that there was a clear distinction between the two classes of cases:

"It may however be recalled that in Kalyanji Vithaldas's case, 1937-5 ITR 90 = (AIR 1937 PC 36) (supra) the income assessed to tax belonged separately to four out of six partners; of the remaining two it was from an ancestral source, but the fact that each such partner had a wife or daughter did not make that income from an ancestral source income of the undivided family of the partner, his wife and daughter. In Comedalli Lakshminarayan's case, 1935-3 ITR 367 = (AIR 1935 Bom 412) (supra), the property from which income accrued belonged to a Hindu Undivided Family and the effect of the death of the father, who was a manager, was merely to invest the rights of a manager upon the son. The income from the property was and continued to remain the income of the undivided family. This distinction, which had a vital bearing on the issue falling to be determined, was not given effect to by the Judicial Committee in A. P. Swami Comedalli's case, 1937-5 ITR 416 = (AIR 1937 PC 239) (supra)."

At page 302 (of ITR) = (at p. 1529 of AIR) Shah, J. referred to the decision of

the Judicial Committee in Arunachalam's case, 1957 AC 540 (supra) and concluded as follows:—

"Property of a joint family, therefore, does not cease to belong to the family merely because the family is represented by a single coparcener who possesses rights which an owner of property may possess. In the case in hand the property which yielded the income originally belonged to a Hindu Undivided Family. On the death of Buddappa, the family which included a widow and females, born in the family was represented by Buddanna alone, but the property still continued to belong to that undivided family and income received therefrom was taxable as income of the Hindu Undivided Family."

9. In the present case the property which is sought to be taxed in the hands of the appellant originally belonged to the Hindu Undivided Family belonging to the appellant, his father and his brothers. There were joint family properties of that Hindu Undivided Family when the partition took place between the appellant, his father and his brothers and these properties came to the share of the appellant and the question presented for determination is whether they ceased to bear the character of joint family properties and became the absolute properties of the appellant. As pointed out by the Judicial Committee in Arunachalam's case, 1957 AC 540 (supra) it is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as "joint property of the undivided family". Applying this test it is clear that, though in the absence of male issue the dividing coparcener may be properly described in a sense as the owner of the properties, that upon the adoption of a son or birth of a son to him, it would assume a different quality. It continues to be ancestral property in his hands as regards his male issue for their rights had already attached upon it and the partition only cuts off the claims of the dividing coparceners. The father and his male issue still remain joint. The same rule would apply even when a partition had been made before the birth of the male issue or before a son is adopted, for the share which is taken at a partition by one of the coparceners is taken by him as representing his branch. Again the ownership of the dividing coparcener

is such "that female members of the family may have a right to maintenance out of it and in some circumstances to a charge for maintenance upon it". [See Arunachalam's case, 1957 AC 540 (Supra)]. It is evident that these are the incidents which arise because the properties have been and have not been ceased to be joint family properties. It is no doubt true that there was a partition between the assessee, his wife and minor daughters on the one hand and his father and brothers on the other hand. But the effect of partition did not affect the character of these properties which did not cease to be joint family properties in the hands of the appellant. Our conclusion is that when a coparcener having a wife and two minor daughters and no son receives his share of the joint family properties on partition, such property in the hands of the coparcener belongs to the Hindu Undivided Family of himself, his wife and minor daughters and cannot be assessed as his individual property. It is clear that the present case falls within the ratio of the decision of this Court in Gowali Buddanna's case, 1966-60 ITR 293 =(AIR 1966 SC 1523) (supra) and the Appellate Tribunal was right in holding that the status of the respondent was that of a Hindu Undivided Family and not that of an individual.

10. On behalf of the respondent reference was made to the decision of this Court in T. S. Srinivasan v. Commissioner of Income Tax, 1966-60 ITR 36=(AIR 1966 SC 984), and it was contended that the decision proceeded on the basis that property received by the coparcener on partition cannot be regarded as property of a Hindu Undivided Family if he has merely a wife or daughter and no son. It is therefore necessary to examine the material facts and find out what is the ratio decidendi of that case. The appellant was a member of the Hindu Undivided Family with his father and brothers. As a result of partial partition of properties belonging to the Hindu Undivided Family the appellant received certain shares and with these shares as nucleus he acquired house properties, shares and deposits. His first son was born on 11th December, 1952 and it was common ground that the conception of the child must have taken place sometime in March, 1952. For the assessment year 1953-54 the relevant accounting year being the financial year 1st April, 1952 to 31st March, 1953, the appellant claimed that the income from the assets should be

assessed in the hands of the Hindu Undivided Family consisting of himself and his son which, according to him, had come into existence in or about March, 1952, when the son was conceived. The Income Tax Officer recognised the Hindu Undivided Family only from the date of the birth of the son, viz., 11th December, 1952 and assessed the income till 11th December, 1952 in the hands of the appellant as an individual. The Appellate Assistant Commissioner and the Tribunal upheld this view on appeal. Before the High Court the question debated was whether the Hindu Undivided Family came into existence in or about March, 1952 when the son was conceived and whether the assessee could be assessed in the status of an individual for any part of the relevant accounting year. The question was answered against the assessee by the High Court. The assessee appealed to this Court and the contention of the appellant was that according to the doctrine of Hindu law a son conceived is in the same position as a son actually in existence. The argument was rejected by this Court which held that the Hindu Undivided Family did not come into existence on the conception of the son as claimed by the appellant, but came into being when the son was actually born. It was suggested on behalf of the respondent that the decision of this case must be taken to be implicitly, if not explicitly that there was no Hindu Undivided Family prior to the date of the birth of the son. But we do not think that any such implication can be raised. The case of the appellant throughout the course of the proceedings was that the Hindu Undivided Family came into existence for the first time in or about March, 1952 when the son was conceived and it was not his case at any time that a Hindu Undivided Family was in existence prior to the conception of the son. Indeed, it was common ground between the parties that there was no Hindu Undivided Family in existence prior to the conception of the son. The only dispute was whether the Hindu Undivided Family came into existence for the first time when the son was conceived as claimed by the assessee or whether it came into existence when the son was born as claimed by the Income Tax Department. The appellant relied on the doctrine of Hindu law that the son conceived is in the same position as the son born and the respondent contended that this doctrine was inapplicable. That was the only question raised before this Court

which it was called upon to decide and which in fact it decided. The question whether there was in any event even without a son conceived or born, a Hindu Undivided Family consisting of the appellant and his wife and whether the properties received on partition belonged to that Hindu Undivided Family was neither raised nor argued before this Court which had no occasion to consider it. The decision of T. S. Srinivasan's case, 1966-60 ITR 36=(AIR 1966 SC 984) (supra) has therefore no bearing on the question now presented for determination in the present case.

11. For the reasons already expressed we hold that the status of the appellant was rightly determined as that of a Hindu Undivided Family by the Income Tax Appellate Tribunal and the question of law referred to the High Court must be answered in the affirmative and against the Commissioner of Wealth Tax. These appeals are accordingly allowed with costs. One hearing fee.

Appeals allowed.

AIR 1970 SUPREME COURT 20
(V 57 C 6)

(From Calcutta)*

S. M. SIKRI, R. S. BACHAWAT AND
V. RAMASWAMI, JJ.

Rash Behari Chatterjee, Appellant v.
Fagu Shaw and others, Respondents.

Criminal Appeal No. 5 of 1967, D/- 23-4-1969.

Penal Code (1860), Section 441 — Intention to annoy — Suit by A against B for ejectment and khas possession of disputed land — Decree for ejectment passed — B's appeal against decree dismissed — In execution of decree, A obtaining actual physical possession of land on 3-2-1963 with police help — B trespassed on land on night of 16-2-1963 and on 17-2-1963 they were found making preparations for construction of bamboo structures — Held, that intention of B was to annoy A who was in possession of land — Though the land was lying vacant after A obtained possession, the actual possession must be held to be of A — Law did

*(Cri. Revn. No. 188 of 1966, D/- 11-5-1966—Cal.)

JM/JM/D298/69/SSG/D

not require that intention must be to annoy person who is actually present at time of trespass — Cri. Rev. No. 188 of 1966, D/- 11-5-1966 (Cal), Reversed, AIR 1964 SC 986, Applied. (Paras 4, 5)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 986 (V 51) =
1964-5 SCR 916=1964 (2) Cri LJ
57, Mathuri v. State of Punjab 2

Mr. Sukumar Ghose, Advocate, for Appellant; Mr. D. N. Mukherjee, Advocate, for Respondents (Nos. 1 to 8); Mr. P. K. Chakravarti, Advocate, for Respondent (No. 9).

The following Judgment of the Court was delivered by

SIKRI, J.: This appeal by special leave is directed against the judgment of the High Court at Calcutta allowing the criminal revision and acquitting the respondents of the charge under S. 447, I. P. C.

2. The only question which arises in the present appeal is whether on the facts and circumstances of the case the intent to annoy the appellant has been established. The law on the point is now settled by this Court in Mathuri v. State of Punjab, 1964-5 SCR 916 at p. 927=(AIR 1964 SC 986 at p. 991). Das Gupta, J., speaking for the Court, after reviewing the authorities, stated the law thus:

"The correct position in law may, in our opinion be stated thus: In order to establish that the entry on the property was with the intent to annoy, intimidate or insult, it is necessary for the Court to be satisfied that causing such annoyance, intimidation or insult was the aim of the entry; that it is not sufficient for that purpose to show merely that the natural consequence of the entry was likely to be annoyance, intimidation or insult, and that this likely consequence was known to the person entering; that in deciding whether the aim of the entry was the causing of such annoyance, intimidation or insult, the Court has to consider all the relevant circumstances including the presence of knowledge that its natural consequences would be such annoyance, intimidation or insult and including also the probability of something also than the causing of such intimidation, insult, or annoyance, being the dominant intention which prompted the entry."

This judgment was not brought to the notice of the High Court in this case.

In view of this judgment it is not necessary to review the earlier High Court cases.

3. The appellant gave the history of the dispute between himself and the respondents in his evidence. He stated that he and his three brothers filed title suit No. 404 of 1951 in the first Court of Munsiff at Serampur against the respondent Fagu Shaw praying for ejectment and khas possession of the land in dispute; the respondent Fagu Shaw contested the suit; on May 23, 1954, a decree of ejectment was passed; against the judgment and decree the respondent Fagu Shaw preferred an appeal before the District Judge and the appeal was dismissed; the respondent Fagu Shaw preferred a second appeal to the Calcutta High Court which was dismissed summarily; the appellant executed the decree and in September 1962 when the Nazir of Serampur Civil Court with process servers went to take delivery of possession of the case land the respondent resisted and refused to give possession; however on February 3, 1963, the Nazir with police help went to the spot for delivery of possession and the appellant obtained actual physical possession. The appellant further stated that the land was in their possession from February 3, 1963 upto February 17, 1963, when the present occurrence took place. It appears that the respondent trespassed on the land on the night of February 16, 1963, and on February 17, 1963, they were found making preparations for construction of bamboo structures on the same land and some bamboo pegs had already been posted.

4. Now the question arises whether the intention of the respondents was to annoy the appellant or not within the meaning of Section 441, I. P. C. It seems to us that on the facts of this case there cannot be any doubt that the intention of the respondents was to annoy the appellant who was in possession of the case land. There could have been no hope on the part of the respondents that they would be able to stay in possession of the land. The litigation started in 1951 and it was on February 3, 1963 that the appellant was able to obtain possession. It is only after two weeks after that day that the respondents chose to trespass and start construction. In this case we cannot find any other dominant intention which prompted the trespass.

5. The High Court seems to have proceeded on the footing that the appellant

was not in actual possession of the property and further that the law requires that the complainant must not only be in actual possession but also be present at the time of trespass so as to bring the offence within the provisions of S. 441/447, I. P. C. In our view the High Court was in error in holding that the appellant was not in actual possession of the property. The land in dispute was lying vacant after the appellant obtained possession and the actual possession must be of the appellant. Further the law does not require that the intention must be to annoy a person who is actually present at the time of the trespass.

6. In the result the appeal is allowed, the judgment of the High Court set aside and the judgment and order of the Magistrate 1st Class, Serampur, which was affirmed by the learned Additional Sessions Judge, Hoogly, restored.

7. We may mention that the Magistrate sentenced the respondents to pay a fine of Rs. 100 each and in default to suffer rigorous imprisonment for one month. We are of the view that the Magistrate was rather lenient to the respondent Fagu Shaw who seems to be an inveterate trespasser, and in the circumstances of this case the Magistrate should have sentenced him to imprisonment however short.

Appeal allowed.

AIR 1970 SUPREME COURT 21 (V 57 C 7)

(From: Allahabad)*

J. C. SHAH AND V. RAMASWAMI, JJ.

Western U. P. Electric Power and Supply Co. Ltd., Appellant v. State of U. P. and others, Respondents.

Civil Appeal No. 2482 of 1968, D/- 7-3-1969.

(A) Electricity Act (1910), Ss. 3(1), 3(2) (e) (ii) (as amended by U. P. Act 30 of 1961) — Grant of licence to a company to supply electrical energy for certain area — On that account State Government is not debarred from granting licence within that area to another person or to supply electrical energy to consumer if necessary in public interest, S. A. No. 317 of 1965, D/- 18-3-1968 (All), Affirmed.

(Paras 5, 12, 15)

*(Second Appeal No. 317 of 1965 D/- 18-3-1968-All)

JM/JM/B744/69/SSG/D

(B) Constitution of India, Art. 14 — Scope — Plea of denial of equal treatment — Onus on person setting up such plea.

Article 14 of the Constitution ensures equality among equals: its aim is to protect persons similarly placed against discriminatory treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law.

(Para 7)

(C) Constitution of India, Art. 226 — Administrative order — Electricity Act (1910), Section 3(2)(e) (as amended by U. P. Act 30 of 1961) — Supply of energy to consumers within area of licensee — Exercise of power under Section — Satisfaction of Government that supply is necessary in public interest is in appropriate cases not excluded from judicial review — S. A. No. 317 of 1965, D/- 18-3-1965 (All), Reversed.

By Section 3(2)(e) as amended by the U. P. Act 30 of 1961, the Government is authorised to supply energy to consumers within the area of the licensee in certain conditions: exercise of the power is conditioned by the Government deeming it necessary in public interest to make such supply. If challenged, the Government must show that exercise of the power was necessary in public interest. The Court is thereby not intended to sit in appeal over the satisfaction of the Government. If there be prima facie evidence on which a reasonable body of persons may hold that it is in the public interest to supply energy directly to the consumers, the requirements of the statute are fulfilled. Normally a licensee of electrical energy, though he has no monopoly, is the person through whom electrical energy would be distributed within the area of supply, since the licensee has to lay down electric supply lines for transmission of energy and to maintain its establishment. An inroad may be made in that right in the conditions which are statutorily prescribed. The satisfaction of the Government that the supply is necessary in the public interest is in appropriate cases not excluded from judicial review. Held that the licensee company was given an opportunity to

show that granting of electric energy direct to the consumer was not in public interest but that the representation made by the company did not satisfy the Government that it was not in public interest to supply energy direct to the consumer. S. A. No. 317 of 1965, D/- 18-3-1965 (All), Reversed. (Para 11)

(D) Constitution of India, Art. 31 (2) — Electricity Act (1910), S. 3(2)(e) (as amended by U. P. Act 30 of 1961) — Grant of Licence under Act to a company for certain area — Right of State to authorise supply of electrical energy to consumer through State Electricity Board in same area — There is no infringement of Article 31(2).

By the grant of a licence under Electricity Act to a company for certain area no monopoly is created in favour of the Company. The statute expressly reserves the right of the State to authorise supply of electrical energy through another licensee in the same area or to a consumer directly through the State Electricity Board. Assuming that the right to supply electrical energy is property there is no infringement of the guarantee under Article 31 (2) of the Constitution.

(Para 14)

By CL (2A) of Art. 31 there is no compulsory acquisition or requisitioning of property, unless ownership or right to possession of the property stands transferred to the State or a corporation owned or controlled by the State. By the order granting direct supply of electrical energy ownership of property or right to possession of property was not transferred to the State or to a corporation owned or controlled by the State, and Art. 31(2) has no application to such a case. The Company licensee may as a result of direct supply of electrical energy to a consumer suffer loss, but Art. 31(2) does not guarantee protection against that loss. (Para 14)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 1099 (V 55) =
(1968) 3 SCR 312, Western U. P.
Electric Power and Supply Co.
Ltd. v. State of U. P. 6, 9

Mr. Mohan Behari Lal, Advocate, for Appellant; Mr. O. P. Rana, Advocate, for Respondents (Nos. 1 & 2), M/s. C. K. Daphtary and B. R. L. Iyengar, Senior Advocate (M/s. Bishambar Lal and H. K. Puri, Advocates, with them), for Respondent (No. 3).

The following Judgment of the Court was delivered by

SHAH, J. — The Western U. P. Electric Power and Supply Company Ltd., — hereinafter called 'the Company' — holds a licence under Section 3(1) of the Indian Electricity Act 9 of 1910 to supply electricity in certain areas in the State of U. P. Messrs. Hind Lamps Private Ltd., set up a factory for manufacturing electrical equipment within the area of supply of the Company. Hind Lamps was receiving energy from the Company. Hind Lamps made several representations to the State Government that the supply of energy by the Company was inadequate to meet its requirements and was "interrupted and fluctuating". Meetings were held between the Company, the State officials and Hind Lamps for devising means to ensure uninterrupted and adequate supply of energy required by Hind Lamps, but there was no improvement in the supply position.

2. Hind Lamps then applied to the Government of U. P. to grant direct supply of electrical energy from the State Electricity Board. The State Government by order dated December 26, 1961, issued in exercise of the powers conferred by Section 3(2)(e)(ii) of the Indian Electricity Act, 1910 as amended by the Indian Electricity (Uttar Pradesh Sanshodhan) Adhiniyam 1961, directed the State Electricity Board "to supply electrical energy directly to Hind Lamps upon terms and conditions similar to those on which it supplied electrical energy to other customers". In reply to a representation to reconsider the decision, the Government informed the Company that the "decision was necessitated in the public interest and there was no justification for revising it". Another representation made by the Company was also turned down and direct supply of electrical energy was commenced by the State Electricity Board to Hind Lamps.

3. A petition moved by the Company in the High Court of Allahabad for a writ of certiorari quashing the order dated December 26, 1961 was rejected by R. S. Pathak, J. In appeal under the Letters Patent against the order passed by the learned Judge, counsel for the Company applied for leave to plead that the order dated December 26, 1961, resulted in discrimination between Hind Lamps and other consumers within the area of supply of the Company, and also between Hind Lamps and the Company and the order was on that account invalid. The High

Court permitted the Company to raise the contention, but declined to give opportunity to "enlarge the evidence on record at that stage". Sole reliance was therefore placed by counsel for the Company on paragraph 2 of the Government Gazette Notification issued by the U. P. Government on April 24/28, 1962, containing the revised tariff for the supply of electrical energy to licensees obtaining bulk supply from the U. P. State Electricity Board and to other consumers. It stated:

"The revised tariff shall, except in the case of the licensees, be applicable to consumers in respect of consumption in the month of May 1962. In the case of licensees, obtaining bulk supply of energy from the Board, the revised tariff shall apply to supplies made from 1st July, 1962 and onwards."

The Schedules in the Gazette Notification set out the rates at which electrical energy was to be supplied by the Board to licensees as well as to diverse classes of consumers who received supply of energy from the Board. The High Court held that there was no evidence on the record to prove the rates at which energy was being supplied to the Company on December 25, 1961, and the rates at which the energy was being supplied to Hind Lamps. The High Court observed that before the order dated December 26, 1961 could be challenged on the ground of discrimination between Hind Lamps and other consumers as also between Hind Lamps and the Company, it was necessary for the Company to establish by evidence the rates of supply of energy to the Company, to Hind Lamps and to the other consumers obtaining at the time of the impugned order, i. e. December 26, 1961 and in the absence of that evidence the plea of discrimination must fail.

4. The High Court also rejected the contentions raised by the Company that the impugned order was not made in public interest, that granting direct supply of electrical energy to Hind Lamps amounted to compulsory acquisition of property of the Company without payment of compensation, and that in refusing to give an opportunity to the Company to object the rules of natural justice were violated.

5. The Indian Electricity Act 9 of 1910 makes provision by Section 3 for the grant of a licence to supply energy in any specified area and also to lay down or place electric supply-lines for transmission of energy. Clause (e) of sub-sec-

tion (2) as amended by U. P. Act 30 of 1961, and sub-section (3) provide:

"(2)(e) grant of a licence under this Part for any purpose shall not in any way hinder or restrict —

(i) the grant of licence to another person within the same area of supply for a like purpose; or

(ii) the supply of energy by the State Government or the State Electricity Board within the same area, where the State Government deems such supply necessary in public interest."

"(3) Where the supply of energy in any area by the State Electricity Board is deemed necessary under sub-clause (ii) of clause (e) of sub-section (2), the Board may, subject to any terms and conditions that may be laid down by the State Government, supply energy in that area notwithstanding anything to the contrary contained in this Act or the Electricity Supply Act, 1948."

The State Government may grant a licence to supply electrical energy to consumers within a specified area on terms and conditions prescribed in the licence and subject to statutory conditions but on that account the State Government is not debarred from granting a licence to another person or to supply energy directly to a consumer within the same area if the State Government deemed it necessary so to do in the public interest.

6. Section 3 (2) (e) is challenged on the ground of denial of the guarantee of the equal protection clause of the Constitution. Strong reliance was placed by counsel for the appellant upon a recent judgment of this Court: *The Western U. P. Electric Power and Supply Co. Ltd. v. State of U. P.*, AIR 1968 SC 1099. In that case the Government of U. P. had by Notification dated September 21, 1963, authorised the State Electricity Board to supply energy directly to consumers in the area of supply for which a licence was already granted. This Court held that a licensee supplying electrical energy in an area has no monopoly under its licence; but the Notification issued by the U. P. Government directing the State Electricity Board to supply energy directly to a consumer at a rate lower than the rate at which it was supplied to the licensee Company amounted to discrimination between that consumer and the other consumers and also between the consumer and the licensee and the Notification on that account was invalid. Counsel for the Company says that the

question which falls to be determined in the present appeal is concluded by the judgment in AIR 1968 SC 1099, for the Court in that case held that the Notification of the Government of U. P., directing the State Electricity Board to supply energy directly to certain concerns at a rate lower than the rate at which energy was supplied to the licensee Company amounts to discrimination between those concerns on the one hand and the other consumers on the other, and also between the concerns and the Company.

7. Article 14 of the Constitution ensures equality among equals: its aim is to protect persons similarly placed against discriminatory treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law. In the present case there is no evidence about the rate charged for energy supplied by the State Electricity Board to the Company on December 26, 1961, nor is there any evidence on the record about the rates charged for electrical energy supplied to the consumers by the Company.

8. The plea of discrimination has to be considered from two different points of view — (1) the discrimination between Hind Lamps and the other consumers within the area of supply in respect of which the Company held the licence; and (2) discrimination in the rates of supply charged by the State Electricity Board to the Company and to Hind Lamps. There is no evidence on the record about the operative rates on the date of the impugned order. Again Hind Lamps was a consumer of electrical energy and so were the other consumers within the area of supply in respect of which the Company held the licence. But on that account it does not follow that they belong to the same class. In one case energy is being supplied by the Company and in the other by the State Electricity Board. Again, there is no grievance made by any consumer of energy that he is by the grant of preferential rates to Hind Lamps prejudicially treated. Other consumers of energy and Hind Lamps therefore do not belong to the same class, and there is no grievance by any consumer of any prejudicial treatment accorded to him.

9. There is also no evidence that the rates charged by the State Electricity

Board to Hind Lamps were lower than the rates charged to the Company. The Company and Hind Lamps again do not belong to the same class. The Company is a distributor of electrical energy, whereas Hind Lamps is a consumer. If the State Government charged different rates from persons belonging to the same class in the absence of any rational basis for that treatment, the plea of discrimination founded on differential rates may probably have some force. But the Company and Hind Lamps did not belong to the same class, and there is no evidence that for energy supplied different rates were charged. In AIR 1968 SC 1099 the position was different. That case was decided on the footing that the consumer and the Western U. P. Electric Power and Supply Co. Ltd. belonged to the same class, and the Board charged higher rates from the distributing Company than the rates charged from the third respondent in that case. The Court observed in that case:

..... the notification and the Government's direction to the Board therein results in clear discrimination. If the Board were to supply energy directly to the 3rd respondent it has to do so at rates lower than the rates at which electricity is supplied by it to the petitioner company. The petitioner company being thus charged at higher rates from its other consumers with the result that the 3rd respondent would get energy at substantially lower rates than other consumers including other industrial establishments in the area. The notification thus results in discrimination between the 3rd respondent on the one hand and the other consumers on the other as also between the 3rd respondent and the petitioner company."

The first contention was, therefore, rightly negated by the High Court.

10. By the amendment made by U. P. Act 30 of 1961 electrical energy may be supplied by the State Government or the State Electricity Board within the same area in respect of which a licence is granted only if the State Government deems such supply "necessary in public interest". The High Court observed that "the State Government was the sole judge of the question whether direct supply of energy to Hind Lamps was or was not in the public interest. The test is of a subjective nature, no objective test being contemplated. Thus it is not open to this Court to examine whether it was necessary in the public interest. The subjective

opinion of the Government is final in the matter, and the same is not justiciable or subject to judicial scrutiny as to sufficiency of the grounds on which the State Government has formed its opinion. In other words the Legislature has left it to the sole discretion of the State Government to decide whether a direct supply of energy was in the public interest".

11. We are unable to agree with that view. By Section 3 (2) (e) as amended by the U. P. Act 30 of 1961, the Government is authorised to supply energy to consumers within the area of the licensee in certain conditions: exercise of the power is conditioned by the Government deeming it necessary in public interest to make such supply. If challenged, the Government must show that exercise of the power was necessary in public interest. The Court is thereby not intended to sit in appeal over the satisfaction of the Government. If there be prima facie evidence on which a reasonable body of persons may hold that it is in the public interest to supply energy directly to the consumers, the requirements of the statute are fulfilled. Normally a licensee of electrical energy, though he has no monopoly, is the person through whom electrical energy would be distributed within the area of supply, since the licensee has to lay down electric supply-lines for transmission of energy and to maintain its establishment. An inroad may be made in that right in the conditions which are statutorily prescribed. In our judgment, the satisfaction of the Government that the supply is necessary in the public interest is in appropriate cases not excluded from judicial review.

12. But the decision of the High Court must still be maintained. The order issued by the Government recited:

"The Governor is satisfied that it is necessary in the public interest for the State Electricity Board to make the supply of electricity direct to the industry (Hind Lamps Private Ltd.) and is, therefore, pleased to order in exercise of the powers vested in him under Section 3 (2) (e) (ii) of the Indian Electricity Act, 1910 (Act No. IX of 1910) as amended by the Indian Electricity (Uttar Pradesh Sanshodhan) Adhiniyam, 1961 (U. P. Act No. XXX of 1961) that the U. P. State Electricity Board make the supply of electricity direct to the Hind Lamps Ltd., Shikohabad."

There is ample evidence on the record to prove that uninterrupted supply of

electrical energy to Hind Lamps was necessary in public interest, and the Company was unable to ensure it. The only averment made in the petition filed by the Company before the High Court was that "the giving of the supply to Hind Lamps (Private) Ltd., could not be said to be in public interest as required by Section 3 (2) (e) (ii) of the Indian Electricity Act, 1910 as amended by Indian Electricity (U. P. Amendment) Act XXX of 1961." No particulars were furnished in the petition. In the affidavit filed on behalf of the State Electricity Board it was affirmed that Hind Lamps was engaged in the manufacture of electric bulbs, fluorescent tubes etc., and the process required uninterrupted supply; that it was one of the major industries of the State and was the only industry of its kind in the State; that as a result of the defective supply by the Company, Hind Lamps felt dissatisfied and informed the Government that if the supply position was not improved it would be forced to shift its factory from the State to some other State, that the industry gave employment to a number of people in the State and saved a large amount of foreign exchange and on that account the State Government was keen to give it fair and due protection that it deserved; that the total supply of electricity to the Company was 1700 K. W. and even if the entire supply under the agreement was made available by the Company to Hind Lamps it would fall short of its requirements. It was, therefore, in public interest that direct supply of energy should be made available to Hind Lamps. An affidavit containing similar averments was also filed on behalf of the State of Uttar Pradesh.

13. There is no evidence on behalf of the Company to the contrary. For maintaining effective working of a large industry which gave scope for employment to the local population and earned foreign exchange, if it was necessary to give direct supply of electrical energy to Hind Lamps, the order to the Electricity Board to make direct supply of electrical energy to Hind Lamps was unquestionably in public interest within the meaning of Section 3 (2) (e) (ii) of the Act.

14. There is no substance in the contention that by the issue of the order dated December 26, 1961, there was compulsory acquisition of the property of the Company without providing for compensation. By the grant of a licence under Act 9 of 1910 no monopoly was created

in favour of the Company. The statute expressly reserves the right of the State to authorise supply of electrical energy through another licensee in the same area or to a consumer directly through the State Electricity Board. Assuming that the right to supply electrical energy is property (on that question we express no opinion), we are of the view that there is no infringement of the guarantee under Article 31 (2) of the Constitution. Clause (2) of Article 31 as amended by the Constitution (Fourth Amendment) Act, 1955, insofar as it is material, provides:

"No property shall be compulsorily acquired . . . save for a public purpose and save by authority of a law which provides for compensation for the property so acquired . . . and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; . . ."

Clause (2A) in substance defies compulsory acquisition or requisitioning of property within the meaning of Clause (2). It provides:

"Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property."

By Clause (2A) there is no compulsory acquisition or requisitioning of property, unless ownership or right to possession of the property stands transferred to the State or a corporation owned or controlled by the State. By the order granting direct supply of electrical energy ownership of property or right to possession of property was not transferred to the State or to a corporation owned or controlled by the State, and on that limited ground it must be held that Article 31 (2) has no application. The Company may, it may be assumed, as a result of direct supply of electrical energy to Hind Lamps, suffer loss; but Article 31 (2) does not guarantee protection against that loss.

15. The Company was afforded sufficient opportunity to make its representation before and after the impugned order was passed. Hind Lamps had submitted several representations to the Government of U.P. regarding inadequate and irregular supply of electrical energy. The Company was informed about the complaints

made by Hind Lamps. Meetings were held in which certain steps to be taken by the Company to make the supply regular were agreed upon, but they were not carried out, presumably because the Company had not the requisite equipment for that purpose. The Company was asked to supply electrical energy as released in favour of Hind Lamps: it failed to do so. Representations made by the Company, after the order was passed, requesting that the order dated December 28, 1961, be withdrawn, were also considered by the Government and rejected. Adequate opportunity of making a representation was afforded to the Company to satisfy the State Government that it was not in the public interest to supply electrical energy directly to Hind Lamps.

16. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 27 (V 57 C 8)

(From Patna: AIR 1966 Pat 464)

S. M. SIKRI, R. S. BACHAWAT AND
V. RAMASWAMI, JJ.

State of Bihar, Appellant v. Nathu Pandey and others, Respondents.

Criminal Appeal No. 203 of 1966, D/- 23-4-1969.

(A) Constitution of India, Art. 136 — Findings recorded by High Court on appeal against conviction based on adequate evidence and not shown to be perverse — Supreme Court on appeal by special leave refused to interfere with findings.

(Para 6)

(B) Penal Code (1860), S. 149 — To attract provisions of S. 149 prosecution must establish that there was unlawful assembly and crime was committed in prosecution of its common object.

(Para 8)

(C) Penal Code (1860), Ss. 141, fourth clause and 96 — Expression "to enforce any right or supposed right" in S. 141 fourth clause — Assertion of a right of private defence within limits prescribed by law cannot fall within the expression — S. 141 must be read with Ss. 96 to 106 dealing with right of private defence — Assembly whose common object is to defend property by use of force within limits prescribed by law cannot be designated as unlawful assembly — AIR 1950 FC 80, Rel. on.

(Para 8)

JM/JM/C87/69/KSB/D.

(D) Penal Code (1860), Ss. 34, 149 and 302 — Assembly with common object of preventing theft of their property exercising right of private defence — Some exceeding right of private defence and causing death but who exceeded right not known — No one accused could be held guilty either under S. 302 or under S. 302/149 or under S. 302/34 — (Penal Code (1860), S. 103).

C who was in possession of a plot and mahua trees standing thereon went to the plot along with his party with the object of preventing the commission of theft of the mahua fruits by the prosecution party in exercise of their right of private defence of property. In the altercation that followed, two persons from prosecution party received fatal bhala injuries resulting in their death. Some of the accused party were armed with bhalas but it was not possible to say who were so armed and which of them inflicted the fatal wounds on the deceased. It was found that persons who caused the two deaths exceeded the right of private defence as they inflicted more harm than was necessary for the purpose of defence.

Held (1) that none of the accused could be convicted under S. 302, I. P. C.

(Para 7)

(2) that none of the accused could be convicted under S. 302 read with S. 149 or S. 34, I. P. C. The object of the assembly was not unlawful. There was no common object or common intention to kill the two deceased persons. The murders were not committed in prosecution of the common object of the assembly or were not such as the members of the assembly knew to be likely to be committed. AIR 1966 Pat 464, Affirmed; 1969 Pat LJR 17A (SC), Rel. on; AIR 1965 SC 257, Dist.

(Paras 9, 10, 11)

Cases Referred: Chronological Paras (1968) Cri Appeal No. 191 of 1966, D/- 5-12-1968=1969 Pat LJR 17A (SC), Kishori Prasad v. State of Bihar

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(1965) AIR 1965 SC 257 (V 52)= 1965 (1) Cri LJ 242, Gurdittamal v. State of U. P.

11

(1950) AIR 1950 FC 80 (V 37)= 1949 FCR 834=51 Cri LJ 1057, Kapildeo Singh v. The King

8

Mr. D. P. Singh, Advocate, for Appellant; M/s. Nur-Ud-din Ahmed and D. Goburdhan, Advocate, for Respondents.

The following Judgment of the Court was delivered by

BACHAWAT J.: The prosecution case was that Bhaiya Ramanuj Pratap Deo was

the proprietor of village Phatpani and owned and possessed hakasht and gaimazura lands therein including plot No. 1311 and the mahua trees standing thereon. On April 10, 1962 at 3 P. M. his employee P.W. 33 Bindeshwari Singh was in charge of collection of mahua fruits in plot No. 1311 and the victims Ram Swarup Singh and Ramdhari Singh were supervising the collection. P.W. 1 Dhaneshwari, P.W. 2 Deokalia, P.W. 3 Dewal, P.W. 4 Rajmatia, P. W. 6 Udai Singh, P. W. 7 Border Singh, P. W. 8 Moghan Chamar, P. W. 9 Ram Dihal Kharwar, P.W. 10 Ram Torai Kharwar, P.W. 11 Manan Singh and P.W. 13 Jhagar Kharwar were collecting mahua fruits when suddenly accused Mathu Pandey, Kundal Pandey and Muneshwardhar Dubey armed with garassas, Chandradeo Pandey, Dayanand Pandey and Nasir Mian armed with bhalas and Bife Bhogta, Thegu Bhogta, Nageshwardhar Dubey and Uma Shanker Duhey armed with lathis surrounded Ramswarup and Ramdhari and assaulted them with their weapons. Dewal also was assaulted by Bife and Thegu and suffered minor injuries. Ramadhari died on the spot. Ramswarup died while preparations were being made to carry him to the hospital.

2. Bindeshwari lodged the first information report at 8 P. M. on the same date. On April 14, 1962, accused Mathu gave a report at Nagaruntari hospital. He said that on April 10, 1962 at 3 P. M. while he was returning home, he was assaulted with lathis, garassas and bhalas by the employees of the Bhalya Sabeh.

3. The following injuries were found on the dead body of Ramswarup Singh: "(1) abrasion $1\frac{1}{2}'' \times 1\frac{1}{4}''$ with ecchymosis on anterior aspect of right knee joint, (2) another abrasion $\frac{1}{2}'' \times \frac{1}{4}''$ with ecchymosis on anterior aspect of right leg, (3) a small abrasion with ecchymosis on anterior aspect of left knee joint, (4) an incised wound $4'' \times \frac{1}{4}'' \times$ scalp on anterior aspect of the left side of the head, (5) a lacerated wound $3\frac{1}{2}'' \times 1\frac{1}{3}'' \times$ scalp with ecchymosis on right side of head and (6) a penetrating wound with clean cut margins $2\frac{1}{2}'' \times 1'' \times$ abdominal cavity placed transversely on right hypochondrium just right to mid line with stomach and loop of large bowel bulging out of it." On opening the abdominal wall it was found that the peritoneum was congested and the stomach was perforated on its anterior wall. Injuries 1, 2, 3 and 5 were caused by hard and blunt substance such as lathi. Injury No. 4 was caused

by sharp cutting weapon such as garassa. Injury No. 6 on the abdominal cavity was caused by some sharp pointed weapon with sharp cutting margin such as bhala. The death was due to shock and internal haemorrhage caused by the abdominal wounds.

4. The following injuries were found on the dead body of Ramdhari Singh: "(1) the helix of left ear was cut, (2) a lacerated wound $\frac{1}{2}'' \times 1\frac{1}{10}'' \times 1\frac{1}{10}''$ with ecchymosis on the outer part of the left eye brow, (3) a punctured wound with clean cut margins $2\frac{1}{2}'' \times 1'' \times 1\frac{1}{2}''$ on left thigh below its middle, (4) a punctured wound with clean cut margin $1'' \times \frac{3}{4}'' \times 1''$ on posterior aspect of the left thigh in its middle, and (5) a penetrating wound with clean cut margins $2\frac{1}{4}'' \times \frac{3}{4}'' \times$ abdominal cavity on right side of the abdomen. The loops of intestines were bulging out of this opening. Injury No. 2 was caused by hard and blunt substance such as lathi. The other injuries were caused by a sharp pointed weapon with sharp cutting edge such as bhala. Death was due to shock and internal haemorrhage caused by injury No. 5 the abdominal wound.

5. The trial Court convicted the accused-respondents Mathu, Chandradeo, Kundal, Dayanand, Bife, Thegu, Nasir, Muneshwardhar, Nageshwardhar, Umashankardhar under Section 302 read with Section 149 of the Indian Penal Code for the murders of Ramdhari and Ramswarup and sentenced them to rigorous imprisonment for life each. Bife, Thegu, Nageshwardhar and Umashankardhar were convicted under Section 147 of the Indian Penal Code and sentenced to rigorous imprisonment for six months each. The remaining respondents were convicted under Section 148 of the Indian Penal Code and sentenced to rigorous imprisonment for one year each. Bife and Thegu were convicted under Section 323 of the Indian Penal Code for causing hurt to Dewal and sentenced to rigorous imprisonment for six months each. The sentences of each respondent were to run concurrently. The trial Court held that (1) Bhaiya Sahab was in possession of plot No. 1311; (2) while Ramswarup and Ramdhari were collecting mahua on the plot, the respondents armed with bhalas, garassas and lathis inflicted fatal injuries on them with a view to forcibly prevent them from collecting the mahua, (3) Thegu and Bife assaulted Dewal with lathis; (4) the accused persons knew that there was likeli-

hood of murders being committed in prosecution of the common object, and (5) the assailants inflicted the injuries on Ramswarup and Ramdhari with the intention of murdering them.

6. The respondents filed an appeal in the High Court of Patna. The High Court allowed the appeal and set aside all the convictions and sentences. The High Court found that (1) respondent Chandradeo was the thikadar of plot No. 1311 and was in possession of the mahua trees standing thereon, (2) on the date of the occurrence, the members of the prosecution party including Ramdhari and Ramswarup committed theft of the fruits of the mahua trees, and the respondents had the right of private defence of property against the theft; (3) Ramswarup carrying a tangi and Ramdhari carrying a danta caused severe injuries to respondent Mathu on his head, leg and that while doing so they were not defending themselves; Mathu became unconscious. He regained consciousness on April 14, 1962; (4) the theft of mahua fruits was committed under such circumstances as might reasonably cause apprehension that death or grievous hurt would be the consequence if the right of private defence was not exercised. Accordingly, the respondents' right of private defence of property extended under Section 103 of the Indian Penal Code to voluntarily causing death to Ramdhari and Ramswarup subject to the restrictions mentioned in Section 99 (5) the person or persons who caused the two deaths exceeded the right of private defence as they inflicted more harm than was necessary for the purpose of defence. These findings are based on adequate evidence and are not shown to be perverse. In this appeal under Article 136 of the Constitution from an order of acquittal passed by the High Court, we are not inclined to interfere with the above findings. The question is whether in these circumstances the High Court rightly acquitted the appellants.

7. The fatal wounds on the abdominal cavities of Ramdhari and Ramswarup were caused by bhalas. The prosecution case was that Chandradeo, Dayanand and Nasir were armed with bhalas. The High Court rightly held that the prosecution failed to establish that Chandradeo was armed with a bhala. The prosecution witnesses said generally that all the respondents surrounded Ramdhari and Ramswarup and assaulted them. The prosecution case has been found to be false in material respects. It is not possible to

record the finding that Chandradeo, Dayanand and Nasir were armed with bhalas. Some of the respondents were armed with bhalas but it is not possible to say which of them were so armed and which of them inflicted the fatal wounds on Ramdhari and Ramswarup. Accordingly we cannot convict any of the respondents under Section 302. The only question is whether they can be convicted under Section 302 read with either Section 149 or Section 34.

8. In order to attract the provisions of Section 149 the prosecution must establish that there was an unlawful assembly and that the crime was committed in prosecution of the common object of the assembly. Under the fourth clause of Section 141 an assembly of five or more persons is an unlawful assembly if the common object of its members is to enforce any right or supposed right by means of criminal force or show of criminal force to any person. Section 141 must be read with Sections 96 to 108 dealing with the right of private defence. Under Sec. 96 nothing is an offence which is done in the exercise of right of private defence. The assertion of a right of private defence within the limits prescribed by law cannot fall within the expression "to enforce any right or supposed right" in the fourth clause of Section 141. In *Kapildeo Singh v. The King*, 1949 FCR 834=(AIR 1950 FC 80) the High Court had affirmed the appellant's conviction and sentence under Section 147 and Section 304 read with Section 149, without considering the question as to who was actually in possession of the plot at the time of the occurrence. The High Court observed that the question of possession was immaterial and that the appellants' party were members of an unlawful assembly, as "both sides were determined to vindicate their rights by show of force or use of force." The Federal Court set aside the conviction and sentence. It held that the High Court Judge stated the law too loosely "if by the use of the word 'vindicate' he meant to include even cases in which a party is forced to maintain or defend his rights". The assembly could not be designated as an unlawful assembly if its object was to defend property by the use of force within the limit prescribed by law.

9. The charges against the respondents were that they "were members of an unlawful assembly in prosecution of the common object of which, viz., in forcibly preventing Ramdhari Singh and Ramswarup Singh from collecting Mahua from

Barmania field of village Phatpani and if necessary in causing the murder of the said two persons, for the purpose, "that some of them caused the murders of Ramdhari and Ramswarup and that thereby all of them committed offences under Section 302 read with Section 149. We have found that respondent Chandradeo was in possession of plot No. 1311 and the mahua trees standing thereon. The object of the respondent's party was to prevent the commission of theft of the mahua fruits in exercise of their right of private defence of property. This object was not unlawful. Nor is it possible to say that their common object was to kill Ramdhari and Ramswarup. Those who killed them exceeded the right of private defence and may be individually held responsible for the murders. But the murders were not committed in prosecution of the common object of the assembly or were not such as the members of the assembly knew to be likely to be committed in prosecution of the common object. The accused respondents cannot be made constructively responsible for the murders under Section 302 read with Section 149.

10. In *Kishori Prasad v. State of Bihar*, Cr. App. No. 191 of 1966, D/- 5-12-1968 (SC) the High Court convicted the appellants under Section 326/149 of the Indian Penal Code though the appellant Hirdaynarin was in lawful possession of the western portion of plot No. 67 and the attempt by the prosecution party to cultivate the same was high-handed. This Court set aside the conviction and sentence. Ramaswami, J., observed:—

"In a case where the accused person could invoke the right of private defence it is manifest that no charge of rioting under Section 147 or Section 148, Indian Penal Code can be established for the common object to commit an offence attributed in the charge under Section 147 or Section 148, Indian Penal Code is not made out. If any accused person had exceeded the right of private defence in causing the death of Chitanu Rai or in injuring Gorakh Prasad it is open to the prosecution to prove the individual assault and the particular accused person concerned may be convicted for the individual assault either under Section 304, Indian Penal Code or of the lesser offence under Section 326, Indian Penal Code. The difficulty in the present case is that the High Court has not analysed the evidence given by the parties and given a finding whether any or which of the appellants are guilty of causing the

death of Chitanu Rai or of assaulting Gorakh Prasad. As we have already said, none of the appellants can be convicted of the charge of rioting under Section 148 or of the constructive offence under Section 326/149, Indian Penal Code."

We accordingly hold that the respondents cannot be convicted under Section 302 read with Section 149, Indian Penal Code. Nor is it possible to convict them under Section 302 read with Section 34. The High Court rightly found that the respondents wanted to prevent the collection of mahua fruits and that a common intention of all of them to murder Ramdhari and Ramswarup was not established.

11. The case of *Gurdittam v. State of U. P.*, AIR 1965 SC 257 is distinguishable. In that case the court found that (1) the accused persons who were in possession of a field had exceeded the right of private defence of property by murdering four persons who were peacefully harvesting the crops standing on the field, and (2) each of the four appellants killed one member of the prosecution party and each of them individually committed an offence under Section 302 (see paragraph 6 and end of paragraph 14). In these circumstances, the Court upheld their conviction and sentence under Section 302. The Court also found that the appellants had the common intention to kill the victims and could be convicted under Section 302 read with Section 34 (see paragraphs 12 and 9). In the present case, none of the respondents can be convicted under Section 302. As a common intention to murder Ramdhari or Ramswarup is not established, they cannot be convicted under Section 302 read with Section 34.

12. In the result, the appeal is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 30
(V 57 C 9)

(From: Allahabad)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

Rai Bajrang Bahadur Singh, (In both the appeals), Appellant v. Jai Narain (In both the appeals), Respondent.

Civil Appeals Nos. 735 and 736 of 1966.
D/- 8-4-1969.

* (Second Ex. Decree Appeals Nos. 3 and 4 of 1961, D/- 26-3-1965 — (All-LB).)

JM/JM/B838/69/MVJ/D

Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 289 — Reference of question of jurisdiction to High Court — Revenue Court holding that it has no jurisdiction — Civil Court deciding matter — Party not raising objection to jurisdiction of Civil Court — Same held could not be raised in appeal to the High Court — Second Execution Decree Appeals Nos. 3 and 4 of 1961, D/- 26-3-1965 (All—LB), Reversed.

Section 289 vests in the High Court a special jurisdiction. The decision of the High Court given on a reference to it under Section 289 is binding on all Courts. A reference can be made under Sec. 289 (1) if any Court doubts its own competence to entertain any proceeding. The reference under Section 289 (1) is optional. Without making any reference the Court may refuse to entertain the proceeding on the ground of want of jurisdiction. But the Court of the other description in which the proceeding is subsequently instituted is not bound by this finding. Before the enactment of Section 289 (2) if it disagreed with the finding, it could reject the proceeding on the ground that the matter was cognizable by the other Court. As neither Court was bound by the finding of the other, the litigant could not get relief in any forum. Section 289 (2) has been specially enacted to avoid such a deadlock. In such a situation, Sec. 289 (2) compels the Court to refer the matter to the High Court and to obtain a decision which will bind all the Courts. (Para 8)

Thus the object of Sec. 289 (2) is to avoid a deadlock between the civil and the revenue Courts on the question of jurisdiction, and its provisions should receive a liberal construction. Section 289 (2) applies whenever any suit, application or appeal having been rejected either by the Civil Court or Revenue Court on account of want of jurisdiction is subsequently filed in the Court of the other description and the latter Court disagrees with the finding of the former. In such a case, a reference to the High Court is compulsory and the conflict of opinion is resolved by a decision of the High Court which is binding on all courts. In a case falling within Sec. 289 (2), only the Court in which the proceeding is subsequently instituted can disagree with the finding of the former Court on the question of jurisdiction. If it so disagrees it must refer the matter to the High Court; and only the High Court on such a reference can override the finding. No other

Court can disagree with the finding and make the reference. If no such reference is made, the finding of the former court on the question of jurisdiction becomes final and conclusive; and the objection that it is erroneous cannot be entertained by the appellate or revisional Court or any other Court. (Paras 10, 11)

The respondent did not raise any objection in appeal before the additional Civil Judge that the Civil Court was not competent to entertain the appeal. The Additional Civil Judge did not make any reference to the High Court under Section 289 (2). He decided the appeal on the merits and did not disagree with the finding of the revenue Court on the question of jurisdiction. Having regard to this decision the appellant did not proceed with the revision petitions filed by him against the orders of the Revenue Court on the question of jurisdiction.

Held, in these circumstances, it was not open to the respondent to raise the objection in the High Court in second appeal that the Civil Court was not competent to hear the appeals. In view of the fact that no reference under S. 289 (2) was made, the finding of the Revenue Court that the Civil Court was competent to entertain the appeals could not be challenged in the High Court. Second Ex. Decree Appeals Nos. 3 and 4 of 1961 D/- 26-3-1965 (All—LB), Reversed.

(Para 12)

Cases Referred:	Chronological	Paras
(1931) AIR 1931 Oudh 123 (V 18)=		
ILR 5 Luck 645, Mahadeo Singh v. Pudai Singh		9
(1930) AIR 1930 All 254 (V 17)=		
1930 All LJ 352, Nathan v. Harbans Singh		8
(1928) AIR 1928 Oudh 503 (V 15)=		
ILR 4 Luck 159, Saira Bibi v. Chandra Pal Singh		9
(1900) 3 Oudh Cas 32, Mohammad Mehdi Ali Khan v. Mt. Sharafunnissa		9

M/s. J. P. Goyal and S. P. Singh, Advocates, for Appellant (In both the Appeals); Mr. C. B. Agarwala, Senior Advocate, (Mr. K. P. Gupta, Advocate, with him), for Respondent, (In both the Appeals).

The following judgment of the Court was delivered by

BACHAWAT, J.: The appellant filed suit Nos. 87 of 1948 and 2/12 of 1948 in the Court of the Assistant Collector, 1st Class, Pratapgarh, (a revenue Court), against the respondent and 8 other persons under Sections 60, 61 and 180 of the

U. P. Tenancy Act (U. P. Act XVII of 1939) claiming a declaration that the defendants had no right to the suit lands and a decree for possession in case the defendants were found to be in possession thereof. The suits were decreed in 1948. The appellant took symbolical possession of the lands in execution of the decrees. Appeals against the decrees filed by the respondent and other defendants were dismissed by the Additional Commissioner, Faizabad. The defendants filed second appeals against the decrees. During the pendency of the appeals Rr. 4 and 5 of the Uttar Pradesh Zamindari Abolition and Land Reforms Rules 1952 came into force. The Board of Revenue held that in view of Rules 4 and 5 the pending appeals as also the suits had abated.

2. In 1953 the respondents filed applications for restitution of the lands under Section 144 of the Code of Civil Procedure in Court of the Assistant Collector, 1st Class, Pratapgarh. The appellant contested the application. One of the issues arising on the application was whether the appellant had acquired Bhumidari rights. The Assistant Collector referred this issue to the Civil Court for decision. He refused to recall the order of reference in spite of the respondent's plea that he had no power to pass the order as no question of proprietary title had arisen. On May 7, 1958 the Civil Court answered the issue in the negative. On February 18, 1958 the Assistant Collector allowed the application for restitution and directed that the respondent be put in possession of the lands.

3. The appellant filed appeals against the orders dated February 18, 1958. As he was not certain about the proper forum of the appeals he took the precaution of filing the appeals in the Revenue Court as also in the Civil Court. On October 23, 1959 the Additional Commissioner, Faizabad Division, held that the Revenue Court had no jurisdiction to entertain the appeals and that the appeals lay to the Civil Court under Sections 286 (4) and 265 (3) of the U. P. Tenancy Act. Accordingly he returned the memoranda of appeals for presentation to the proper Court. The appellant filed revision petitions against the orders before the Board of Revenue. In the meantime the appeals filed before the Civil Court came up for hearing. The respondent submitted to the jurisdiction of the Civil Court. He did not raise the contention that the Civil Court had no jurisdiction to enter-

tain the appeals. On November 12, 1960 the Additional Civil Judge, Pratapgarh, allowed the appeals and dismissed the applications for restitution. He held that (1) the appellant was in possession of the lands on the dates of the institution of the suits; (2) the board of revenue had no power to abate the suits or to set aside the decree passed therein, and (3) the application for restitution was not maintainable as the appellant had not obtained possession of the lands in execution of any decree which had been reversed or set aside. In view of this decision, the appellant did not proceed with the pending revision petitions before the board of revenue and on November 18, 1960 the revision petitions were dismissed. On February 1, 1961 the respondent filed second appeals in the High Court against the appellate orders of the Civil Court dated November 12, 1960. In the original memorandum of appeal, he did not take the plea that the Civil Court had no jurisdiction to entertain the appeals. For the first time on January 24, 1964, he took this plea by adding a new ground in his memorandum of appeal. The High Court held that (1) the appellant was in possession of the lands before the passing of the decree; (2) the suits had not abated and the Board of Revenue had no jurisdiction to set aside the proceedings in the suits and (3) the applications for restitution were not maintainable. The High Court, however, held that (1) appeals against the orders for restitution lay to the Revenue Court, (2) the Civil Court had no jurisdiction to entertain the appeals and (3) the respondent was not estopped from raising the contention. Accordingly on March 28, 1965 the High Court allowed the second appeals, set aside the orders of the Additional Civil Judge and returned the memoranda of appeals for presentation to the proper Court. The appellant has filed the present appeals after obtaining special leave.

4. On behalf of the appellant it is argued that (1) the appeal from the order of the Assistant Collector dated February 18, 1959 lay to the Civil Court and not to the Revenue Court; (2) in the circumstances of the case, and in view of Section 289 (2) of the U. P. Tenancy Act, the respondent was precluded from raising the objection that the appeals did not lie to the Civil Court.

5. It is common case that suits Nos. 87 of 1946 and 2/12 of 1946 were of the nature specified in Group B of the fourth schedule to the U. P. Tenancy Act. In

view of Section 265 (2) read with Section 271 (2) appeals from orders in proceedings under Section 144 of the Code of Civil Procedure arising out of the two suits lay to the Revenue Court. The appeals did not lie to the Civil Court under Sections 265 (3) and 286 (4) read with Section 271 (2) as no question of jurisdiction was decided by the Assistant Collector nor was any question of proprietary title referred to or decided by the Civil Court. But the more important question is whether having regard to the scheme of the U. P. Tenancy Act and the circumstances of the case, the objection as to the lack of competence of the Civil Court to entertain the appeals could be raised in the High Court.

6. The U. P. Tenancy Act 1939 consolidates and amends the law relating to agricultural tenancies and other matters connected therewith in Agra and Oudh. It repealed the Agra Tenancy Act, 1926 and the Oudh Rent Act 1886. Chapter XIV of the Act deals with the procedure and jurisdiction of Courts. Section 242 provides that certain suits and applications are cognizable by the Revenue Courts only. The chapter provides for appeals and revisions. No appeal lies from any decree or order passed by any Court under the Act except as provided in the Act (Section 263). In some cases an appeal lies to a Revenue Court; in other cases the appeal lies to the Civil Court. The High Court has no revisional power under Section 276 in a case in which no appeal lies to the Civil Court. It is often a question of extreme nicety whether a suit, application or appeal is cognisable by the Revenue Court or by the Civil Court. Sections 289, 290 and 291 deal with objections regarding the proper forum.

7. Section 290 provides that where in a suit instituted in a Civil or Revenue Court, an appeal lies to the District Judge or to the High Court, an objection that the suit was instituted in the wrong Court shall not be entertained by the appellate Court unless such objection was taken in the Court of the first instance; and the appellate Court shall dispose of the appeal as if the suit has been instituted in the right Court. The section closely resembles Section 21 of the Code of Civil Procedure and is a recognition of the principle that an objection as to the proper forum for the trial of a suit may be waived. Section 291 treats the objection as technical and provides that even where the objection was taken in

the Court of the first instance, the appellate court may dispose of the appeal as if the suit had been instituted in the right Court. It may declare any Court to be competent to try the suit and may remand the suit for fresh trial, and the competence of the trial Court cannot be questioned later. With a view to avoid conflicts of jurisdiction Section 289 provides for reference to the High Court. Section 289 is as follows:—

“289 (1) Where either a Civil or Revenue Court is in doubt whether it is competent to entertain any suit, application or appeal, or whether it should direct the plaintiff, applicant or appellant to file the same in a Court of the other description, the Court may submit the record with a statement of the reasons for its doubt to the High Court;

(2) Where any suit, application or appeal, having been rejected either by a Civil Court or by a Revenue Court on the ground of want of jurisdiction, is subsequently filed in a Court of the other description, the latter Court, if it disagrees with the finding of the former, shall submit the record, with a statement of the reasons for its disagreement to the High Court;

(3) In cases falling under sub-section (1) or sub-section (2) if the Court is a Revenue Court subordinate to the Collector, no reference shall be made under the foregoing provisions of this section except with the previous sanction of the Collector;

(4) On any such reference being made, the High Court may order the Court either to proceed with the case, or to return the plaint, application or appeal for presentation to such other Court as it may declare to be competent to try the same;

(5) The order of the High Court shall be final and binding on all Courts, subordinate to it or to the Board.”

8. Section 289 vests in the High Court a special jurisdiction. The decision of the High Court given on a reference to it under Sec. 289 is binding on all Courts. A reference can be made under Section 289 (1) if any Court doubts its own competence to entertain any proceeding. The reference under Section 289 (1) is optional. Without making any reference the Court may refuse to entertain the proceeding on the ground of want of jurisdiction. But the Court of the other description in which the proceeding is subsequently instituted is not bound by this finding, see *Nathan v. Harbans Singh*, AIR

1930 All 254. Before the enactment of Section 289 (2) if it disagreed with the finding, it could reject the proceeding on the ground that the matter was cognizable by the other Court. As neither Court was bound by the finding of the other, the litigant could not get relief in any forum. Section 289 (2) has been specially enacted to avoid such a deadlock. In such a situation, Section 289 (2) compels the Court to refer the matter to the High Court and to obtain a decision which will bind all the Courts.

9. Provisions corresponding to Sections 290, 291 and 289 (1) were contained in Sections 124A, 124B, 124C and 124D of the Oudh Rent Act 1886 and Ss. 268, 269 and 267 (1) of the Agra Tenancy Act, 1926. It seems that the Oudh Rent Act, 1886 did not contain any provision corresponding to Section 289 (2). The absence of such a provision seriously hampered the administration of justice. In numerous cases under the Oudh Rent Act, after a suit, application or appeal was rejected by a Civil Court or Revenue Court on the ground of want of jurisdiction, the Court of the other description where the proceeding was subsequently filed came to the opposite conclusion and held that the matter was within the cognizance of the former Court. The decision of the Court of one description including the decision of the High Court exercising appellate or revisional power over that Court was not binding upon the Court of the other description. Such a situation led to great injustice. The litigant was banded about from Court to Court and he could not get any relief anywhere. The Oudh Chief Court mitigated the evil by applying the doctrine that a party litigant could not approbate and reprobate in respect of the same matter. A party litigant may not be allowed to take inconsistent positions in Court to the detriment of its opponent at successive stages of the same proceeding or in a subsequent litigation growing out of the judgment in the former proceeding, see *Bigelow on Estoppel*, 6th Edn. pp. 783, 789, *Mohammad Mehdi Ali Khan v. Mt. Sharafunnissa*, (1900) 3 Oudh Cas 32 at pp. 35-37. On this principle it was held in *Mahadeo Singh v. Puda Singh*, AIR 1931 Oudh 123 that where a Revenue Court upheld the plea that it had no jurisdiction to entertain a suit, the party putting forward the plea would be precluded from contending that the Civil Court could not entertain the suit. Likewise in *Saira Bibi v. Chandrapal Singh*, ILR 4 Luck 159 at p. 166=(AIR 1928

Oudh 503 at p. 506) it was held that when an appeal was originally instituted properly in the Revenue Court but on objection being raised by a party was dismissed on the ground that the appeal did not lie to that Court, it was not open to the party to raise the objection that the appeal could not be entertained by the Civil Court. This form of estoppel arises when the litigant takes inconsistent pleas as to jurisdiction in different Courts. It cannot be pressed into service, where, as in the present case, the Court in which the proceeding was originally filed *suo motu* raised the objection as to jurisdiction. In the present case it does not appear that the respondent raised before the Revenue Court the objection that it was not competent to entertain the appeals. The doctrine of approbate and reprobate cannot be invoked to preclude the respondent from raising the objection that the appeals did not lie to the Civil Court. But the effect of upholding his objection is that the appellant is deprived of his right of appeal altogether. His appeals cannot be entertained either by the Civil Court or by the Revenue Court. Section 289 (2) is intended to prevent such grave miscarriage of justice.

10. Section 289 (2) re-enacts the provision of Section 267 (2) of the Agra Tenancy Act, 1926. The object of Section 289 (2) is to avoid a deadlock between the Civil and the Revenue Courts on the question of jurisdiction, and its provisions should receive a liberal construction. Section 289 (2) applies whenever any suit, application or appeal having been rejected either by the Civil Court or Revenue Court on account of want of jurisdiction is subsequently filed in the Court of the other description and the latter Court disagrees with the finding of the former. In such a case, a reference to the High Court is compulsory and the conflict of opinion is resolved by a decision of the High Court which is binding on all Courts. A Court subordinate to the Collector cannot make the reference without the previous sanction of the Collector under Section 289 (3). It is implicit in Section 289 (3) that if the Collector refuses to give the sanction, the case will proceed as if there is no disagreement with the finding of the former Court.

11. In a case falling within Section 289 (2), only the Court in which the proceeding is subsequently instituted can disagree with the finding of the former Court on the question of jurisdiction. If it so disagrees, it must refer the matter to

the High Court; and only the High Court on such a reference can override the finding. No other Court can disagree with the finding and make the reference. In our opinion, if no such reference is made, the finding of the former Court on the question of jurisdiction becomes final and conclusive; and the objection that it is erroneous cannot be entertained by the appellate or revisional Court or any other Court.

12. In the present case the respondent did not raise any objection before the Additional Civil Judge that the Civil Court was not competent to entertain the appeals. The Additional Civil Judge did not make any reference to the High Court under Section 289 (2). He decided the appeal on the merits and did not disagree with the finding of the Revenue Court on the question of jurisdiction. Having regard to this decision the appellant did not proceed with the revision petitions filed by him against the orders of the revenue court on the question of jurisdiction. In these circumstances, it was not open to the respondent to raise the objection in the High Court that the Civil Court was not competent to hear the appeals. In view of the fact that no reference under Section 289 (2) was made, the finding of the Revenue Court that the Civil Court was competent to entertain the appeals could not be challenged in the High Court. The case must be decided on the footing that the Additional Civil Judge, Pratapgarh, was competent to entertain the appeals.

13. On the merits the respondent has no case. The Additional Civil Judge found that the appellant was in possession of the lands on the dates of the institution of the suits. The High Court agreed with this finding. We see no reason for setting aside this concurrent finding of fact. The appellant did not obtain possession of the lands by executing the decrees passed in the two suits. Even assuming that the suits had abated and the decrees passed therein had been set aside or reversed, no case for restitution of the lands under Section 144 of the Code of Civil Procedure is made out. The Additional Civil Judge rightly dismissed the application under Section 144.

14. In the result, the appeals are allowed with costs, the orders of the High Court are set aside and the orders passed by the Additional Civil Judge, Pratapgarh, are restored.

Appeals allowed.

AIR 1970 SUPREME COURT 35

(V 57 C 10)

(From: Delhi)*

M. HIDAYATULLAH, C. J., J. M.

SHELAT, V. BHARGAVA, K. S.

HEGDE AND A. N. GROVER, JJ.

Kumari Chitra Ghosh and another, Appellants v. Union of India and others, Respondents.

Civil Appeal No. 452 of 1969, D/- 25-4-1969.

(A) Constitution of India, Arts. 14, 15 and 29 — Admission to Medical College — Reservation of seats — Categories (c) to (h) of R. 4 of College Prospectus — Reservations held were not violative of Articles.

The reservation of seats in the Maulana Azad Medical College, Delhi in respect of categories (c) to (h) contained in R. 4 of the College Prospectus relating to the eligibility for admission to the College, is not violative of Arts. 14, 15 and 29 of the Constitution. AIR 1958 SC 538, Rel. on: AIR 1968 Pat 3 (FB) & AIR 1968 SC 1012, Disting. (Paras 7, 8)

The Rules do not discriminate between any citizen on grounds only of religion, race, caste, sex, place of birth or any one of them. Therefore Arts. 15 and 29 cannot be invoked. (Para 7)

The first group of persons for whom seats have been reserved are the sons and daughters of residents of Union territories other than Delhi. These areas are well known to be comparatively backward and with the exception of Himachal Pradesh they do not have any Medical College of their own. It was necessary that persons desirous of receiving medical education from these areas should be provided some facility for doing so. As regards the sons and daughters of Central Government servants posted in Indian Missions abroad it is equally well known that due to exigencies of their service these persons are faced with lot of difficulties in the matter of education. Apart from the problems of language, it is not easy or always possible to get admission into institutions imparting medical education in foreign countries. The Cultural, Colombo Plan and Thailand scholars are given admission in medical institutions in this country by reason of reciprocal arrangements of educational and cultural

*(Civil Writ Petn. No. 817 of 1968, D/- 3-12-1968 — Delhi.)

JM/JM/D290/69/MVJ/D

nature. Regarding Jammu and Kashmir scholars it must be remembered that the problems relating to them are of a peculiar nature and there do not exist adequate arrangements for medical education in the State itself for its residents. The classification in all these cases is based on intelligible differentia which distinguished them from the group to which the petitioners belonged. (Para 5)

Further, it is the Central Government which bears the financial burden of running the medical college. It is for it to lay down the criteria for eligibility. From the very nature of things it is not possible to throw the admission open to students from all over the country. The Government cannot be denied the right to decide from what sources the admission will be made. That essentially is a question of policy and depends inter alia on an overall assessment and survey of the requirements of residents of particular territories and other categories of persons for whom it is essential to provide facilities for medical education. If the sources are properly classified whether on territorial, geographical or other reasonable basis it is not for the courts to interfere with the manner and method of making the classification. (Para 9)

(B) Constitution of India, Art. 29 — Maulana Azad Medical College Delhi Prospectus, R. 4 — Reservation of seats for certain categories — Nomination by Central Government — If some reserved seats fall vacant due to non-compliance with rules, Government cannot be compelled to release these seats to general pool — Civ. Writ Petn. No. 817 of 1963, D/- 3-12-1963 (Delhi), Reversed.

The Central Government is under no obligation to release the reserved seats to the general pool. It may in the larger interest of giving maximum benefit to candidates belonging to the non-reserved seats release them but it cannot be compelled to do so at the instance of students who have applied for admission from out of the categories for whom seats have not been reserved. Thus the assumption that if nominations by the Central Government to reserved seats were not in accordance with the rules all such seats not properly filled up would be thrown open to the general pool was wholly unfounded. Civ. Writ Petn. No. 817 of 1963, D/- 3-12-1963 (Delhi), Reversed. (Para 12)

(It was held that the High Court was in error in going into the question and holding that out of the nine seats filled

by nomination two had been filled contrary to the admission rules and those would be converted into the general pool. However, the Supreme Court refrained from making any further observation in the matter since there was no appeal against that part of the order.)

(Para 12)

(C) Constitution of India, Art. 133 — Admission to Medical College — Reservation of seats for some categories — Contention that nominations were illegal as candidates who had been nominated had not applied in time — Held, that the contention could not be entertained on two grounds, namely, that it was not raised before the High Court and that the petitioners did not compete for the reserved seats and had no locus standi in the matter of nomination to such seats. (Para 13)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 1012 (V 55)=

(1968) 2 SCR 786, P. Rajendran

v. State of Madras

10, 11

(1968) AIR 1968 Pat 3 (V 55)=ILR

46 Pat 616 (FB), Umesh Ch. Sinha

v. V. N. Singh

11

(1958) AIR 1958 SC 538 (V 45)=

1959 SCR 279, Shri Ram Krishna

Dalmia v. S. R. Tendolkar

8

Mr. B. C. Misra, Senior Advocate, (Mr. M. V. Goswami, Advocate, with him), for Appellants; Mr. B. Sen, Senior Advocate, (Mr. S. P. Nayar, Advocate, with him), for Respondents (Nos. 1, 2 and 4).

The following judgment of the Court was delivered by

GROVER, J.:— This is an appeal by certificate from a judgment of the Delhi High Court dismissing a petition filed by the appellants under Articles 226 and 227 of the Constitution in the matter of their admission to the Maulana Azad Medical College, New Delhi, hereinafter called the "Medical College."

2. The appellants are residents of Delhi. They passed the pre-medical examination of the Delhi University held in April 1963 and obtained 62.5 per cent marks. In June 1963 they applied for admission to the first year M.B.B.S. class at the Lady Hardinge Medical College, New Delhi but they were not admitted. Thereafter they applied for admission to the Maulana Azad Medical College. This college, which is a constituent of the University of Delhi, was established by the Government of India in June 1958. According to the college prospectus, 125 students are admitted annually; 15 per cent seats are reserved for scheduled caste candidates and 5 per cent for scheduled

tribes candidates. 25 per cent of the seats (excluding the seats reserved for Government of India nominees) are reserved for girl students who are taken on the basis of merit. The following categories of students only are eligible for admission:

- (a) Residents of Delhi.
- (b) (i) Sons/Daughters of Central Government Servants posted in Delhi at the time of the admission.
- (ii) Candidate whose father is dead and is wholly dependent on brother/sister who is a Central Government Servant posted in Delhi at the time of the admission.
- (c) Sons/Daughters of residents of Union Territories specified below including displaced persons registered therein and sponsored by their respective Administration of Territory:—
- (i) Himachal Pradesh (ii) Tripura (iii) Manipur (iv) Naga Hills (v) N.E.F.A. (vi) Andaman.

(d) Sons/daughters of Central Government servants posted in Indian Missions abroad.

- (e) Cultural Scholars.
- (f) Colombo Plan Scholars.
- (g) Thailand Scholars.
- (h) Jammu & Kashmir State Scholars.

According to the note 23 seats are reserved for categories (c) to (h) above. The minimum percentage of marks which a candidate seeking admission must have obtained in the aggregate of compulsory subjects is 55.

3. Now the appellants had obtained 62.5 per cent marks and were domiciled in Delhi. According to them they were entitled to admission and would have been admitted but for the reservation of the seats which were filled by nominations by the Central Government. In the year 1968 when the appellants sought admission 9 students had been nominated by the Central Government out of the 23 seats which had been reserved for categories (c) to (h) mentioned above. These students had obtained less percentage of marks than the appellants. The appellants filed a writ petition in the High Court challenging primarily the power of the Central Government to make the nominations. It was prayed that these nominations be struck down and the respondents (Union of India, Medical College, University of Delhi etc.) be directed to admit the appellants and all other students who were eligible strictly in the order of merit. The writ petition was disposed of by a Division Bench of the High Court. The authority of the Central

Government to select candidates for the reserved seats was upheld. It was however, found that among the nine seats filled in the Medical College by the Government, two nominations had been made contrary to the admission rules. The High Court was of the view that these two seats would also become a part of the general pool for admission of candidates on merit. The order was, therefore, made in the following terms:

"We, therefore, direct the respondents 1 to 4 as follows: two seats shall be filled immediately for admission to the first year M.B.B.S. Course of the College from the merit list in which petitioner No. 1 is number 4 and petitioner No. 2 is number 9. The respondents 1 to 4 shall immediately enquire from the candidates who are above the petitioners in order of merit whether they want the admissions and on their failure to reply in a short time or on their refusal to accept the offer, the admission shall be made either of the petitioners or of other candidates who are above them in the merit list within one week from today."

In December 1968, the appellants filed a petition under Section 114 and Order 47, Rule 1 read with Section 141, Civil Procedure Code seeking a review of the judgment and order dated December 3, 1968. This petition was dismissed by the High Court by a detailed order dated January 27, 1969. On February 1, 1969, a petition was filed under Articles 133 (1) (c) and 132 (1) of the Constitution for leave to appeal to this Court. In the prayer leave was sought against the judgment dismissing the writ petition as also the order by which the review petition was disposed of. In the certificate, however, in the heading only the judgment dated December 3, 1968 is mentioned. It would appear that the Certificate was limited to the appeal against the writ petition. This would be so because under Order 47, Rule 7 the order of the Court rejecting the application for review is not appealable. If the appellants desired to challenge that order it could have been done only by asking for leave of this Court under Article 136 which was never done. In these circumstances the arguments of Mr. B. C. Misra for the appellants were confined to the matters decided by the judgment dated December 3, 1968.

4. It is common ground that the University of Delhi is a statutory body incorporated by the Delhi University Act of 1922 as amended from time to time. Under Section 30 of that Act Ordinances

can be made providing for various matters which include the admission of students to the University and their enrolment as such. Ordinance II provides that there shall be a Medical Courses Admission Committee. It is this committee which finalises the cases of admission except those which are to be referred to the Standing Committee on account of any special features. The Medical Courses Admission Committee at its meeting held on November 5, 1965, recognised that 23 seats in the Medical College shall be reserved for certain categories for nomination. This reservation was approved by the Standing Committee of the Academic Council of the Delhi University and finally by the Academic Council itself by means of a resolution dated March 3, 1966. In the High Court and before us both sides argued on the footing that the rules set out in the prospectus of the Medical College relating to admission have statutory sanction and are not of a purely administrative nature.

5. Before the High Court only two questions were raised. The first was whether the provision for reservation of seats was unconstitutional. The second was whether the nominations to the reserved seats had been made contrary to the rules. Mr. Misra has amplified the first submission by urging that the reservation of seats for admission to the Medical College was not based on any reasonable classification and suffered from the vice of discrimination. According to him such reservation was hit by Article 14 read with clauses (1) and (4) of Article 15 and clause (2) of Article 29 of the Constitution. In addition the system of nominations being made by the Government and not by the Admission Committee was per se discriminatory.

6. Article 29 (2) may be read first. It says, no citizen shall be denied admission into any educational institution maintained by the State of receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. Under clause (1) of Art. 15 the State cannot discriminate against any citizen on grounds only of religion, caste, sex, place of birth or any of them. Clause (4), however, provides that nothing in the Article shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and tribes. According to Mr. Misra the categories (c) to (h) contained in R. 4

relating to eligibility for admission for whom seats are reserved do not fall within the exception contained in cl. (4) of Art. 15. The persons in these categories, it is said, cannot be regarded as socially and educationally backward classes of citizens nor can it be supposed that all of them must belong to scheduled castes and tribes.

7. We are unable to see how Art. 15 (1) can be invoked in the present case. The rules do not discriminate between any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Nor is Art. 29 (2) of any assistance to the appellants. They are not being denied admission into the Medical College on grounds only of religion, race, caste, language or any of them. This brings us to Art. 14. It is claimed that merit should be the sole criterion and as soon as other factors like those mentioned in clauses (c) to (h) to Rule 4 are introduced, discrimination becomes apparent.

8. As laid down in *Shri Ram Krishna Dalmia v. S. R. Tendolkar*, 1959 SCR 279=(AIR 1958 SC 538) Article 14 forbids class legislation; it does not forbid reasonable classification. In other words to pass the test of permissible classification two conditions must be fulfilled, (i) that the classification is founded on intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that differentia must have a rational relation to the object sought to be achieved. The first group of persons for whom seats have been reserved are the sons and daughters of residents of Union territories other than Delhi. These areas are well known to be comparatively backward and with the exception of Himachal Pradesh they do not have any Medical College of their own. It was necessary that persons desirous of receiving medical education from these areas should be provided some facility for doing so. As regards the sons and daughters of Central Government servants posted in Indian Missions abroad it is equally well known that due to exigencies of their service these persons are faced with lot of difficulties in the matter of education. Apart from the problems of language, it is not easy or always possible to get admission into institutions imparting medical education in foreign countries. The Cultural, Colombo Plan and Thailand scholars are given admission in medical institutions in this country by reason of reciprocal arrangements of educational and cultural nature. Regarding

Jammu & Kashmir scholars it must be remembered that the problems relating to them are of a peculiar nature and there do not exist adequate arrangements for medical education in the State itself for its residents. The classification in all these cases is based on intelligible differentia which distinguishes them from the group to which the appellants belong.

9. It is the Central Government which bears the financial burden of running the medical college. It is for it to lay down the criteria for eligibility. From the very nature of things it is not possible to throw the admission open to students from all over the country. The Government cannot be denied the right to decide from what sources the admission will be made. That essentially is a question of policy and depends inter alia on an overall assessment and survey of the requirements of residents of particular territories and other categories of persons for whom it is essential to provide facilities for medical education. If the sources are properly classified whether on territorial geographical or other reasonable basis it is not for the courts to interfere with the manner and method of making the classification.

10. The next question that has to be determined is whether the differentia on which classification has been made has rational relation with the object to be achieved. The main purpose of admission to a medical college is to impart education in the theory and practice of medicine. As noticed before the sources from which students have to be drawn are primarily determined by the authorities who maintain and run the institution, e.g., the Central Government in the present case. In *P. Rajendran v. State of Madras*, AIR 1968 SC 1012 it has been stated that the object of selection for admission is to secure the best possible material. This can surely be achieved by making proper rules in the matter of selection but there can be no doubt that such selection has to be confined to the sources that are intended to supply the material. If the sources have been classified in the manner done in the present case it is difficult to see how that classification has no rational nexus with the object of imparting medical education and also of selection for the purpose.

11. The case of *P. Rajendran*, AIR 1968 SC 1012 (supra) is clearly distinguishable because there the classification had been made district-wise which was considered to have no reasonable relation with the object sought to be achieved.

Nor can the decision of a Full Bench of the Patna High Court in *Umesh Ch. Sinha v. V. N. Singh*, ILR 46 Pat 616=(AIR 1968 Pat 3) (FB) be of any avail to the appellants. In that case preferential treatment had been given to the children of the employees of the Patna University in the matter of admission to the Patna Medical College. It was held that there was no reasonable nexus between the principle governing admission to the college on the one hand and the pecuniary difficulties or the meritorious services rendered by the employees of the University on the other. Preferential treatment to the children of these employees would amount to favouritism and patronage. There is no question of any preferential treatment being accorded to any particular category or class of persons desirous of receiving medical education in the present case. The mere fact that the Central Government has to make the nominations with regard to the reserved seats cannot be considered to be preferential treatment of any kind. As the candidates for the reserved seats have to be drawn from different sources it would be difficult to have uniformity in the matter of selection from amongst them. The High Court was right in saying that the standards of the examination passed by them, the subject studied by them and the educational background of each of them would be different and divergent had (and?) therefore the Central Government was the appropriate authority which could make a proper selection out of those categories. Moreover this is being done with the tacit approval and consent of the Medical Courses Admission Committee. It appears that the Central Government has been acting in a very reasonable way inasmuch as when nominations were made only to nine seats the rest were thrown open to the general pool.

12. The other question which was canvassed before the High Court and which has been pressed before us relates to the merits of the nominations made to the reserved seats. It seems to us that the appellants do not have any right to challenge the nominations made by the Central Government. They do not compete for the reserved seats and have no locus standi in the matter of nomination to such seats. The assumption that if nominations to reserved seats are not in accordance with the rules all such seats as have not been properly filled up would be thrown open to the general pool is wholly unfounded. The Central

Government is under no obligation to release those seats to the general pool. It may in the larger interest of giving maximum benefit to candidates belonging to the non-reserved seats release them but it cannot be compelled to do so at the instance of students who have applied for admission from out of the categories for whom seats have not been reserved. In our opinion the High Court was in error in going into the question and holding that out of the nine seats filled by nomination two had been filled contrary to the admission rules and these would be converted into the general pool. Since no appeal has been filed against that part of the order we refrain from making any further observations in the matter.

13. Finally Mr. Misra attempted to agitate the question of some of the nominations being illegal as the candidates who had been nominated had not applied in time — the prescribed date being August 1, 1968. This contention cannot be entertained for two reasons. The first is that no such point appears to have been raised before the High Court when the writ petition was disposed of on December 3, 1968. It is only at the stage of review that this matter seems to have been pressed. Secondly it has been held by us that the appellants had no right to challenge the nominations which had been made by the Central Government. It was not, therefore, open to them to assail any of the nominations which had been made.

14. The appeal fails and it is dismissed with no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 40
(V 57 G 11)

(From Allahabad)*

J. C. SHAH AND G. K. MITTER, JJ.

Hari Nandan Sharan Bhatnagar, Appellant v. S. N. Dikshit and another, Respondents.

Civil Appeal No. 1020 of 1966, D/- 25-4-1969.

Civil Services — United Provinces Legislative Department Rules, Rule 7 — Recruitment to post of Superintendent by

* (Second Appeal No. 356 of 1964, D/- 28-10-1965 — All-LB).

JM/JM/D291/69/GMJ/D

promotion — Considerations — "Grade" — Meaning of — Officials holding posts in same scale of pay as Upper Division Assistants are eligible — Appointment made after thorough scrutiny of representations — Court will not interfere — (Constitution of India, Article 226) — (Words and Phrases — "Grade").

The post of Superintendent referred to in Rule 7 is a selection post and seniority by itself is not a sufficient qualification for promotion. The Speaker has to take into consideration the claims of Senior Upper Division Assistants but under the rules his choice is not limited to the Upper Division Assistants. He can consider the claims of others who are in the same grade, that is to say, enjoying the same scales of pay and pick out the person considered by him to be qualified in all respects to perform the duties of a Superintendent. All officials of the Legislative Assembly Secretariat holding posts in the same scale of pay as Upper Division Assistants are eligible for promotion to the post of the Superintendent. The word "grade" in Rule 7 is suggestive of status and it does not refer to a class or a particular class. (Para 4)

The fact that the educational qualification of the appellant was much superior to that of the respondent selected for the post is not a matter which can be taken into consideration by the court when the appointment was made by the Speaker after a thorough scrutiny of representations received and after consideration of the recommendation made by the Secretary of the Legislative Department.

(Para 5)

M/s. R. K. Carg and D. P. Singh, Advocates of M/s. Ramamurthi and Co., for Appellant; Mr. S. S. Shukla, Advocate, for Respondent No. 1.

The following Judgment of the Court was delivered by

MITTER, J.: The only question in this appeal by special leave is, whether there was a violation of Rule 7 of the United Provinces Legislative Department Rules in the appointment of the first respondent, S. N. Dixit, as the Superintendent in the Legislative Assembly of the State of Uttar Pradesh in preference to the appellant.

2. The facts are as follows. The appellant was appointed as an Upper Division Assistant (formerly known as superior service assistant) in the Legislative Assembly Secretariat Uttar Pradesh in 1954 on the result of a competitive examination held by the Public Service Commission

of the State. He was confirmed in the post of Upper Division Assistant with effect from June 16, 1955. In September 1961 a vacancy occurred in the post of a Superintendent in the Legislative Assembly Secretariat. The first respondent was working as a Treasurer in the same office. According to the appellant, one Uma Shanker was the senior Upper Division Assistant and he was immediately after Uma Shanker in order of seniority. In view of the fact that Uma Shanker had not put in the minimum period of ten years' service as Upper Division Assistant the Speaker of the Assembly did not think it fit to appoint him as Superintendent but he ignored the appellant's claim to the post after Uma Shanker and appointed Dixit in violation of the mandatory provisions of Rule 7. The said Rule reads:

"Recruitment to the post of the Superintendent shall be made by promotion from the grade of superior service assistants in the Council Department. While due regard will be paid to seniority, no assistant will be appointed to the post of Superintendent unless he is considered qualified in all respects to perform the duties of a Superintendent and full authority will be reserved to appoint the assistant most fitted for the post. If, however, no suitable assistant is available for promotion from amongst the grade of superior service assistants in the Council Department, recruitment may, as a special case, be made from outside."

2a. The appellant filed a suit in the court of the Munsif of South Lucknow impleading the State of Uttar Pradesh, the Speaker, Legislative Assembly of the State and Dixit as defendants therein and praying for a decree for declaration that he should be deemed entitled to the post of Superintendent in the Legislative Assembly with effect from 1st January, 1962 and a further declaration that the order dated October 7, 1961 appointing defendant No. 3 as Superintendent was illegal and ultra vires. Written statements were filed on behalf of the defendants. The learned Munsif held in the plaintiffs' favour. His judgment was upheld in appeal by the Civil Judge Lucknow. The same was reversed in Second Appeal to the High Court.

3. The order of the Speaker passed in October 1961 shows that he had considered the matter carefully before appointing Dixit to the post. The contention of learned counsel for the appellant

was that the post could not be given to a person who was not a superior service assistant and the "grade of superior service assistants in the Council Department" meant and included only those persons whose names were borne on the roll of Upper Division Assistants. Exhibit 10 the gradation list of permanent ministerial establishment of the Uttar Pradesh Legislative Assembly Secretariat as it stood in April, 1956 shows that the scales of pay of Upper Division Assistants, Translators, Reference Clerk, Treasurers, Stenographer to Secretary and Assistant Librarian were the same, namely, Rs. 160—15—280—20—400. By an order of the Governor dated March 16, 1959 efficiency bars in the scales of pay of all the above posts were uniformly altered and fixed at Rs. 220 and Rs. 300. The High Court took the view that 'grade' in Rule 7 was suggestive of status and it did not refer to a class or a particular class. According to the High Court:

"All officials working in the same scale of pay in a department, although holding posts with different designations, shall be deemed to be holding posts in the same grade, because their rank in the same department will be the same and equal to one another."

4. The High Court noted that the dictionary meaning of "grade" was 'rank, position in scale, a class or position in a class according to the value.' In our view the High Court came to the correct conclusion in holding that the post was a selection post and seniority by itself was not a sufficient qualification for promotion. The Speaker had to take into consideration the claims of Senior Upper Division Assistants but under the rules his choice was not limited to the Upper Division Assistants. He could consider the claims of others who were in the same grade, that is to say, enjoying the same scales of pay and pick out the person considered by him to be qualified in all respects to perform the duties of a Superintendent. All officials of the Legislative Assembly Secretariat holding posts in the same scale of pay as Upper Division Assistants were eligible for promotion to the post of the Superintendent.

5. Counsel argued that this would be an unreasonable interpretation of the rule for in that case even a book-binder or a chauffeur would have to be considered if their scales of pay were the same as those of Upper Division Assistants. We do not think that anyone would place such an absurd construction on the rule.

The appointing authority had to consider not only the eligibility based on the grade (assuming that the rule unreasonably places a chauffeur, a book-binder, an accountant and a special duty clerk in the same grade) but also the qualification of the person appointed to perform the duties of the Superintendent and a book-binder or a chauffeur would certainly not be eligible for consideration. It was said that the educational qualification of the appellant was much superior to that of Dixit and while the appellant had joined service by passing a competitive examination held by the Public Service Commission the first respondent had failed to pass such a test. These are matters on which we can express no opinion. As noted already, the appointment was made after a thorough scrutiny of representations received and after consideration of the recommendation made by the Secretary of the Legislative Department.

6. In the result the appeal is dismissed but we make no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 42

(V 57 C 12)

(From Allahabad: ILR (1964) 2 All 191)

J. C. SHAH, V. RAMASWAMI AND
G. K. MITTER, JJ.

Raj Kumar Mohan Singh and others,
Appellants v. Raj Kumar Pashupati Nath
Saran Singh and others, Respondents.

Civil Appeal No. 380 of 1965 D/ 29-4-1969.

(A) Tenancy Laws — Oudh Estates Act (1 of 1869) Ss. 22(6), 22(7), 23, 2 — Taluqdar named in List 2 — Succession to non-taluqdari property — Presumption is that it is also governed by rule of devolution on single heir and not by rule of Hindu law — Such presumption is not inconsistent with Section 23 — (Evidence Act (1872), Section 114).

It must be taken as a settled rule that, whereas the entry of a taluqdar in list 2 is conclusive evidence that his taluqa is governed by the rule of devolution on a single heir, it raises also a presumption that the family custom applying to a taluqa governs also the succession to non-taluqdari immovable property. This presumption may be rebutted by evidence to the contrary. AIR 1916 PC 89 and AIR 1938 PC 252, Rel. on. (Para 4)

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There is no inconsistency between the presumption that non-taluqdari property also devolves upon a single heir and the terms of Section 23 of the Act. (Para 5)

A widow on whom the estate of the deceased taluqdar devolved under S. 22(6) technically may not be called an "heir" as defined in Section 2 of the Act, but that is irrelevant in determining whether in the devolution of the taluqdari and non-taluqdari estates different rules prevail. (Para 7)

Held on facts that even the non-taluqdari estate left by the Taluqdar devolved on his widow for her life time and the son adopted by her had, during her life time, no interest in that property which he could transfer, alienate or settle as the devolution was not governed by the rule of Hindu law under which a widow is divested of her interest on adopting a son. (Para 10)

(B) Civil P. C. (1908), Pre. — Precedent — Privy Council decision — Reconsideration by Supreme Court — Stare decisis.

Where the Privy Council decisions lay down a rule of succession which is regarded as settled for many years and to depart from it would result in upsetting settled titles, the Supreme Court would not interfere with the decisions. (Para 6)

(C) Civil P. C. (1908), O. 6, R. 17 — Litigation continuing for 22 years — Defendant applying in Supreme Court for amendment of written statement to raise a new contention — Held that amendment could not be allowed at such a late stage. (Para 8)

Cases Referred: Chronological Paras
(1938) AIR 1938 PC 252 (V 25) =

65 Ind App 397, Ara Begum v. Deputy Commr., Gonda 4, 5

(1916) AIR 1916 PC 89 (V 3) = 43

Ind App 269, Murtaza Hussain Khan v. Mabomed Yasin Ali Khan 4, 5

(1883) 11 Ind App 135 = ILR 10 Cal 792 (PC), Thakur Ishri Singh v. Beldeo Singh 5

Mr. C. B. Agarwala, Senior Advocate (M/s. Ishtiaq Ahmad Abbasi, S. Rehman and C. P. Lal, Advocate, with him), for Appellants. Mr. S. P. Sinha, Senior Advocate, (M/s. Mohammad Hussain and S. S. Shukla, Advocate, with him), for the Respondents (Nos. 1 and 3.)

The following Judgment of the Court was delivered by

SHAH, J. — By our judgment dated April 19, 1968, we passed the following order in this appeal:

"It will be declared that the deed of trust executed by Raja Bishwanath on August 29, 1932, did not operate to settle any property being part of the taluqdari estate and governed by the Oudh Estates Act 1 of 1869, for the purposes specified therein."

The Senior Raj Kumar applied for review of judgment on the ground that the deed of trust dated August 20, 1932, settled properties as non-taluqdari as well as taluqdari and the Court at the earlier hearing did not make any order as to the devolution of the non-taluqdari property. Apparently at the earlier hearing no argument on the matter now sought to be raised was advanced, though the hearing lasted for several days. We have, however, granted review of judgment and heard the parties on the question whether a different rule of devolution prevails in respect of properties which are non-taluqdari.

2. We have held that on the death of Raja Surpal Singh the taluqdari estate of Tiloi vested in Rani Jagannath Kaur, and she continued to hold the property as life owner under Section 22 (7) of the Oudh Estates Act, even after she adopted Raja Bishwanath Singh on February 21, 1901, and so long as she was alive Raja Bishwanath Singh had no interest in the estate which he could settle or convey. The deed of settlement was executed by Raja Bishwanath Singh during the life-time of Rani Jagannath Kaur and did not operate to convey the taluqdari estate. Counsel for the Senior Raj Kumar contends that even if Raja Bishwanath had no interest in the taluqdari estate, under the ordinary Hindu Law, on adoption the non-taluqdari property left by Raja Surpal Singh vested in Raja Bishwanath Singh and he was competent under the deed of settlement to dispose of the property in the manner directed by that deed. Counsel says that the devolution of non-taluqdari property is governed by the rules of Hindu Law, and that on adoption of a son by Rani Jagannath Kaur her interest in the property was divested and the adopted son became the owner of the property.

3. Counsel for the Junior Raj Kumar resists this claim. Section 8 of the Oudh Estates Act 1 of 1869 provides for the preparation of lists of taluqdars and grantees, and the second list prepared under that section is a list of taluqdars whose estates, according to the custom of the family on and before the 13th day of February, 1856, ordinarily devolved

upon a single heir. The taluqdari estate of Tiloi was entered in the second list. By Section 10 of the Act it is provided:

"No persons shall be considered taluqdars or grantees within the meaning of the Act, other than the persons named in such original or supplementary lists as aforesaid. The Courts shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are such taluqdars or grantees."

Section 22 of the Act prescribes a special mode of succession to intestate taluqdars and grantees. By Clause (6) of Sec. 22 in default of any brother, or a male lineal descendant, the estate devolves upon the widow of the deceased taluqdar or grantee heir or legatee, for her life-time only, and by Clause (7) on the death of the widow, the estate devolves upon such son as the widow shall, with the consent in writing of her deceased husband, have adopted, and his male lineal descendants. The Tiloi Estate which was a taluqdari estate therefore, devolved upon Rani Jagannath Kaur and she held that estate during her life-time. The rule of Hindu law that on the adoption of a son by a widow to her deceased husband, the estate vests in the adopted son, is by the express provisions of Clauses (6) and (7) of Section 22 of the Oudh Estates Act inapplicable to taluqdari estates. That was so held in our earlier judgment dated April 19, 1968, and on that account the claim of the Senior Raj Kumar to take the taluqdari estate under the deed of settlement was negated.

4. It was decided by the Judicial Committee of the Privy Council that it will be presumed that the non-taluqdari estate of a taluqdar governed by the Oudh Estates Act, 1869, is governed by the same rules which govern succession to the taluqdari estate. In *Ara Begum v. Deputy Commissioner, Gonda*, 65 Ind App 397 = (AIR 1938 PC 252) the Judicial Committee held that the entry of a taluqdar in List 2 prepared under Section 8 of the Oudh Estates Act, 1869, which raises an irrebuttable presumption of single heir succession to the taluqdari property also raises a presumption, rebuttable by evidence proving a different rule of devolution, that the family custom of single heir succession applicable to the taluqda governs the succession to the non-taluqdari property, movable as well as immovable, of the taluqdar. In that case the taluqdar of Utraula Estate obtained decrees for

recovery of money against a debtor. The taluqdar died on March 4 1934, leaving him surviving a widow, a daughter and two sons. The widow on behalf of herself and as the guardian of her daughter filed applications for execution of the decrees obtained by the taluqdar. The execution was resisted on the ground that the widow and the daughter had no right to enforce the decrees because the right to the decrees had devolved upon the eldest son who was under the Oudh Estates Act the sole heir under the law and family custom of single-heir succession. The Board upheld the contention raised by the judgment-debtor. They observed:

"Now, the taluqdar of the Utrula Estate is named in list 2 of the taluqdars prepared under Section 8 of the Oudh Estates Act, 1 of 1869, whose estate, according to the custom of the family on or before February 13, 1856, ordinarily devolved upon a single heir. Section 10 of the statute provides that the Court shall take judicial notice of the said list and regard as conclusive the fact that the person named therein is such taluqdar. In other words, there was a pre-existing custom attaching to the estate on which its inclusion in list 2 was based. There is, therefore, an irrebuttable presumption in favour of the existence of the custom of the family by which the estate devolves on a single heir, but the provision as to the conclusiveness of the custom is confined to the estate coming within the ambit of the statute. It does not apply to any property which is not comprised in the estate or taluqa. What is the rule which governs succession to non-taluqdari property? If immovable property forming part of the taluqa is governed by the custom of single heir succession, there is no prima facie reason why immovable property which is not comprised in the taluqa should follow a different rule.

Indeed, it has been decided by this Board that there is a presumption that the rule as to succession to a taluqa governs also the succession to non-taluqdari immovable property; *Murtaza Hussain Khan v. Mahomed Yasin Ali Khan*, 43 Ind App 269 = (AIR 1916 PC 89). It must, therefore, be taken as a settled rule that, whereas the entry of a taluqdar in List 2 is conclusive evidence that his taluqa is governed by the rule of devolution on a single heir, it raises also a presumption that the family custom applying to a taluqa governs also the succession to non-taluqdari immovable property."

5. Counsel for the Senior Raj Kumar contended that the rule enunciated by the Judicial Committee in *Rani Huzur Ara Begam's case*, 65 Ind App 397 = (AIR 1938 PC 252) applies only to muslims and has no application to Hindus. Counsel submitted that in 43 Ind App 269 = (AIR 1916 PC 89) Mr. Ameer Ali delivering the judgment of the Board explained that the reason of the rule is that the presumed custom applies to the acquired property of a muslim taluqdar since under the Mahomedan Law, ancestral and self-acquired properties are subject to the same rule of descent, and that in the case of self-acquired property of a Hindu taluqdar, the presumed custom only affects the succession upon proof that the property was incorporated with the taluqa either by intention of the owner or by family custom. It is true that in *Rani Huzur Ara Begam's case*, 65 Ind App 397 = (AIR 1938 PC 252) the dispute related to the succession to the estate held by a muslim taluqdar, but the Board in that case relied upon the observations at p. 148 in *Thakur Ishri Singh v. Beldeo Singh*, (1883) 11 Ind App 135 (PC) a case of Hindu succession to a taluqdari held by a Hindu taluqdar. Counsel also invited our attention to Section 23 of the Oudh Taluqdars Act, but we see no inconsistency between the presumption that non-taluqdari property also devolves upon a single-heir and the terms of Section 23 of the Act.

6. Counsel for the Senior Raj Kumar contends that the decision of the Judicial Committee gives no reasons in support of the view taken by the Board and should be reconsidered by this Court. We are unable to agree with that contention. The rule has apparently been settled for the last many years that where property devolves upon a single heir of a taluqdar entered in the second list, there is a presumption that the non-taluqdari estate also devolves upon him and we see no reason to depart from that rule. To do so would result in upsetting settled titles. Prior to the enactment of the Oudh Estates Act, 1869, there was no distinction between taluqdari and non-taluqdari estates and the presumption merely gives effect to family custom. There is, therefore, a presumption, unless rebutted, that non-taluqdari property of a taluqdar entered in List 2 devolves by the custom of the family upon a single heir. On the death of Raja Surpal Singh his entire estate devolved upon his wife Rani Jagannath Kuar and by virtue of the custom, she must be presumed to have remained life

owner of the non-taluqdari estate also. The customary rule may undoubtedly be rebutted by evidence to the contrary, but at no stage of the hearing of this protracted trial was the contention raised that if (sic) the Senior Raj Kumar had under the deed of settlement interest in the non-taluqdari estate, even if his claim to the taluqdari estate under that deed failed to take effect.

7. It was then urged that in any event the widow of a taluqdar is not an "heir" within the definition of the Act. It is true that in the interpretation clause in the Act an "heir" means a person who has inherited or inherits otherwise than as a widow or a mother, an estate or portion of an estate whether before or after the commencement of the Act. But we fail to appreciate the bearing of this definition upon the question in issue. By virtue of Section 22 (6) of the Act the taluqdari estate devolved upon Rani Jagannath Kuar on the death of her husband and the estate enured during her life-time. She also inherited the non-taluqdari estate. Technically she may not be called an "heir" under the Act, but that is irrelevant in determining whether in the devolution of the taluqdari and non-taluqdari estates different rules prevail.

8. Counsel then contended that though the argument was not raised at an earlier stage, the Senior Raj Kumar should be permitted to amend his pleading to contend that there was a custom in the family under which non-taluqdari estate did not devolve upon a single heir. This case is more than 22 years old and we do not think that we would be justified at this date in allowing the parties to raise a new contention and give it a fresh lease of life. On the record there is evidence relating to devolution of the estate since the time of Raja Jagpal Singh to whom the Tiloi Estate was granted by the Government, and it has never been suggested that the non-taluqdari estate devolves otherwise than upon a single heir.

9. Counsel also contended that even if leave to amend the written statement be not granted to the Senior Raj Kumar the Court may review the evidence and hold on the evidence already on the record that such a custom did prevail in the family. Our attention has, however, not been invited to any reliable evidence on this part of the case.

10. We, therefore, declare that even in the non-taluqdari estate left by Raja

Surpal Singh which devolved upon his widow Rani Jagannath Kuar for her life-time, Raja Bishwanath Singh had on August 29, 1932, no interest which he could transfer, alienate or settle.

11. Counsel for the Senior Raj Kumar finally submitted that the Trial Court did not decide issues Nos. 14 and 15 relating to the rights of Rani Aditya Binai Kumari—defendant No. 4—and Rani Fanindra Rajya Lakshmi Devi—defendant No. 5—and these issues should be decided. No argument was advanced before the High Court in respect of issues Nos. 14 and 15. The reason is obvious; in the Trial Court the defendants agreed that no findings should be recorded on those issues. We cannot at this stage enter upon the trial of issues which, it was agreed, had to be tried in another suit.

12. The Senior Raj Kumar will pay the costs of this hearing.

Order accordingly.

AIR 1970 SUPREME COURT 45 (V 57 C 13)

(From Bombay: AIR 1968 Bom 400)
S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

Mohd. Hussain Umar Kochra etc., Appellants v. K. S. Dalipsinghji and another etc., Respondents.

Criminal Appeals Nos. 139 to 144 of 1966, D/- 31-3-1969.

(A) Sea Customs Act (1878), S. 167 (81) — Import of gold by air — Fraudulent evasion of restrictions imposed under Foreign Exchange Regulation Act — Offence punishable under section — Conspiracy to evade restriction — Punishable under Section 120B, Penal Code — (Foreign Exchange Regulation Act (1947), Sections 8 and 23A) — (Penal Code (1860), Section 120B).

A fraudulent evasion of the restriction imposed by the notification dated 25-8-1948 under Section 8 (1), Foreign Exchange Regulation Act, 1948 on the import of gold by air is punishable under Section 167 (81), Sea Customs Act, 1878 and the criminal conspiracy to evade the restriction is punishable under S. 120B, Penal Code. (Para 13)

Section 23A of the Foreign Exchange Regulation Act provided that the restrictions imposed by Section 8 (1) shall be deemed to have been imposed under Sec-

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tion 19 of the Sea Customs Act, 1878 and all the provisions of that Act shall have effect accordingly. The effect of S. 23A was that the contravention of the notification under Section 8 (1) attracted to it each and every provision of the Sea Customs Act, 1878 in force for the time being including Section 167 (81) of the Sea Customs Act 1878 which was inserted by the Amending Act XXI of 1955.

(Para 11)

The notification dated the 25th August 1948 issued under Section 8 (1) of the Foreign Exchange Regulation Act, 1947 restricted the bringing into India of gold from any place outside India by air as well and the statutory fiction created by Section 23A of Foreign Exchange Regulation Act does not cut down the wide ambit of the notification or limit its application to imports by sea and land only because of the fact that Section 19 of the Sea Customs Act authorised the imposition of prohibitions and restrictions on the imports and exports of goods by land and sea only. An import of gold by air without the permission of the Reserve Bank is a breach of the notification and the breach attracts to it the provisions of Section 167 (81) of the Sea Customs Act, 1878.

(Para 12)

Further, it can also be said that the import or export by air is a species of import or export by land, inasmuch as the aircraft carrying goods lands or takes off from land, and the prohibition or restriction on the import or export of goods by land is a prohibition or restriction on the import or export by aircraft, landing or taking off from land.

(Para 13)

(B) Penal Code (1860), Section 120A — Agreement is gist of offence — General and separate unrelated conspiracies — Distinction — Essentials of single general conspiracy.

Criminal conspiracy, as defined in Section 120A, is an agreement, by two or more persons, to do, or cause to be done, an illegal act, or an act, which is not illegal, by illegal means. The agreement is the gist of the offence. In order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the

common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of persons co-operate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of his group only. AIR 1967 SC 450 and AIR 1957 SC 340 and 1965-2 All ER 448, Ref. to.

(Para 15)

Held that in the instant case there was only one single general conspiracy to smuggle gold into India from foreign countries in contravention of the restriction imposed by notification under Section 8 of the Foreign Exchange Regulation Act, 1948.

(Para 16)

(C) Evidence Act (1872), Section 124 — Communications to public officer in official confidence — Cable addresses and cables sent to those addresses are not communications to public officer in official confidence — Court acts wrongly in allowing the claim of privilege from production made by the Telegraph Check Office.

(Para 17)

(D) Criminal P. C. (1898), Section 503 — May issue a commission — Application for issue of a commission for examination of witness either in Switzerland or U. K. or in Pakistan — No particulars indicating willingness of witness to be examined on commission given — Even address of the witness not given — Court cannot issue a roving commission to a Court or authority in any of those countries — Application is liable to be rejected on the ground of want of good faith alone.

(Para 18)

(E) Criminal P. C. (1898), Section 540 — Recalling witness — Court has inherent power to recall a witness, if satisfied that he is prepared to give evidence which is materially different from what he had given at the trial — Party asking for the recall of witness not placing material before court on which it could be

so satisfied — Court acts rightly in rejecting the prayer. (Para 19)

(F) Criminal P. C. (1898), Section 411A — Supreme Court appeals — Practice — New point — Point not taken either in trial court or High Court — Point ought not to be allowed to be raised for the first time in the Supreme Court. (Para 20)

(G) Constitution of India, Article 136 — Supreme Court appeals — Practice — Normally Supreme Court does not re-appraise evidence unless the findings are perverse or are vitiated by any error of law or there is a grave miscarriage of justice. (Para 21)

(H) Evidence Act (1872), Sections 133 and 114, Illus. (b) — Accomplice's evidence — Court will not accept it unless corroborated in material particulars.

The combined effect of Sections 133 and 114 illustration (b) is that though a conviction based upon accomplice evidence is legal the court will not accept such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material particulars. The corroboration must be from an independent source. One accomplice cannot corroborate another. AIR 1963 SC 599 and (1916) 2 KB 658, Rel. on. (Para 21)

(I) Evidence Act (1872), Sections 133 and 114, Illus. (b) — Accomplice — Participes criminis in respect of actual crime charged is an accomplice — Though witness concerned may not confess to his participation, court has to decide on a consideration of the entire evidence whether he is an accomplice. 1954 AC 378, Rel. on. (Para 28)

(J) Evidence Act (1872), Sections 133 and 114, Illus. (b) — Several accomplices simultaneously and without previous concert giving consistent account of the crime implicating accused — Court may accept the several statements as corroborating each other. AIR 1968 SC 832 and AIR 1949 PC 257, Rel. on. (Para 33)

(K) Evidence Act (1872), Section 30 — Retracted confession of co-accused — Though it can be taken into consideration against the other accused it can be used only in support of other evidence — It cannot be made the foundation of a conviction. AIR 1949 PC 257, Rel. on. (Para 34)

(L) Penal Code (1860), Sections 71 and 120B — Separate sentences for offence under Section 167 (81), Sea Customs Act and under Section 120B, Penal Code — Not illegal — (Criminal P. C. (1898), Section 35).

The offence under Section 167 (81) of the Sea Customs Act, 1878, is punishable with imprisonment for a term not exceeding two years or to fine or to both. A party to a criminal conspiracy to commit this offence is punishable under S. 120B(1) of the Penal Code in the same manner as if he had abetted the offence. A criminal conspiracy is a separate offence, punishable separately from the main offence. (Para 42)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 832 (V 55) =
70 Bom LR 540 = 1968 Cri LJ
1017, Haroon Haji Abdulla v.
State of Maharashtra 33
(1967) AIR 1967 SC 450 (V 54) =
1967-1 SCR 595 = 1967 Cri LJ
414, S. K. Khetwani v. State of
Maharashtra 15
(1965) 1965-2 All ER 448 = 1965-3
WLR 405, R. v. Griffiths 15
(1963) AIR 1963 SC 599 (V 50) =
1963-3 SCR 830 = 1963-1 Cri LJ
489, Bhiva Doulu Patil v. State of
Maharashtra 21
(1957) AIR 1957 SC 340 (V 44) =
1957 Cri LJ 422, S. Swaminathan
v. State of Madras 15
(1954) 1954 AC 378 = 1954-2 WLR
343, Davis v. Director of Public
Prosecution 28
(1949) AIR 1949 PC 257 (V 36) =
76 Ind App 147 = 50 Cri LJ
872, Bhuboni Sahu v. The King 33, 34
(1916) 1916-2 KB 658 = 86 LJ (KB)
28. R. v. Baskerville 21

In Cr. A. No. 139 of 1966:

M/s. Porus A. Mehta, B. M. Parikh and Janendra Lal, Advocates and M/s. J. R. Gagrati and B. R. Agarwala, Advocates of M/s. Gagrati and Co., for Appellant;

In Cr. A. No. 140 of 1966:

Mr. A. K. Sen, Senior Advocate, (M/s. Porus A. Mehta, B. M. Parikh, M. V. Rao and Janendra Lal, Advocates and M/s. J. R. Gagrati and B. R. Agarwala, Advocates of M/s. Gagrati and Co. with him), for Appellant;

In Cr. As. Nos. 141 and 142 of 1966:

M/s. R. Jethmalani, M. V. Rao and Janendra Lal, Advocates, and M/s. J. R. Gagrati and B. R. Agarwala, Advocates of M/s. Gagrati and Co., for Appellant;

In Cr. As. Nos. 143 and 144 of 1966:

M/s. R. Jethmalani and Janendra Lal, Advocates and M/s. J. R. Cagrat and B. R. Agarwala, Advocates of M/s. Cagrat and Co., for Appellant; M/s. H. G. Khandelawala, A. B. Pandya, H. R. Khanna and R. N. Sachthey, Advocates, for Respondents (In all appeals).

The following Judgment of the Court was delivered by

BACHAWAT, J.: The six appellants are A-8, Mohamed Hussain Omer Kochra alias Mr. Buick alias Nazzen, A-12, Maganlal Naranji Patel, A-18, N. B. Mukherji, A-15, N. S. Rao, A-14, Parasuram T. Kanel, A-6, Lakshmandas Chaganlal Bhatia alias Sham. In this Judgment "A" means accused. Forty persons including the appellants were jointly prosecuted for criminal conspiracy to import and deal in gold punishable under Section 120B of the Indian Penal Code read with S. 167 (81) of the Sea Customs Act, 1878 and for substantive offences punishable under Section 167 (81).

2. A-1 to 5, A-18 to 35 and A-37 are absconding or being foreigners are not amenable to the processes of the Court. A-1 Jamal Shuhaibar, A-2 George Shuhaibar and A-3 Jawadat Shuhaibar of Beirut and A-4 Yusuf Mohamed Lori alias Abdulla of Bahrein sent gold from the Middle East. A-5 Juan Castaner Casanovas and A-18 Bernardo Sas of Geneva are foreign collaborators. A-19 Hamad Sultan and A-37 Chunilal alias Professor Kamal alias Dwarkadas of Bombay were concerned in the smuggling of gold. A-20 to A-35 Mrs. Gisele Minot, B. J. Lupi, J. P. Hoffman, Jacques Minot, Geoffire Allan, M. Torrens, Mrs. Mora Margaret, Armand Yaverowaski, Gran Powell, C. J. Flamant, Mrs. A. Ramel, Mrs. S. B. Taylor J. C. Catino, E. D. Gill, A. J. Mascardo and A. A. Grant are foreigners and are said to have carried gold from foreign countries to India by air.

3. The trial proceeded against A-6 to 17, A-36, A-38, A-39 and A-40. A-6 Lakshmandas is a financier. A-14 Parasuram is his brother-in-law. A-7, Rabi-yabi Usman alias Grandma is the mother of A-9 Rukaiyabai Mohamed Hussain Kochra, A-10 Abidabai Usman and A-38 Hassan Usman. A-8 Kochra is the husband of A-9. A-11 Murad Asharnoff remitted funds to foreign countries. A-12 Maganlal Naranji Patel and A-13 Mafatal Mohanlal Parekh are bullion merchants of Bombay. A-15 N. S. Rao, A-16 N. B. Mukherji, A-17 Timothy Miranda, A-39

D. K. Deshmukh and A-40 Jacob Miranda alias Tambaku were mechanics in the employ of the Air India International. A-36 Francis Bello was a co-conspirator. The Additional Chief Presidency Magistrate, 3rd Court, Esplanade, Bombay, acquitted A-9, 10, 13, 39 and 40 of all the charges. He convicted A-6, 7, 8, 11, 12, 14, 15, 16, 17, 36 and 38 of criminal conspiracy and substantive offences under Section 167 (81) and passed sentences of imprisonment and fine.

4. All the convicted persons filed appeals in the High Court. During the pendency of the appeal A-11 absconded. The High Court upheld the convictions of A-36 and A-7 but directed that A-36 be released on probation and that A-7 do pay a fine of Rs. 4,000 and undergo simple imprisonment for a day only. The High Court dismissed the appeals of A-6, 8, 11, 12, 14, 15, 16 and 17. The present appeals have been filed by A-6, 8, 12, 14, 15 and 16 after obtaining special leave.

5. The first count charged that all the 40 accused persons along with Mohamed Yusuf Merchant, Pedro Fernandez and other persons at Bombay and other places from 1st November, 1956 to 2nd February 1959 were parties to a continuing criminal conspiracy to acquire possession of, carry remove deposit harbour keep conceal and deal in gold and knowingly to be concerned in fraudulent evasion of duty chargeable on gold and of the prohibition and restriction applicable thereto and committed an offence punishable under Section 120-B, I. P. C. read with Section 167 (81) of the Sea Customs Act, 1878. The other counts charged the accused persons individually with offences punishable under Section 167 (81).

6. In broad outline the prosecution case is as follows: Before November 1, 1956 some of the accused persons along with others were concerned in the illegal importation of gold. In or about November 1956 Pedro Fernandez and Yusuf Merchant hatched the present conspiracy to which A-11 Murad Ahaharnoff was a party. The scheme was that necessary finances would be arranged, remittances to foreign countries would be made through Murad, gold would be sent by air from foreign countries to Bombay, Delhi, Calcutta and other air ports and the smuggled gold would be sold in India. A-6 Lakshmandas, A-8 Kochra and A-7 Rabi-yabai were approached for the necessary finances. Between February 3, and July 8, 1957 eleven carriers brought gold by air from Switzerland. Lakshmandas

financed the first four transactions and his telegraphic address "Subhat" was used for receipt and despatch of cables. On February 3, 1957 the first carrier Gisele Minot came to Bombay. On February 25, 1957, the second carrier B. J. Lupi and on March 9, 1957 the third carrier J. P. Hoffman came to Delhi. The fourth carrier Jacques Minot went to Colombo. Kochra and Rabiyaibai financed the subsequent transactions and allowed the use of his telegraphic address "Nazneen". Cables used to be sent in codes known as the "Private Dictionary" "the new Geneva Code" and "the Beirut Code", and "the Behrein Code". Laxmandas ceased to be a financier but he continued to participate in the disposal of gold. On April 8, 1957 the fifth carrier Mora Margaret went to Colombo. On April 19, 1957 the sixth carrier Geoffre Allan and on May 3, 1957 the seventh carrier came to Bombay. At about this time A-12 is said to have joined the conspiracy. On May 21, 1957 the eighth carrier Grant Powell came to Delhi. On June 9, 1957 the ninth carrier Mora Margaret and on June 24, 1957 the tenth Carrier Armand Yaverco-waski came to Bombay. On July 8, 1957 the 11th carrier Grant Powell came to Calcutta. A-37 Chunilal who was despatched to contact the carrier disappeared with the gold. Thereafter the smuggling of gold stopped for sometime.

7. In August 1957 Yusuf and A-38 Hassan representing Kochra and Rabiyaibai went to Beirut and induced A-1 to A-3 Jamal Shuhaibar and his two brothers to join the conspiracy. The scheme was that the Shuhaibar brothers would send gold from the Middle East, Kochra and Rabiyaibai would remit the necessary funds and that A-19 Hamad Sultan would have an interest in the venture. Pedro also came to Beirut. Accounts between him and Yusuf were settled. It was decided that Pedro would continue to send gold from Switzerland, that Kochra and Rabiyaibai would supply the necessary finances and that Pedro would receive a half share of Yusuf's profits in the smuggling of gold from the Middle East. Between November 7, 1957 and February 13, 1958 eleven carriers of gold sent by Pedro came to Bombay. On February 24, 1958 the twelfth carrier A. J. Mascardo was arrested in Delhi. Simultaneously gold was sent from the Middle East. On November 3, 1957 Grant Powell carrying gold sent by the Shuhaibar brothers came to Calcutta, but he was arrested. In November 1957 A-4 Yusuf Mohamed Lori

of Bahrein acting for Shuhaibar brothers came to India and it was decided that gold would be hidden in the body of Air India International planes by a mechanic at Beirut or Bahrein and would be removed in Bombay by another mechanic and that Kochra and Rabiyaibai would supply funds on the guarantee of Murad. From time to time the services of the mechanics, A-15 N. S. Rao, A-39 D. K. Deshmukh, A-40 Jacob Miranda, A-17 Timothy Miranda and other mechanics were requisitioned. Between December 12, 1957 and January 15, 1958, 4 or 5 consignments of gold concealed inside the belly of aircrafts were sent by Lori to India. From February 1958, 7 or 8 consignments of gold concealed in the rear left bathroom of the aircrafts were sent to Lori to Bombay. Due to disturbances in the Middle East the smuggling of gold stopped for some time. Since October 1958 eleven consignments of gold were sent to Bombay. On February 1, 1959 the Rani of Jhansi carrying the 11th consignment of gold was searched by the customs officers at the Santacruz Airport Bombay and the gold was seized.

8. On February 2, 1959 the residence of Yusuf Merchant was searched and many incriminating articles were seized. From time to time Yusuf was interrogated, and his statements were recorded. On October 24, 1959 the investigation was completed. The trial started in July 1960. The prosecution examined PW 2 Yusuf Merchant and other accomplices, and witnesses and exhibited numerous documents. Yusuf Merchant, the main witness on behalf of the prosecution implicated all the appellants in the crime. The Courts below accepted his testimony found that it was corroborated in material particulars, and convicted the appellants.

9. All the appeals were heard together. We shall note only those arguments which were raised in this Court by Counsel. Having regard to those arguments the following general questions affecting all the appellants arise for decision:—

(1) was the import of gold in contravention of Section 8 (1) of the Foreign Exchange Regulation Act, 1947 punishable under Section 167 (81) of the Sea Customs Act, 1878:

(2) did the prosecution establish the general conspiracy laid in charge No. 1;

(3) did the learned Magistrate wrongly allow a claim of privilege in respect of the disclosure of certain addresses and cables and if so, with what effect:

(4) did he wrongly refuse to issue commission for the examination of Pedro Fernandez; and

(5) did he wrongly refuse to recall PW 50 Ali for cross-examination?

10. As to the first question, the law since the passing of the Customs Act, 1962 admits of no doubt. The import and export of goods by sea, land and air may be prohibited absolutely or subject to conditions under Section 11. Customs duties are leviable under Section 12 on all goods so imported or exported. The fraudulent evasions of duties and of prohibitions are punishable under S. 135.

11. In the present case we are concerned with the law in force before 1982. The Sea Customs Act 1878 contained a number of prohibitions on imports by land or sea (S. 18) and authorised the imposition of further prohibitions and restrictions on import or export by sea or by land (S. 19). The Act also provided the machinery for the enforcement of prohibitions and restrictions by means of search, seizure, confiscation and penalties. Several other statutes contained further prohibitions and restrictions on the import or export of goods. Section 8 of the Foreign Exchange Regulation Act, 1947 is one such enactment. A notification dated August 23, 1948 as amended upto date issued under Section 8 (1) of this Act directed that "except with the general or special permission of the Reserve Bank, no person shall bring or send into India (a) any gold coin, gold bullion, gold sheets or gold ingot whether refined or not....." Section 23A of the Act provided that the restrictions imposed by Section 8 (1) "shall be deemed to have been imposed under Section 19 of the Sea Customs Act, 1878 and all the provisions of that Act shall have effect accordingly....." The effect of S. 23A was that the contravention of the notification under Section 8 (1) attracted to it each and every provision of the Sea Customs Act 1878 in force for the time being including Section 167 (81) of the Sea Customs Act 1878 which was inserted by the Amending Act XXI of 1955.

12. It is to be noticed that Section 19 of the Sea Customs Act, 1878 authorised the imposition of prohibitions and restrictions on the import or export of goods by sea and land only. But the notification dated the 25th August 1948 issued under Section 8 (1) of the Foreign Ex-

change Regulation Act, 1947 restricted the bringing into India of gold from any place outside India by land, sea and air. Section 23A of the Foreign Exchange Regulation Act, 1947 created the fiction that the restriction had been imposed under Section 19 of the Sea Customs Act, 1878, so that all the provisions of that Act would be attracted to a breach of the notification. But the statutory fiction did not cut down the wide ambit of the notification or limit its application to imports and exports by sea and land only. An import of gold by air without the permission of the Reserve Bank was a breach of the notification, and the breach attracted to it the provisions of Section 167 (81) of the Sea Customs Act, 1878.

13. The matter may be looked at from another point of view. When the Sea Customs Act 1878 was passed, goods could be imported or exported by sea and land only. Transport by air was unknown. After the Second World War traffic by air began. There is force in the contention that the import or export by air is a species of import or export by land. The aircraft carrying goods lands or takes off from land. The prohibition or restriction on the import or export of goods by land is a prohibition or restriction on the import or export by aircraft, landing or taking off from land. A fraudulent evasion of the restriction imposed by the notification under Section 8 (1) of the Foreign Exchange Regulation Act, 1947 was punishable under Section 167(81) of the Sea Customs Act, 1878 and criminal conspiracy to evade the restriction was punishable under Section 120B of the Indian Penal Code.

14. In this connection a question arose whether customs duty was leviable on imports and exports whether a fraudulent evasion of the duty was punishable under Section 167 (81). The Sea Customs Act 1878 and the rules and notifications made thereunder set up a complete machinery for the levy of sea customs duties. Section 20 provided for a levy of customs duties on goods imported or exported by sea. Payment of the duty was enforced by compelling all foreign trade to pass through certain ports. Drastic powers were given for detection, prevention and punishment of evasions of duty. The Land Customs Act, 1924 set up the machinery for the levy of land customs duties, and Section 9 of the Act applied for the purpose of this levy several provisions of the Sea Customs Act 1878 with suitable modifications and adaptations.

Rules 53 to 64 contained in Part IX of the Indian Aircraft Rules 1920 framed under Sections 3 and 6 of the Indian Aircraft Act, 1911 provided for the levy of air customs duties. The duty was leviable under Rules 58 and 59 on goods imported or exported by air "as if such goods were chargeable to duties under the Sea Customs Act 1878". Rule 63 provided that all persons importing or exporting goods into and from India "shall, so far as may be observed, comply with and be bound by the provisions of the Sea Customs Act, 1878", with certain adaptations. The Indian Aircraft Act 1934 repealed the Indian Aircraft Act, 1911 but the Indian Aircraft Rules 1920 continued in force in view of Section 24 of the General Clauses Act, 1897. The Indian Aircraft Rules 1937 framed under Secs. 5 and 8 of the Indian Aircraft Act 1934 preserved and continued Part IX of the Indian Aircraft Rules 1920. Until the passing of the Customs Act 1962, Part IX of the Indian Aircraft Rules 1920 continued to be the basic law for the levy of air customs duties. On behalf of the appellants it was argued that (1) Rules could not authorise the levy of a tax, (2) Rules could not create a new offence punishable under Section 167 (81) of the Sea Customs Act 1878, (3) a contravention of the Rules was punishable under Section 10 of the Indian Aircraft Act, 1934 and not under Section 167 (81). On behalf of the respondent our attention was drawn to Section 16 of the Indian Aircraft Act 1934 which provided —

"The Central Government may, by notification in the official gazette, declare that any or all of the provisions of the Sea Customs Act, 1878, shall with such modifications and adaptations as may be specified in the notifications apply to the import and export of goods by air."

Counsel for the respondent argued that (1) the notification dated March 23, 1937 continuing Part IX of the Aircraft Rules 1920 was a sufficient declaration under Section 16; (2) Section 16 was a piece of conditional legislation, and by force of Section 16 and on the declaration being made the duty became leviable on goods imported and exported by air, and a fraudulent evasion of duty became punishable under Section 167 (81) of the Sea Customs Act, 1878. We do not think it necessary to express any opinion on these questions having regard to our conclusion that a fraudulent evasion of the restriction imposed by Section 8 (1) of the

Foreign Exchange Regulation Act, 1947 was punishable under Section 167 (81).

15. As to the second question the contention was that the evidence disclosed a number of separate conspiracies and that the charge of general conspiracy was not proved. Criminal conspiracy as defined in Section 120A of the I. P. C. is an agreement by two or more persons to do or cause to be done an illegal act or an act which is not illegal by illegal means. The agreement is the gist of the offence. In order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of persons co-operate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of his group only. The cases illustrate the distinction between a single general conspiracy and a number of unrelated conspiracies. In *S. K. Khetwani v. State of Maharashtra*, 1967-1 SCR 595 = (AIR 1967 SC 450) *S. Swaminatham v. State of Madras*, AIR 1957 SC 340 the court found a single general conspiracy while in *R v. Griffiths*, 1965-2 All ER 448 the Court found a number of unrelated and separate conspiracies.

16. In the present case, there was a single general conspiracy to smuggle gold into India from foreign countries. The scheme was operated by a gang of international crooks. The net was spread over Bombay, Geneva, Beirut and Bahrein. Yusuf Merchant and Pedro Fernandez

supplied the brain power, Murad Aaharanoff remitted the funds, Lakshmandas Kochra and Rabiyaibai supplied the finances, Pedro Fernandez and the Shuhaibar brothers sent the gold from Geneva and the Middle East, carriers brought the gold hidden in jackets, mechanics concealed and removed gold from aircrafts and others helped in contacting the carriers and disposing of the gold. Yusuf, Pedro and Murad and Lakshmandas were permanent members of the conspiracy. They were joined later by Kochra, the Shuhaibar brothers and Lori and other associates. The original scheme was to bring the gold from Geneva. The nefarious design was extended to smuggling of gold from the Middle East. There can be no doubt that the continuous smuggling of gold sent by Pedro from Geneva during February 1956 to February 1958 formed part of a single conspiracy. The settlement of accounts between Yusuf and Pedro at Beirut did not end the original conspiracy. There can also be no doubt that the smuggling of gold from Beirut by the Shuhaibar brothers and from Bahrein by their agent Lori were different phases of the same conspiracy. The main argument was that the despatch of gold from Geneva was the result of one conspiracy and that the despatch of gold from the Middle East was the result of another separate and unrelated conspiracy. The Courts below held, and in our opinion rightly, that there was a single general conspiracy embracing all the activities. Pedro had a share in the profits of the smuggling from Geneva. He got also a share of Yusuf's profits from the smuggling of the Middle East gold. Apparently Shuhaibar brothers and Lori had no share in the profits from the smuggling of the Geneva gold but they attached themselves to the general conspiracy originally devised by Yusuf and Pedro with knowledge of its scheme and purpose and took advantage of its existing organization for obtaining finances from Kochra and Rabiyaibai and for remittances of funds by Yusuf. Each conspirator profited from the general scheme and each one of them played his own part in the general conspiracy. The second contention is rejected.

17. As to the third question, we find that on or about February 22, 1962 the prosecution took out a summons to the Deputy Accountant General Telegraphs Check Office, Calcutta, for the production of all records pertaining to 15 cable addresses including "Subhat" and "Nazneen"

together with the summons under Section 171A previously issued by the customs officers to the Telegraphs Check Office, for the production of the cables and the receipts given by the customs officers to the Telegraphs Check office for the cables so produced. Pursuant to the summons issued on February 22, 1962 Mr. Madhavan, Superintendent of the Telegraphs Check Office, Calcutta, produced in court the cables, summons and receipts. All the cables relating to the aforesaid 15 cable addresses, and two more addresses with which the appellants were concerned were exhibited at the trial. The summons under Section 171A was a consolidated summons issued by the customs officer to the Telegraphs Check Office for the production of the cables relating to the investigations in the present case and several other cases. The receipt was a consolidated receipt for the cables produced under the summons. Affidavits were filed by Mr. P. C. Kalla, Senior Deputy Accountant, Post and Telegraphs and Mr. S. K. Srivastava, an Additional Collector of Customs, Calcutta claiming privilege under Section 124 of the Evidence Act in respect of the disclosure of the other cable addresses mentioned in the summons and receipts and the cables sent to those addresses. The learned Magistrate upheld this claim of privilege. In our opinion, the privilege was not properly claimed under Sec. 124. It is difficult to say that the other cable addresses and cables were communications to a public officer in official confidence. However, we find that the other addresses and cables were required in connection with investigations unconnected with the present case and did not relate to any person or persons concerned in the offences for which the appellants were being tried. The other cables and cable addresses were not relevant to the defence, and their non-disclosure has not occasioned any failure of justice.

18. As to the fourth question it appears that Pedro Fernandez was a material witness. In 1959 he wrote a letter to Yusuf stating that he was willing to come to India and to be examined as a witness. The prosecution tried to contact him but his whereabouts could not be traced. On April 13, 1962 the defence applied for the issue of a commission "to the appropriate authority or court either in Switzerland or in United Kingdom or in Pakistan for examination of Pedro Fernandez and Cinness as witnesses for the

defence". Except stating that the defence undertook to pay all expenses and supply all relevant information, the application did not give any other particulars. The learned Magistrate rejected the application. He held and in our opinion rightly that the application was misconceived and proper grounds for the issue of the commission under Section 503 of the Code of Criminal Procedure had not been made out. The defence did not produce any letter from Pedro or any other material indicating that he was willing to be examined on commission. Even his address was not given. The Court could not issue a roving commission to a court or authority either in Switzerland or in United Kingdom or in Pakistan. The application was not made in good faith and was liable to be rejected on this ground alone.

19. As to the last question, we find that examination-in-chief of P.W. 50 Ali commenced on October 7, 1960 and was concluded on October 10, 1960. His cross-examination commenced on August 21, 1961 and was concluded on September 4, 1961. On March 6, 1962 and again on June 21, 1962 the defence applied for recalling Ali for cross-examination. The learned Magistrate rejected the two applications. According to the defence Ali was repentant and wanted to say that he had given false evidence. In our opinion, no ground was made out for recalling Ali. There was no affidavit from Ali nor was there any other material showing that his testimony was incorrect in any material particular. The Court has inherent power to recall a witness if it is satisfied that he is prepared to give evidence which is materially different from what he had given at the trial. In this case there was no material upon which the Court could be so satisfied. The learned Magistrate rightly disallowed the prayer for recalling Ali.

20. Mr. Jethmalani argued that the rough notes of statements given by Yusuf to the customs officers had been destroyed and that the defence was thereby prejudiced. This point was not taken either in the trial court or in the High Court. In our opinion, Counsel ought not to be allowed to raise this new point for the first time in this Court.

21. On the merits, we find that the two courts have recorded concurrent findings of fact. Normally this Court does not re-appraise the evidence unless the findings are perverse or are vitiated by any error of law or there is a grave mis-

carriage of justice. The Courts below accepted the testimony of the accomplice Yusuf Merchant. Section 133 of the Evidence Act says:—

"An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

Illustration (b) to Section 114 says that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. The combined effect of Sections 133 and 114 Illustration (b) is that though a conviction based upon accomplice evidence is legal the Court will not accept such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material particulars. The corroboration must be from an independent source. One accomplice cannot corroborate another, See *Bhiva Doulu Patil v. State of Maharashtra*, 1963-3 SCR 830 = (AIR 1963 SC 599), *R. v. Baskerville*, 1916-2 KB 658. In this light we shall examine the case of each appellant separately.

Case of Accused No. 8 Mohamed
Hussain Umar Kochra
(Cr. A. No. 139 of 1966)

22. Yusuf Merchant deposed that Kochra and his mother-in-law, A-7 Rabiya-bai acted as financiers after the fourth transaction, that Kochra's cable address "Nazneen" at 19, Erskine Road and his telephone was used in connection with the gold smuggling activities. The arrangement was that cables addressed to "Nazneen" would be received at No. 19, Erskine Road and would then be forwarded to the Warden Road residence of Rabiya-bai or the Napean Sea Road residence of Kochra and that on receiving phone messages Yusuf would collect the cables. Yusuf's testimony has been corroborated in material particulars.

23. Kochra's mother resided at 10, Erskine Road, 4th floor, Esmail Building, Bombay-3. Exhibit Z70 dated February 19, 1957 is the application for the registration of "Nazneen". This document purports to have been signed by Ismail Kader, a domestic servant of Kochra's mother. It was proved that the signature "Ismail Kader" and the address 19, Erskine Road, 4th floor, Esmail Building,

Bombay-3 on Ex. Z-70 were in the handwriting of Rajabali Karmalli, another servant of Kochra's mother. Rajabali Karmalli lived in Kochra's garage in Napean Sea Road. Kochra's mother was invalid and Kochra held a power-of-attorney from her for management of the family property. Rajabali Karmalli was under Kochra's control and was his trusted servant. Kochra had his office in the ground floor of the building at 19, Erskine Road and his denial that he had no office there is false. Both Rajabali Karmalli and Ismail Kader have now disappeared and cannot be traced. Several cables sent to Nazneen in connection with the gold smuggling have been exhibited. The other cables could not be traced. Kochra registered "Nazneen" because he desired to join the conspiracy and received the cables sent to this address. The registration of Nazneen was not procured by Yusuf in collusion with Rajabali Karmalli or Ismail Kader. Though Yusuf surreptitiously used other addresses for the receipt of his cables, Nazneen was used with the full knowledge and approval of Kochra.

24. On or about August 13, 1957 Yusuf and Hassan went to Beirut for inducing the Shuhaibar brothers to join the conspiracy. About August 15, Kochra's wife Rukaiyabai and Hassan's wife reached Beirut. A cable (Z-745) dated August 16, 1957 was sent from Beirut informing "Nazneen" that Rukaiyabai had arrived safely. On a consideration of the materials on the record including the written statements of Kochra and Rukaiyabai the courts below have found that this cable was received by Kochra. The cable Z-745 was produced by PW 207 on April 4, 1962, after the examination of Yusuf Merchant had been concluded. An application for recalling Yusuf filed on the same date was rejected. A point was made that Kochra was prejudiced by the rejection of this application. Counsel suggested that Yusuf sent the cable Z-745 from Beirut and that this fact could be established if Yusuf was recalled for cross-examination. We shall assume that Yusuf despatched the cable. But the fact remains that the cable was received at "Nazneen". It was an intimation of the safe arrival of Rukaiyabai at Beirut and was obviously meant for her husband. The Courts below rightly held that the cable was received by Kochra, and that there was no substance in the defence case that he was not aware of the existence of Nazneen. The rejection of the applica-

tion for recalling Yusuf did not prejudice Kochra.

25. The carrier Crant Powell arrived in Calcutta on November 3, 1957 and was arrested. PW 127 Chandiwalla and Jagbandhudas were sent to Calcutta to contact the carrier. Yusuf's brother PW 50 Ali also went to Calcutta. On November 6, Ali sent a telephone message to Kochra informing him of a message from Chandiwalla that there was a raid in his room by the customs officials and that the carrier had not come. Kochra received the message on his telephone No. 72328 at his residence. Exhibit Z-459 dated November 7, 1957 is a copy of the bill for this telephone call. Thereafter Kochra contacted Chandiwalla on the telephone and assured him that nothing would happen and asked him to return to Bombay immediately. On November 7, 1958, Ali sent a phone message to Kochra at his telephone No. 72328 informing him that Chandiwalla was returning to Bombay. Exhibit Z-459 dated November 7, 1957 is the copy of the bill for this telephone call. Taking into account Kochra's statement, Ex. Z-703 para. 6 and his written statement paragraph 72 the Courts below rightly held that Kochra received the two telephone messages from Ali relating to matters connected with the gold smuggling. Even after the receipt of these messages Kochra allowed the use of Nazneen for receipt of cables from Pedro and acceptance of cables by Yusuf. PW 31 Mastakar, proved that Kochra did not send any complaint to the telegraphic office that Nazneen was registered or was used without his authority.

26. Mr. Mehta suggested that (a) Nazneen was used before Kochra joined the conspiracy and that (b) Kochra did not join the conspiracy on or about April 8, 1957 when the fifth carrier came and in this connection read to us several documents. The Courts below rejected this contention and we find no reason for reappraising the evidence. It may be pointed out that by the cable Ex. Z-69 dated March 14, 1957 and the letter Ex. Z-71 dated March 17, 1957 Yusuf informed Pedro of the registration of Nazneen and by the cable Ex. Z-77 dated March 17, 1957 Yusuf asked him to send the cables to the new address. The materials on the record show that Kochra had then joined the conspiracy and the address Nazneen was used for despatch and receipt of cables after March 17, 1957. Mr. Mehta commented on the fact that Yusuf

implicated Kochra for the first time in his statement given on April 30, 1957 and that Yusuf had not referred to Kochra in his earlier statements. Yusuf at first wanted to shield his friend Kochra. The customs officers discovered the existence of Nazneen on or about April 20, 1959. On being then questioned with regard to Nazneen, Yusuf was compelled to disclose his connection with Kochra and the circumstances under which Nazneen came to be registered.

27. The material on the record clearly establishes the connection of Kochra with the conspiracy and materially corroborates the testimony of Yusuf Merchant. The Courts below rightly convicted Kochra.

Case of Accused No. 12
Maganlal Naranji Patel
(Cr. A. No. 140 of 1966)

28. The prosecution case is that since May 3, 1957 Maganlal was buying the smuggled gold from Yusuf Merchant and that when consignments of gold bearing the mark "Chaisso" and having the fineness of about 99.99 came from Beirut, Yusuf Merchant and Maganlal had the gold melted in the silver refinery of P.W. 127 Chandiwalla at Bandra by his employees Bahadulla and Shankar in December 1957 and Ram Naresh and Mohamed Rafique in February 1958, with a view to remove the mark "Chaisso" and to reduce the fineness of the gold. The mark "Chaisso" and the 99.99 fineness indicated that the gold was of foreign origin. The object of melting the gold and reducing the fineness was to destroy the tell-tale evidence of its origin. For the purpose of implicating Maganlal the prosecution relied on the testimony of P. W. 2 Yusuf Merchant, P.W. 127 Mohamed Chandiwalla and P.W. 68 Mohamed Rafique. It is common case that Yusuf and Chandiwalla are accomplices. The question in issue is whether P.W. 69 Mohamed Rafique was also an accomplice. The two Courts held that Rafique was not an accomplice but we are unable to agree with this finding. The melting was done late in the night after normal working hours. The melting of gold in the silver refinery was unusual. On no other occasion gold was melted in the refinery. Rafique was asked to keep the matter secret. For two hours' secret work, he got about Rs. 10 though his daily wage was Rs. 3 only. Once, the gold was brought in a jacket usually worn for carrying smuggled gold. In his statement Ex. 25-K Yusuf admitted that of the two

workmen Rafique had more intimate knowledge of the reason for the secret handling of the gold. The secrecy of the job, the unusual hours, the special remuneration, the carriage of gold in jackets, the user of silver refinery for the melting of gold, the inside knowledge of Rafique of the purpose of the melting, lead to the irresistible conclusion that Rafique was knowingly a party to melting of smuggled gold with intent to destroy the evidence of its foreign origin and to evade the restrictions on its import. He was clearly a particeps criminis in respect of the offences with which Maganlal was charged and was liable to be tried jointly with him for those offences. As pointed out by Lord Simonds in *Davis v. Director of Public Prosecution*, 1954 AC 378 at pp. 400-402 a particeps criminis in respect of the actual crime charged is an accomplice. The witness concerned may not confess to his participation in the crime, but it is for the Court to decide on a consideration of the entire evidence whether he is an accomplice. Rafique was an accomplice, and his evidence cannot be used to corroborate the evidence of Yusuf and Chandiwalla, the other accomplices. There is no corroboration of the evidence of the accomplices from an independent source. On the materials on the record it is not safe to convict Maganlal of the offences with which he is charged.

29. We may also point out that the positive case of Yusuf and Chandiwalla was that Rafique melted the gold in February 1958. The books of Chandiwalla show that in February 1958 Rafique did not work in the refinery. In his place one Kedar worked there. Chandiwalla suggested that Kedar was another name of Rafique. This is an impossible story. Rafique himself did not say that his other name was Kedar. Thumb impressions of the workers used to be taken on the muster roll of the refinery but that document was not produced and the identity of Rafique with Kedar was not established. The High Court rightly held that Kedar and Rafique were different persons. The High Court made a new case for the prosecution and held that Rafique might have melted the gold towards the latter part of December 1958. Mr. Khandelwala frankly stated that he could not support this finding. In this Court Mr. Khandelwala maintained that the gold was melted by Rafique in February 1958 and that Rafique was also known as Kedar. For the reasons given above, we are unable

to accept this case. In our opinion, Criminal Appeal No. 140 of 1966 should be allowed and accused No. 12 Maganlal Naranji Patel must be acquitted of all the charges.

Case of Accused No. 16 N. B. Mukherjee (Cr. A. No. 141 of 1966)

30. Mukherjee was the engineer-in-charge of Group A base maintenance. According to the prosecution Mukherjee was responsible for removing gold from aircrafts bringing gold from the Middle East. P.W. 2 Yusuf Merchant, P.W. 49. Maxie Miranda, P.W. 129 C. B. D'Souza, P.W. 143 Bhide and P.W. 148 Zahur, implicated Mukherjee. All these witnesses are accomplices. The High Court found that their evidence has been corroborated in material particulars from independent sources. We are unable to accept this finding. Mr. Khandelwala argued that the following circumstances corroborated the evidence of the accomplices:—

(1) the reference to Mukherjee in Ex. Z-209, a letter dated July 8, 1958 from Lori to Yusuf, and Ex. Z-226, a letter dated August 16, 1958 from Bello to Yusuf;

(2) Mukherjee's leave application Z-558 dated December 13, 1958 and Z-313 dated January 18, 1959, a cable from Yusuf to Jamal;

(3) simultaneous statements of a number of accomplices; and

(4) Ex. Z-697 the retracted confession of Bello. Mr. Khandelwala did not rely on any other circumstances.

31. In Ex. Z-209 Lori referred to Bello's friend. Ex. Z-226 is a letter of Bello to Yusuf referring to "our friend." These two letters do not refer to Mukherjee by name. There is no corroboration from any independent source, that Mukherjee was one of the co-conspirators referred to in these letters. The two letters cannot be regarded as a corroboration of Yusuf's evidence.

32. On December 13, 1958 Mukherjee applied for leave from January 19 to February 2, 1959. The leave application Ex. Z-558 was allowed on December 14, 1958. This document is innocuous and does not implicate Mukherjee in the crime. Maxie Miranda now says that Mukherjee asked Maxie not to remove the gold during his absence on leave, that Maxie desired to remove the gold surreptitiously without Mukherjee's knowledge and arranged for the change in the place of concealment of gold in aircrafts and that accordingly Z-213, a cable dated January 18, 1959 was sent by Yusuf to

Jamal informing the latter that a new place of concealment had been airmailed. Ex. Z313 on the face of it does not implicate Mukherjee. The prosecution had to rely entirely on the evidence of Maxie Miranda and other accomplices for the purpose of implicating Mukherjee. Ex. Z-558 and Ex. Z313 do not connect Mukherjee with the crime.

33. Section 114 of the Evidence Act says thus as to Illustration (b): "A crime is committed by several persons, A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable." If several accomplices simultaneously and without previous concert give a consistent account of the crime implicating the accused the Court may accept the several statements as corroborating each other, see *Haroon Haji Abdulla v. State of Maharashtra*, 70 Bom LR 540 at p. 545=(AIR 1968 SC 832 at p. 837). But it must be established that the several statements of accomplices were given independently and without any previous concert, see *Bhuboni Sahu v. The King*, 76 Ind App 147 at pp. 156-157=(AIR 1949 PC 257 at pp. 260-261). In the present case the Rani of Jhansi was searched on February 2, 1959. Yusuf gave his first statement on February 3, 1959. He did not then implicate Mukherjee. Maxie Miranda gave his statement on February 4, 1959 implicating Mukherjee. No other accomplice made a statement on that date. There was ample opportunity thereafter for the accomplices meeting together and conspiring to implicate Mukherjee. On February 6, 1959 C. B. D'Souza, Bhide and Yusuf made separate statements implicating Mukherjee. On June 27, 1959 Zahur made a similar statement. These statements cannot be regarded as having been made independently and without any previous concert and do not amount to sufficient corroboration of the accomplice evidence.

34. On February 11, 1959 Bello made a confession implicating Mukherjee. At the trial he retracted the confession. Under Section 30 the Court can take into consideration this retracted confession against Mukherjee. But this confession can be used only in support of other evidence and cannot be made the foundation of a conviction, see *Bhuboni Sahu's case*, 76 Ind App 147 at p. 156=(AIR 1949 PC 257 at p. 260). It cannot be used

to support the evidence of the other accomplices.

35. In our view, Criminal Appeal No. 141 of 1966 should be allowed and Mukherjee should be acquitted of all the charges.

Case of Accused No. 15 N. S. Rao (Cr. A. No. 142 of 1966)

36. In this case there is sufficient independent corroboration of Yusuf's testimony implicating Rao. Counsel for the appellant did not dispute the finding of the High Court that Rao is guilty of the offences with which he had been charged. The High Court rightly convicted N. S. Rao.

Case of Accused No. 14 Parasuram T. Kanel (Cr. A. No. 143 of 1966)

37. Counsel did not dispute the finding of the High Court that there is sufficient independent corroboration of accomplice evidence implicating Kanel. We have perused the records and we find that the High Court rightly convicted Kanel of the charges against him.

Case of Accused No. 6 Lakshmandas Chhaganlal Bhatia (Cr. A. No. 144 of 1966)

38. The Courts below accepted the testimony of Yusuf Merchant implicating Lakshmandas in the conspiracy and other specific charges against him. Lakshmandas acted as the financier in the first four transactions and subsequently participated in the disposal of gold. Yusuf's testimony has been corroborated in material particulars. It is sufficient to mention two circumstances which connect Lakshmandas with the criminal conspiracy and other charges against him.

39. Exhibit Z-20 shows that on November 26, 1956 Lakshmandas had the telegraphic address "Subhat" registered. The application for registration of "subhat" was signed by Lakshmandas. The address for the delivery of the cables was Lakshmandas Chhaganlal Bhatia, 8, Little Gibbs Road, Alimanor Building, 1st Floor, Bombay 6. Numerous cables with regard to the smuggling of gold were received by Lakshmandas at the telegraphic address "Subhat". The evidence shows that the address "Subhat" was registered for the purpose of the smuggling activities only. It does not appear that any cable relating to any legitimate business was received by Lakshmandas at this telegraphic address.

40. The third carrier J. P. Hoffman arrived in Delhi. The contact of Lakshmandas with this carrier is clearly established. Ex. Z-64 is a cable dated March 6, 1957 from Yusuf to Pedro stating that he was awaiting the party at Hotel Marina in Delhi and that the code name was 'captain'. The passenger manifest of the Indian Airlines Corporation (Ex. Z-566) shows that A-14 P. T. Kanel the brother-in-law of Lakshmandas travelled from Bombay to Delhi by flight No. 125/66 on March 7, 1957. The reservation chart Z-566A shows that the reservation for Kanel was made from telephone No. 70545 of Lakshmandas. The register of Hotel Marina, New Delhi, Ex. Z-65 shows that Kanel arrived at the Hotel on March 8, 1957 at 7-30 A. M. and occupied room No. 22. At the Hotel Kanel declared that Thamba Chetty Street, Madras, was his permanent address, though in fact he had no such address at Madras. The telephone register of Marina Hotel Ex. Z-65C shows that on March 8, Kanel attempted to contact telephone No. 70545 but the call was cancelled. The passenger list of Indian Airlines Corporation Ex. Z-567A shows that a seat was booked for Bhatia by plane from Bombay to Delhi and the manifest shows that he travelled by the plane on March 9, 1957. The manifest of K.L.M. Airways Ex. Z-489 shows that Hoffman travelled by plane from Geneva and arrived at Palam Airport, New Delhi, on March 9. The register of Hotel Marina Ex. Z-66 shows that Hoffman arrived at the Marina Hotel on March 8, at 1-40 A. M. and occupied room No. 39. The bill of Hotel Marina Ex. Z-65B shows that Kanel was charged Rs. 3/8/- extra for a guest and that he left the Hotel on March 10. The passenger manifest Ex. Z-537 shows that on March 10, 1957 Kanel and Lakshmandas travelled by the same plane from Delhi to Bombay and their ticket Nos. were 194885 and 194886. There is nothing to show that Kanel and Lakshmandas came to Delhi for any legitimate business. The documentary evidence completely corroborates Yusuf's testimony that Kanel came to Delhi, and later he was joined by Lakshmandas and that the object of their visit was to contact the carrier Hoffman and to receive from him the smuggled gold. The Courts below rightly convicted Lakshmandas of the charges against him.

41. Counsel for the appellants pleaded for a mitigation of the sentences. The

Courts below passed on them sentences of rigorous imprisonment on the charge of conspiracy and on the individual charges for which they were convicted and directed that the sentences on all the charges except the charge of criminal conspiracy would run concurrently. Counsel argued that a separate punishment on the conspiracy charge was not justified and referred us to the following passage in Ghanville William's Criminal Law, 2nd Ed., (General Part), Article 220, page 685:—

"Conspiracy is a useful feature on which to seize for punishing inchoate crime; it is not, in general, an aggravating factor when crime has been committed. Where there is a prosecution for a consummated crime and for conspiracy to commit it, no separate punishment would be justifiable on the conspiracy count. However, the fact that criminals are organized professionally for crime may be taken into consideration in determining the punishment for the crime."

42. We find that the offence under Section 167 (81) of the Sea Customs Act, 1878 was punishable with imprisonment for a term not exceeding two years or to fine or to both. A party to a criminal conspiracy to commit this offence was punishable under S. 120B (1) of the Indian Penal Code in the same manner as if he had abetted the offence. A criminal conspiracy is a separate offence, punishable separately from the main offence. The sentences passed by the Courts below cannot be said to be illegal. However, in the present case, Yusuf and Pedro, the ring leaders of the conspiracy, have escaped punishment. There has been a prolonged trial commencing in July 1963 and ending in conviction on September 30, 1963. Considering all the circumstances, we think, that the sentences on all the charges should run concurrently.

43. In the result, Criminal Appeal No. 140 of 1966 is allowed and Maganlal Naranji Patel is acquitted of all the charges. Criminal Appeal No. 141 of 1966 is also allowed and N. B. Mukherjee is acquitted of all the charges.

44. Criminal Appeals Nos. 139 of 1966, 142 of 1966, 143 of 1966 and 144 of 1966 are allowed in part and we direct that all the sentences passed on the appellants will run concurrently. In other respects, the appeals are dismissed.

Order accordingly.

AIR 1970 SUPREME COURT 58

(V 57 C 14)

(From: Allahabad)*

S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.

Municipal Board, Sitapur (In both the Appeals), Appellant v. 1. Prayag Narain Saigal (In C. A. No. 847 of 1966); 2. Firm Moosaram Bhagwandas (In C. A. No. 848 of 1966), Respondents.

Civil Appeals Nos. 847 and 848 of 1966, D/- 16-1-1969.

Municipalities — U. P. Municipalities Act (2 of 1916), Ss. 126 (1) (x), 131, 132, 135, 94 — Imposition of water rate by a Municipal Board — Preliminary proposal incorporated and mentioned in special resolution, but not separately published — Omission to do so is mere irregularity — Omission to invite fresh objections to modified proposal of levying tax at reduced rate — No prejudice is caused to the inhabitants — Non-publication of modified proposal is mere irregularity and defect is cured by S. 135 (3) — Non-publication of special resolution in manner prescribed by Section 94 — This defect also held to be cured by S. 135 (3) — W. P. Nos. 108 and 109 of 1962, D/- 20-1-1965 (All), Reversed. (Paras 6, 7, 8)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 693 (V 53)=

1966-1 SCR 950, Municipal Board Hapur v. Raghuendra Kripal 5

(1965) AIR 1965 SC 895 (V 52)=

1965-1 SCR 970, Raza Buland Sugar Co., Ltd., Rampur v. Municipal Board, Rampur 5

(1962) AIR 1962 SC 420 (V 49)=

1962-1 SCR 598, Bezar Swadeshi Vanaspathi v. Municipal Committee, Shegaon 5

Mr. S. C. Manchanda, Senior Advocate, (Mr. S. S. Shukla, Advocate, with him), for Appellant (In both the Appeals); Mr. C. B. Agarwala, Senior Advocate, (Mr. K. P. Gupta, Advocate, with him), for Respondent (In both the Appeals).

The following Judgment of the Court was delivered by

BACHAWAT, J.: These appeals are directed against orders of the Allahabad High Court (Lucknow Bench), quashing the imposition of a water rate imposed by the Municipal Board, Sitapur. Section 128 (1) (x) of the U. P. Municipalities

* (Writ Petns. Nos. 108 and 109 of 1962, D/- 20-1-1965 — All-LB).

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Act, 1916 (U. P. Act No. 2 of 1916) empowers the Board to impose a water tax on the annual value of buildings or lands or of both. Sections 131 to 135 lay down the procedure for imposing the tax. The High Court held that the levy was invalid as the Board did not comply with this procedure.

2. A municipal board desiring to impose the tax is required by Section 131 sub-section (1) to pass a special resolution framing the preliminary proposal for the tax. The Municipal Board, Sitapur, passed a special resolution on January 24, 1956 framing the proposal for the levy of water tax at the rate of 12 per cent per annum on the annual value of buildings and lands and exempting buildings and lands whose annual value was Rs. 24 or below.

3. Section 131 sub-section (2) requires the Board to prepare a draft of the rules in respect of the proposed tax. The Board duly prepared the necessary draft rules. Section 131 sub-section (3) requires the Board to publish in the manner prescribed in Section 94 the proposal and the draft rules along with a notice in the form set forth in Schedule III. The draft rules along with notice were published in the *Rashtra Sandesh*, a local paper published in Hindi. The proposal was not separately published. But the proposal was to be found in the draft rules published in the local paper. Objections against the proposal were filed by the inhabitants of the municipality. The Board duly considered the objections and passed orders thereon under Section 132 sub-section (1). After considering the objections and the recommendations of the prescribed authority under Section 133 sub-section (1), the Board decided to modify the original proposal by reducing the tax to 10 per cent on the annual value and by exempting all lands and buildings whose annual value was Rs. 36 or below. Section 132 sub-section (2) requires the Board to publish the modified proposal along with a notice indicating that it is in modification of the original proposal, and Section 132 sub-section (3) provides that the objections to the modified proposal shall be dealt with in the manner prescribed by sub-section (1). The modified proposal was not published as required by Section 132 sub-section (2). The prescribed authority acting under Section 132 sub-section (2) duly sanctioned the final proposal and made the necessary rules in respect of the tax. It may

be noted that the Commissioner, Lucknow Division, was the prescribed authority. On receipt of the order of sanction and the copy of the rules, the Board acting under Section 134 sub-section (2) passed a special resolution on April 23, 1957 directing the imposition of the tax with effect from October 1, 1957. This special resolution was not published in the manner prescribed by Section 94. On receipt of the special resolution the prescribed authority acting under Section 135 sub-section (2) notified in the official gazette dated August 3, 1957 the imposition of the tax from the appointed date. Section 135 sub-section (3) provides that "a notification of the imposition of a tax under sub-section (2) shall be conclusive proof that the tax has been imposed in accordance with the provisions of this Act."

4. The respondents raised three objections against the validity of the imposition of the water tax: (1) omission to publish the preliminary proposal separately in the manner prescribed by Sec. 131 sub-section (3) read with Section 94; (2) non-publication of the modified proposal in accordance with S. 132 sub-section (2); and (3) non-publication of the special resolution directing the imposition of the tax in accordance with Section 94. The procedure laid down by the Act was not strictly complied with before imposing the tax. But all the procedural defects in the imposition of the tax are cured by Section 135 sub-section (3), where, as in this case, the Municipal Board has the power to levy the tax and has passed the special resolution necessary for the imposition of the tax and the defects are not of a fundamental character. The procedural defects cannot be regarded as fundamental or as invalidating the imposition, if no substantial prejudice is caused thereby to the inhabitants of the municipality. The issue of the notification under Section 135 sub-section (2) is conclusive proof that all necessary steps for the imposition of the tax have been taken in accordance with the provisions of the Act.

5. In *Municipal Board, Hapur v. Raghuvendra Kripal*, 1966-1 SCR 950 = (AIR 1966 SC 693) the Court held that the defect of non-publication of the special resolution proposing the tax in a local Hindi paper and omission to publish the draft rules as required by Section 131 sub-section (3) read with Section 94 sub-section (3) was cured by Section 135 sub-

section (3) and that the publication of the special resolution by affixing a copy of it on the notice board and by beat of drum was sufficient. In *Raza Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur*, 1965-1 SCR 970 = (AIR 1965 SC 895) the Court held that the publication of the proposals and the draft rules in Hindi in a local Urdu paper was sufficient compliance with Section 131 sub-section (3). In *Berar Swadeshi Vana-spahi v. Municipal Committee, Shegaon*, 1962-1 SCR 596 = (AIR 1962 SC 420) the Court held that in view of the similar provisions of section 67 sub-section (7) of the C. P. and Berar Municipal Act, 1922, the validity of imposition of the octroi tax could not be challenged on the ground that the objections were not considered on the merits.

6. As to the first objection we find that there was substantial compliance with Section 131 sub-section (3). The draft rules were published in the *Rashtra Sandesh*. They incorporated the preliminary proposal and mentioned the special resolution dated January 24, 1956 by which the proposal was framed. There was thus sufficient publication of the proposal. The proposal was not separately published in the prescribed form, but the omission to do so was a mere irregularity. The inhabitants of the municipality had due notice of the proposal. The object of the publication under Section 131 sub-section (3) is to inform the inhabitants of the proposal so that they can file their objections to it. That object was fully achieved by the publication in the *Rashtra Sandesh*.

7. As to the second objection, we find that the original proposal was to levy water tax at the rate of 12 per cent per annum on the annual value. The inhabitants had full opportunity to raise objections to the rate of the tax and to submit whether the rate should be 12 per cent or 10 per cent or less. After considering their objections, the Board proposed to levy the tax at the reduced rate of 10 per cent per annum on the annual value. No prejudice was caused by not inviting fresh objections to the modified proposals of levying the tax at the reduced rate. It is interesting to notice that the U. P. Municipalities (Amendment) Act, 1964 (U. P. Act No. XXVII of 1964) inserted in Section 132 sub-section (2) the following proviso: "Provided that no such publication shall

be necessary where the modification is confined to reduction in the amount or rate of the tax originally proposed." This proviso was not in force on January 24, 1956. But it does indicate that it is unnecessary to publish a modified proposal reducing the rate of tax originally proposed. The original proposal exempted all buildings and lands whose annual value was Rs. 24 or below. The modified proposal raised the exemption limit and provided that all buildings and lands whose annual value was Rs. 36 or below would be exempted. The inhabitants of the municipality had full opportunity to raise objections as to the exemption limit as originally proposed and to submit whether buildings and lands of the value of Rs. 24 or Rs. 36 or more should be exempted. No prejudice was caused by not inviting fresh objections to the modified proposal raising the exemption limit. The inhabitants submitted all objections which they could possibly raise both with regard to the rate of tax and the exemption limit. In our opinion, the non-publication of the modified proposal was a mere irregularity, and the defect was cured by Section 135 sub-section (3).

8. As to the third objection it is to be observed that Section 134 sub-section (2) does not provide for the publication of the special resolution passed under it. Assuming that this special resolution had to be published under the general provisions of Section 94, we think that the non-publication was a mere irregularity. The inhabitants had no right to file any objections against the special resolution. They had clear notice of the imposition of the tax from the notification published in the official gazette on August 3, 1957. The defect of the non-publication of the special resolution in the manner prescribed by Section 94 was cured by Sec. 135 sub-section (3). The High Court was in error in quashing the imposition of the water tax.

9. In the result, the appeals are allowed with costs in this Court and in the High Court, the order of the High Court is set aside and the writ petitions are dismissed. There will be one hearing fee.

Appeals allowed.

AIR 1970 SUPREME COURT 61

(V 57 C 15)

(From Bombay)*

M. HIDAYATULLAH, C. J. AND

G. K. MITTER, J.

Shaikh Mahamad Umarsaheb, Appellant
v. Kadalaskar Hasham Karimsab and
others, Respondents.

Civil Appeal No. 2322 of 1968, D/- 11-8-1969.

(A) Municipalities — Maharashtra Municipalities Act (40 of 1965), Section 21 (7) — Power to summon any person as court witness — Power is wider under Section than under Order 16, Rule 14, Civil P. C. — Section does not prescribe any prerequisite — (Civil P. C. (1908), Order 16, Rule 14).

Under Section 21 (7), the Judge is given powers wider than those given by the Code of Civil Procedure under Order 16, Rule 14, inasmuch as the section does not prescribe any prerequisite to the examination of a person as court witness as envisaged by the Code. The Judge has jurisdiction to call persons as court witnesses who had been cited by the election petitioner as his witnesses earlier and the Judge had refused to issue summons to them when asked to do so. The powers of the court in this respect are of wide amplitude, specially when investigation is being made into allegations about the commission of a corrupt practice. A party can have a real cause for grievance if he asks for an opportunity to rebut the evidence of such witnesses and is denied the same. AIR 1969 SC 692, Ref.

(Para 5)

(B) Constitution of India, Articles 226 and 227 — Jurisdiction and powers under — Exercise of — Maharashtra Municipalities Act (40 of 1965), Section 21 (1) — Limitation for filing election petition — Ten days prescribed under Section 21 (1) from date of publication of result of election — Result first published in Gazette on 8-6-1967 — Same result again published in Gazette on 15-6-1967 — Election petition filed on 24-6-1967 i. e. within ten days from second publication as stated in petition — Order allowing petition — If time was counted from first publication, petition was beyond time — This point not raised by appellant before trial court which could have considered which publi-

*(Spl. Civil Appln. No. 2053 of 1968, D/- 4-10-1968—Bom.)

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cation was to be taken for computation of period — Held there was no error apparent on face of record before High Court — Jurisdiction under Article 226 could have been exercised by issue of writ of certiorari — Nor could High Court have set aside order of trial court under Article 227 — Power of superintendence is confined to seeing that trial court had not transgressed limits imposed by Act.

(Para 6)

(C) Civil P. C. (1908), Order 14, Rule 1 — Framing of issues — Unsatisfactory nature of — Effect — Election petition — Charges of corrupt practice — Separate issue with regard to each charge not framed — Issues framed confusing and misleading — Appellant, however, knew exactly what points he had to meet and had contradicted evidence adduced by petitioner — Because of unsatisfactory nature of issues, whole trial held not vitiated.

(Para 7)

(D) Constitution of India, Articles 226 and 227 — Power of High Court under — Appreciation of evidence — It does not act as court of appeal.

Where the evidence adduced before the trial Judge was not so immaculate that another Judge might not have taken a different view, it cannot be said that there was no evidence on which the trial Judge could have come to the conclusion he did. When the trial Court accepts the evidence, the High Court which is not hearing an appeal cannot be expected to take a different view in exercising jurisdiction under Articles 226 and 227.

(Paras 5 and 7)

(E) Municipalities — Maharashtra Municipalities Act (40 of 1965), Sections 21 (1) and 22 (3) and (4) — Penalty for corrupt practice — Allegations for corrupt practice of serious nature falling under Section 22 (3) and (4) — Appellant found guilty thereof — Maximum penalty allowed under Act is disqualification for six years — Disqualification for five years imposed on appellant held not inappropriate.

(Para 9)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 692 (V 56) =

Civil Appeal No. 1519 of 1968,
D/- 29-11-1968, R. M. Seshadri
v. Vasanta Pai

5

Mr. N. N. Keswani, Advocate, for Appellant; M/s. R. B. Datar and S. N. Prasad, Advocates, for Respondent (No. 1); Mr. S. P. Nayar, Advocate, for Respondents (Nos. 2 to 4).

The following judgment of the Court was delivered by

MITTER, J.: This is an appeal by special leave from an order of the Bombay High Court dismissing in limine an application under Arts. 226 and 227 of the Constitution and refusing to quash the judgment and order of the Assistant Judge at Sangli rendered in Election Petition No. 10 of 1967. The facts are as follows.

2. On June 3, 1967 election of councillors to the Sangli City Municipality was held under the Maharashtra Municipalities Act, 1965 (hereinafter referred to as the 'Act'). The counting of votes took place with regard to Ward No. 25 on June 4, 1967. According to the election petition, the results were published in the Official Gazette on June 15, 1967 and the petition was filed on June 24, 1967. The petitioner who was himself a candidate for election from the said ward challenged the election of the appellant before us on several grounds set forth in para. 3 of the petition. The first of these was to the effect that the appellant had, with the help of his supporters, published an undated pamphlet and circulated the same on a large scale among the voters in Ward No. 25 and that the said pamphlet contained untrue, false and defamatory statements about the petitioner thereby prejudicing the voters generally against him and in particular instigating the Muslim voters to vote against him by arousing their religious sentiments. Another similar ground based on a defamatory pamphlet dated 30th May, 1967 was urged in the petition. Charges of terrorising voters and securing votes by false persuasion were also levelled therein. Statements were made in the petition that the appellant's name as councillor had been declared in the official Gazette on June 15, 1967 and the petitioner's cause of action had arisen on that date. The first of these was expressly accepted as correct in the written statement of the appellant and the second remained unchallenged. The appellant however repelled the charges mentioned above and denied that he was responsible for the publication of any of the impugned pamphlets. Of the four issues framed at the hearing of the petition, the first was

ments against the petitioner by publishing pamphlets?"

The petitioner gave evidence himself about the allegations in the petition to substantiate the charges raised by him. The appellant examined himself to contradict the said evidence. It appears that the petitioner had in the list of witnesses filed by him, mentioned the names of two persons, Hakim Abdul Rahiman Shaikh and Gopal Chintaman Ghugare and that these two persons had attended the court on certain days when they were not examined. On August 21, 1968 the petitioner made an application before the Judge for issuing summons on these two persons as his witnesses, but the learned Judge rejected that application. The appellant's case was closed on the same day and the arguments started on August 22, 1968. On that date the court adjourned the hearing of the case to August 24, 1968 for recording the evidence of these two witnesses in respect of whom an application had been made by the election petitioner on the previous day. The order Ex. 36 dated August 22, 1968 tends to show that the learned Judge was persuaded to do so by the mere fact that they were Government servants. He however recorded that the ends of justice required that these witnesses should be examined. He fixed August 24, 1968 for further bearing of the matter and directed the issue of summonses to these two persons. These two persons were examined on the 24th August as court witnesses and thereafter the argument of counsel was resumed and concluded. By judgment delivered on August 30, 1968 the learned Judge allowed the election petition holding in favour of the petitioner on the first issue. The appellant before us presented an application to the High Court under Articles 226 and 227 of the Constitution for quashing the order of the Judge; but the High Court dismissed the writ petition in limine on October 4, 1968 and the appellant has now come up before this court by special leave.

3. Learned counsel for the appellant raised five points before us. The first point was that the procedure adopted by the trial court was wrong in that the two witnesses who were examined as court witnesses had been cited by the election petitioner earlier and the learned Judge had in the exercise of jurisdiction vested in him refused to issue summonses to them when he was asked to do so on August 21, 1968. It was urged that

"whether the petitioner proved that opponent No. 1 who was elected as Municipal Councillor for Ward No. 25 had used malpractices at the time at the election by arousing religious sentiments of the voters and making defamatory state-

having rejected this application, it was not open to the Judge to examine these two persons as court witnesses and this was a serious irregularity which the High Court should have set right by quashing the order of the Judge based on the evidence of these witnesses. The second point was that the election petition was filed beyond the period prescribed by the Act and as such it was not maintainable. The third point was that the first issue which was decided against the appellant was so confusing and misleading that there was no fair trial of the petition to the prejudice of the appellant. The fourth point was that in any event there was no evidence of corrupt practice of which the appellant could be found guilty. The fifth point was that the order of the Judge disqualifying the appellant for a period of five years was unduly harsh and ought to be set aside.

4. With regard to the first point it is to be noted that the case of the election petitioner was that the appellant was guilty of publication of two pamphlets which cast serious aspersions on his character and conduct and prejudiced him materially in the eyes of the voters as a result whereof he lost the election and that the first of these also aroused the religious sentiments of the Muslim voters to his detriment. The appellant was found guilty of publication of the first pamphlet only. This was signed by six persons. There was no evidence as to where it was printed or who got it printed. The evidence adduced by the election petitioner was that the appellant had published all the pamphlets mentioned in the petition and distributed the same amongst the voters and the petitioner had come across the first pamphlet during the process of distribution. There can be no two opinions about the contents of the pamphlet being defamatory of the election petitioner's character. The pamphlet read:

"H. K. Kadalaskar, who contests the election from Ward No. 25 is an independent candidate, has been ostracized from the Muslim community and he has no support of the Muslim community and therefore nobody should vote for him.

While Kadalaskar was in charge of the management of the Kabarasthan, he was extracting Rs. 12 for allowing the members of Muslim community to bury their dead and had prohibited the burial of the dead bodies of dancing girls and had extracted hundreds of rupees from the persons whose dead were buried there. He

turned the Kabarasthan into a brothel and was trading in illicit liquor for which he was convicted. Recently he got published a pamphlet in the name of his mistress Noorjahan Bapulal Kavathekar to defame Mohamed Umar Shaikh and he is making some imputations against the private character of Mohamed Umar and Moulana Innan and nobody should vote for this mean-minded and anti-social person.

In a meeting of the Muslim workers held on April 29, 1967 in the Madina Masjid Hall under the presidentship of M. G. Shaikh it was resolved unanimously that in the place of Shaikh Usman Abdul Bidiwale the Congress ticket should be given to Umar Shaikh, who had the backing of Muslim community and that he did great public service in the past. So all the voters should cast vote in favour of Mohamad Umar Shaikh whose symbol is a pair of bullocks.

(1) Ramjan Mohiddin Jamadar (Hundekari), Chairman Idgah Committee. (2) Shaikh Abdul Sattar Rahimnabhai Bidiwale, Treasurer, Idgah Fund Committee. (3) Moulana Hannan, manager of Madarsa-e-Hidayatul Islam, and member of Madina Masjid (4) Kamalsaheb Babasaheb Shiledar Chairman of Madina Masjid and member of Idgah Committee. (5) Sayyed Amin, member of Madarsa-e-Hidayatul Islam and Idgah Committee. (6) Jalaluddin Allabux Sayyad, B.A.L.L.B., member of Madarsa-e-Hidayatul Islam." The appellant who led evidence on his own behalf denied the publication of the pamphlet and the distribution of it by him as alleged by the petitioner. Nothing came out in cross-examination of the appellant to substantiate the election petitioner's averment that he was responsible for its distribution. Of the two witnesses who were examined as court witnesses by the Judge, the witness Gopal Chintaman Ghugare did not say anything material on the point of distribution by the appellant. He merely said that he had seen people reading the pamphlet but he did not know who had distributed it. The other witness Hakim Abdul Rahiman Shaikh stated categorically that he had received a copy of the pamphlet on the day previous to the municipal election, that is to say, on June 2, 1967 and he gave full particulars as to how he came to receive it. He stated that he had attended a prayer meeting at a mosque on the 2nd June and after the Namaj was over the appellant had read over the pamphlet and one Moulana Hannan lent support to the appellant. In cross-examination it was eli-

cited from him that although he had occasion to see the distribution of other pamphlets, he could give no details thereof i. e., either about the person who distributed them or the dates when that was done. In cross-examination of this witness serious accusations were made against his character and probably no exception could have been taken if the Judge hearing the matter had refused to believe him. However that may be, the learned Judge accepted his testimony and came to the conclusion that the appellant had been personally responsible for the distribution of the first pamphlet and as such found him guilty of a corrupt practice and made an order disqualifying him under the Act from taking part in municipal elections for the next five years.

5. It was strenuously argued by learned counsel for the appellant that the reception of evidence of the two witnesses called as court witnesses vitiated the whole trial and therefore the High Court was not right in refusing to quash the order. Our attention was drawn to the provisions of Order XVI, Rule 14 of the Code of Civil Procedure and particularly to the conditions under which the court may examine any person other than a party to the suit and not called as a witness by a party to the suit but of its own motion to give evidence therein. It was argued that after having turned down the application of the election petitioner on the 21st August for issue of summons to these two persons, the learned Judge clearly went wrong in allowing them to be called as court witnesses. In this connection we may note the provisions of Section 21 sub-section (7) of the Maharashtra Municipalities Act, 1965. It provides as follows:

(7) For the trial of such petition, the Judge shall have all the powers of a civil court including power in respect of the following matters:—

- (a) discovery and inspection;
 - (b) enforcing the attendance of witnesses and requiring the deposit of their expenses;
 - (c) compelling the production of documents;
 - (d) examining witnesses on oath;
 - (e) granting adjournments;
 - (f) reception of evidence on affidavit; and
 - (g) issuing commissions for the examination of witnesses;
- and the judge may summon suo motu any person whose evidence appears to him to

be material. The Judge shall be deemed to be a Civil Court, within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1898."

It appears that under this section, the Judge is given powers wider than those given by the Code of Civil Procedure under Order 16, Rule 14 inasmuch as the section does not prescribe any prerequisite to the examination of a person as court witness as envisaged by the Code of Civil Procedure. In our view, the learned Judge had jurisdiction to call these two persons as witnesses under the provisions of the Act. We may note that even under the Representation of the People Act, 1951 which does not contain a similar provision it has been held by this Court that

"although.....the trial court should be at arms length and the court should not really enter into the dispute as a third party, but it is not to be understood that the Court never has the power to summon a witness or to call for a document which would throw light upon the matter, particularly of corrupt practice which is alleged and is being sought to be proved. If the Court was satisfied that a corrupt practice has in fact been perpetrated, may be by one side or the other, it was absolutely necessary to find out who was the author of that corrupt practice." [see *R. M. Seshadri v. Vasanta Bai*, Civil Appeal No. 1519 of 1968, D/- 29-11-1968 = (AIR 1969 SC 692).]

In that case, the corrupt practice with which the appellant was charged was having used a large number of motor vehicles for the free conveyance of voters at an election. The trial Judge examined two witnesses as court witnesses and it is quite clear that but for the evidence of these two persons, it would have been very difficult, if not impossible, for the Judge to have come to the conclusion he did and find the appellant guilty of corrupt practice. Although one of the two witnesses so examined had been cited earlier as a witness by one of the parties, he was not examined but during the course of the evidence led before the trial court, it became quite clear that the two persons who were called as court witnesses were fully conversant with the engagement of the motor vehicles and the court therefore examined them as court witnesses and on the basis of their evidence, found the appellant guilty of a corrupt practice. There, this Court had to deal with the provisions of Orders 16 Rule 14 and the quotation from that

judgment shows that the powers of the Court in this respect are of wide amplitude, specially when investigation is being made into allegations about the commission of a corrupt practice. It may be that in the instant case, if the two persons had not been examined, the Judge might well have decided the issue the other way. But the Act certainly gave him the power to do so and no exception can be taken to the course adopted by the Judge although it must be recorded that his earlier order refusing to issue summons to them in the first instance when asked to do so on the 21st August was hardly justifiable. Probably the learned Judge realised that his order of the 21st August needed recalling. The appellant must have had a real cause for grievance if he had asked for an opportunity to rebut the evidence of these two witnesses and had been denied the same but this has nowhere been alleged. On the evidence no exception can be taken to the course adopted by the Judge in deciding the issue against the appellant on the facts and circumstances of this case. It may be that the evidence which was adduced was not so immaculate that another learned Judge deciding the petition might not have taken a different view. But it cannot be said that there was no evidence on which the Judge could have come to the conclusion he did. The first point therefore fails.

6. With regard to the second point, the learned counsel argued by reference to two publications in the Maharashtra Gazette, the one of June 8, 1967 and the other of June 15, 1967 that the first publication having taken place on the 8th June the time-limit of ten days fixed under Section 21 sub-section (1) of the Act began to run from that date and the petition which was filed on the 24th June was beyond time and should not have been entertained. It is difficult for us to see why two Gazette notifications had become necessary. One seems to be the verbatim reprint of the other. The first publication dated 8th June is headed "Maharashtra Government Gazette—Extraordinary—Official Publication" while the other is headed "Maharashtra Government Gazette—Official Publication." The first bears the date 8th June and the second bears the date 15th June and both start with the sentence "in accordance with Section 19 (1) of the Maharashtra Municipalities Act, 1965 it is declared that in respect of the Sangli Municipal Council General Elections held on 3rd June,

1967, the below mentioned candidates are elected from the below mentioned wards for the seats mentioned as against their names". As a matter of fact, it does not appear that there is any difference between the two Gazettes with regard to the names of the successful councillors. The appellant might have, if so minded, set up the first Gazette publication as the one fixing the period of limitation in which case the trial Judge would have been required to go into the matter. But the appellant precluded himself from doing so by his unconditional acceptance of the statements in paragraphs 1 and 2 of the petition. If the point had been canvassed before the learned trial Judge he would certainly have gone into the matter and found out why there were two Gazette Publications and which was the publication to be taken into account for computation of the period of limitation prescribed by Section 21 (1) of the Act. There was no error apparent on the face of the record before the High Court and consequently the jurisdiction under Article 226 of the Constitution could not have been exercised on the facts of the case by the issue of a writ of certiorari. Neither could the High Court have set aside the order of the trial court under Article 227 of the Constitution under which the High Court's power of superintendence is confined to seeing that the trial court had not transgressed the limits imposed by the Act. On the facts of the case the High Court was not called upon to go into this question.

7. There is certainly some substance in the grievance raised on behalf of the appellant that the first issue was rather confusing and misleading. Instead of framing a separate issue with regard to each charge of corrupt practice raised in the petition, the learned Judge framed the issue in a manner which leaves much to be desired. For instance he should have framed separate issue with regard to each of the pamphlets. The issues should further have specified the different heads of corrupt practice committed in respect of each of the pamphlets. We cannot, however, come to the conclusion that because of the unsatisfactory nature of the issues framed, the whole trial is vitiated. The appellant knew exactly what points he had to meet. Evidence was adduced about the publication and distribution of the pamphlets by the election petitioner and contradicted by the appellant. As we have already stated, although the evidence about the distribution of the pam-

phlet was meagre and not beyond reproach, it was not for the High Court to take the view that the order ought to be quashed on the ground that there was no evidence. It was urged by learned counsel for the appellant that there was enough material for the court to come to the conclusion that Hakim Abdul Rahiman Shaikh was not a person whose veracity could not be depended upon. There is much that can be said against him but this does not mean that everything deposed to by him should be rejected and when the trial Judge accepted the evidence with regard to the distribution of the pamphlet by the appellant the High Court which was not bearing an appeal could not be expected to take a different view in exercising jurisdiction under Articles 226 and 227 of the Constitution and for ourselves, we see no reason to interfere with the order of the High Court.

8. The fourth point too is not one of substance. If the distribution of the pamphlet be accepted, there can be no doubt that the appellant was guilty of trying to arouse religious sentiments of the voters of the particular ward a majority of whom were Muslims. The pamphlet starts off by describing the election petitioner as a person ostracised from the Muslim community. If this statement was true, naturally any right-thinking Muslim would think twice before casting his vote in favour of such a person. There was also a charge in that pamphlet that he had turned the Kabaraasthan into a brothel and was trading in illicit liquor for which he was alleged to have been convicted. In our view, there is no merit in this point raised by the learned counsel.

9. As regards the last point, it was for the learned Judge to have come to his own conclusion as to the period of disqualification. The maximum penalty which the Act allowed him to impose was disqualification for six years and we see no reason to take any exception to the disqualification actually imposed. As noted above, the allegations of corrupt practice were of a serious nature and if the appellant was found guilty of the commission thereof, the period of five years' disqualification would certainly not be inappropriate.

10. In the result, therefore, the appeal fails; but in the circumstances of this case, we make no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 66 (V 57 C 16)

(From Andhra Pradesh)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

V. P. Gopala Rao, Appellant v. Public Prosecutor, Andhra Pradesh, Respondent.
Criminal Appeal No. 271 of 1968 D/-
7-3-1969.

(A) Factories Act (1948), Sections 2 (m), 2 (k) (i) and 2 (l) — "Factory", meaning of — Sun-cured tobacco leaves subjected to processes of moistening, stripping and packing in a company's premises with a view to their use and transport to company's main factory for manufacturing cigarettes — More than 20 persons under supervision of management working in premises — Held that the manufacturing process was carried on in premises and the persons employed were workers and premises a factory.

In a company's premises at E sun-cured tobacco leaves bought from the growers were subjected to the processes of moistening, stripping and packing. The stalks were stripped from the leaves. The Thukku (wholly spoilt) and Pagu (partly spoilt) leaves were separated. The leaves were tied up in bundles and stored in the premises. From time to time they were packed in gunny bags and exported to the company's factory at B where they were used for manufacturing cigarettes. More than 20 persons were working on the premises regularly every day under the supervision of the management. On a question whether the premises were factory;

Held that the "manufacturing processes" as defined in Section 2 (k) (i) were carried on in the premises and the persons employed were not employed by independent contractors but were "workers" as defined in Section 2 (l) and hence the company's premises at E were a factory.
(Paras 5, 14)

The definition of "manufacturing process" is widely worded. The moistening was an adaptation of the tobacco leaves. The stalks were stripped by breaking them up. The leaves were packed by bundling them up and putting them into gunny bags. The breaking up, the adaptation and the packing of the tobacco leaves were done with a view to their use and transport. All these processes were

*(Crl. Appeal No. 883 of 1968, D/- 3-7-1968 — Andh. Pra.)

"manufacturing processes" within S. 2 (k)
(i). Case law discussed. (Para 5)

A "worker" within meaning of S. 2 (1) is a person employed by the management and there must be a contract of service and a relationship of master and servant between them. It is a question of fact in each case whether the relationship of master and servant exists between the management and the workman. The critical test of the relationship of master and servant is the master's right of superintendence and control of the method of doing the work. In the instant case there was prima facie evidence showing that the relationship of master and servant existed between the workman and the management. AIR 1958 SC 388 and 1946 SC (HL) 24 and AIR 1957 SC 264, Foll. Case law discussed. (Paras 8, 9, 10, 14)

Inasmuch as the returns filed under the provisions of the Employees' Provident Fund Scheme, 1952 were in respect of all persons employed in the establishment either by the management or by or through a contractor they were not of much help in determining whether the employees were employed by the management or were employed by the contractors. (Para 12)

(B) Factories Act (1948), Section 6 (1) read with Section 92 — Prosecution under — Onus lies on prosecution to prove that workmen were employed by the management. (Para 14)

Cases Referred: Chronological Paras

- (1966) AIR 1966 SC 370 (V 53) =
1964-2 Lab LJ 633, D. C. Dewan
Mohideen Sahib and Sons v.
Secy. United Bidi Workers' Union,
Salem 10
(1965) AIR 1965 Raj 65 (V 52) =
ILR (1965) 15 Raj 117, Col. Sardar
C. C. Angre v. The State 6
(1962) AIR 1962 SC 517 (V 49) =
1962-1 Lab LJ 119 = 1962 (1) Cri
LJ 497, Shankar Balaji Waje v.
State of Maharashtra 10
(1961) AIR 1961 SC 644 (V 48) =
1961-2 Lab LJ 86, Birdhichand
Sharma v. First Civil Judge,
Nagpur 10, 11
(1961) 1961-1 Lab LJ 549 = (1960-
61) 19 FJR 207, State of Kerala
v. V. M. Patel 6
(1958) AIR 1958 SC 388 (V 45) =
1958 SCR 1340 = 1958 Cri LJ
803 (2), Chintaman Rao v. State of
Madhya Pradesh 8
(1957) AIR 1957 SC 264 (V 44) =
1957 SCR 152, Dharangadhra

- Chemical Works Ltd. v. State of
Saurashtra 10
(1953) 1953-1 All ER 226 = 1953-1
WLR 187, Pauley v. Kenalido Ltd. 9
(1951) 1951-1 KB 731 = 1951-1 All
ER 368, Gould v. Minister of
National Insurance 9
(1946) 1946 SC (HL) 24, Short v.
J. W. Henderson Ltd. 9, 11

Mr. M. C. Setalvad, Senior Advocate
(M/s. J. M. Mukhi and G. S. Rama Rao,
Advocates with him), for Appellant; Mr.
R. Ram Reddy, Senior Advocate (Mr. A.
V. V. Nair, Advocate, with him), for Res-
pondent.

The following Judgment of the Court
was delivered by

BACHAWAT, J.: M/s. Golden Tobacco
Co. Private Ltd., have their head office
and main factory at Bombay where they
manufacture cigarettes. The appellant is
the occupier-cum-manager of the com-
pany's premises at Eluru in Andhra Pra-
desh where sun-cured country tobacco
purchased from the local producers is col-
lected, processed and stored and then
transported to the company's factory at
Bombay. The prosecution case is that
the aforesaid premises are a factory. The
appellant was prosecuted and tried for
contravention of Section 6 (1) of the Fac-
tories Act 1948 and Rules 3 and 5 (3) of
the Andhra Pradesh Factory Rules 1950
for operating the factory without obtain-
ing a licence from the Chief Inspector of
Factories and his previous permission ap-
proving the plans of the building. The
appellant's defence was that the premises
did not constitute a factory and it was
not necessary for him to obtain the licence
or permission. The 2nd Addl. Munsif
Magistrate, Eluru, accepted the defence
contention and acquitted the appellant.
According to the Magistrate the prosecu-
tion failed to establish that the premises
were a factory or that any manufacturing
process was carried on or that any worker
was working therein. The Public Prose-
cutor filed an appeal against the order.
The Andhra Pradesh High Court allowed
the appeal, convicted the appellant under
Section 92 for contravention of S. 6 (1)
and rules 3 and 5 (3) and sentenced him to
pay a fine of Rs. 50 under each count.
The present appeal has been filed by the
appellant after obtaining special leave.

2. The question in this appeal is wheth-
er the company's premises at Eluru
constitute a factory. Section 2 (m) de-
fines factory. Under Section 2 (m) fac-
tory means any premises including the

precincts thereof "whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on." It is not disputed that more than 20 persons were working on the premises. The points in issue are: (1) whether those persons were "workers"; and (2) whether any manufacturing process was being carried on therein.

3. For the purpose of proving the prosecution case the respondent relied upon the following materials: (1) the testimony of PW 1A, Subharao the Assistant Inspector of Factories; (2) his report of inspection of the premises on December 20, 1965, (Ex. P1); (3) the show cause notice Ex. P3, and the appellant's reply dated January 15, 1966; (Ex. P5); (4) the testimony of PW 2, B. P. Chandraredi, the Provident Fund Inspector; and (5) six returns (Exs. P7 to P12) submitted by the Eluru establishment, to the Regional Provident Fund Commissioner.

4. The materials on the record show that in the company's Eluru premises, sun-cured tobacco leaves brought from the growers were subjected to the processes of moistening, stripping and packing. The tobacco leaves were moistened so that they may be handled without breakage. The moistening was done for 10 to 14 days by sprinkling water on stacks of tobacco and shifting the top and bottom layers. The stalks were stripped from the leaves. The Thukku (wholly spoilt) and Pagu (partly spoilt) leaves were separated. The leaves were tied up in bundles and stored in the premises. From time to time they were packed in gunny bags and exported to the company's factory at Bombay where they were used for manufacturing cigarettes. All these processes are carried on in the tobacco industry. In Encyclopaedia Britannica, 1965 edition, vol. 22 page 265 under the heading "tobacco industry" it is stated: "After curing, only during humid periods or in special moistening cellars can the leaf be handled without breakage. It is removed from the stalks or sticks and graded according to colour, size, soundness and other recognizable elements of quality. It is tied into hands, or bundles, of 15 to 30 leaves by means of a tobacco leaf wrapped securely around the stem end of the leaves. After grading the leaf is ready for the market."

5. In our opinion manufacturing processes as defined in Section 2 (k) (i) were

carried on in the premises. Under Section 2 (k) (i) manufacturing process means any process for "making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal." The definition is widely worded. The moistening was an adaptation of the tobacco leaves. The stalks were stripped by breaking them up. The leaves were packed by bundling them up and putting them into gunny bags. The breaking up, the adaptation and the packing of the tobacco leaves were done with a view to their use and transport. All these processes are manufacturing processes within Section 2 (k) (i).

6. The reported cases are of little help in deciding whether a particular process is a manufacturing process as defined in Section 2 (k) (i). In State of Kerala v. V. M. Patel, 1961-1 Lab LJ 549 (SC) the Court held that the work of garbling pepper by winnowing, cleaning, washing and drying it on concrete floor and a similar process of curing ginger dipped in lime and laid out to dry in a warehouse were manufacturing processes. With regard to the decision in Col. Sardar C. S. Angre v. The State, ILR (1965) 15 Raj 117 = (AIR 1965 Raj 65) it is sufficient to say that the work of sorting and drying potatoes and packing and re-packing them into bags was held not to be a manufacturing process as the work was done for the purpose of cold storage only and not for any of the purposes mentioned in S. 2 (k) (i).

7. The next question is whether 20 or more persons worked on the premises. On behalf of the appellant it is admitted that more than 20 persons work there, but his contention is that they are employed by independent contractors and are not workers as defined in Section 2 (i). Section 2 (i) reads:—"worker" means a person employed, directly or through any agency, whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process."

8. In Chintaman Rao v. State of Madhya Pradesh, 1958 SCR 1340 at p. 1349=(AIR 1958 SC 388 at pp. 392-393) the Court gave a restricted meaning to the words "directly or through an agency" in Section 2 (i) and held that a

worker was a person employed by the management and that there must be a contract of service and a relationship of master and servant between them. On the facts of that case the Court held that certain Sattedars were independent contractors and that they and the coolies engaged by them for rolling bidis were not "workers".

9. It is a question of fact in each case whether the relationship of master and servant exists between the management and the workmen. The relationship is characterized by contract of service between them. In *Short v. J. W. Henderson Ltd.*, 1946 SC (HL) 24 at pp. 33-34 Lord Thankerton recapitulated four indicia of a contract of service. As stated in Halsbury's Laws of England, 3rd Ed. Vol. 25 p. 448 Article 872:

"The following have been stated to be the indicia of a contract of service, namely, (1) the master's power of selection of his servant; (2) the payment of wages or other remuneration; (3) the master's right to control the method of doing the work; and (4) the master's right of suspension or dismissal [(1946) SC (HL) 24, at pp. 33, 34; *Gould v. Minister of National Insurance*, (1951) 1 KB 731 at p. 734; (1951) All ER 368 at p. 371; *Pauley v. Kenaldo Ltd.*, (1953) 1 All ER 226, (C.A.), at p. 228; but modern industrial conditions have so affected the freedom of the master that it may be necessary at some future time to re-state the indicia; e.g., heads (1), (2) and (4) and properly also head (3), are affected by statutory provisions (*Short v. J. W. Henderson Ltd.*, 1946 SC (HL) 24, supra at p. 34.)"

10. In *Dharangadhra Chemical Works v. State of Saurashtra*, 1957 SCR 152=(AIR 1957 SC 264) the Court held that the critical test of the relationship of master and servant is the master's right of superintendence and control of the method of doing the work. Applying this test workmen rolling bidis were found to be employees of independent contractors and not workers within Section 2 (1), in *State of Kerala v. Patel V. M.* (supra) and *Shankar Balaji Waje v. State of Maharashtra*, 1962-1 Lab LJ 119=(AIR 1962 SC 517) while they were found to be workers within Section 2 (1) in *Birdhichand Sharma v. First Civil Judge, Nagpur*, 1961-2 Lab LJ 86=(AIR 1961 SC 644) and workmen within the meaning of Section 2 (s) of the Industrial Disputes Act in *D. C. Dewan Mohideen*

Saheb & Sons v. Secy. United Bidi Workers' Union, 1964-2 Lab LJ 633=(AIR 1966 SC 370).

11. There is no abstract a priori test of the work control required for establishing a contract of service. In 1946 SC (HL) 24 (supra) Lord Thankerton quoting Lord Justice Clerk's dicta in an earlier case said that the principal requirement of a contract of service was the right of the master "in some reasonable sense" to control the method of doing the work. As pointed out in *Birdhichand's case*, 1961-2 Lab LJ 86=(AIR 1961 SC 644) (supra) the fact that the workmen have to work in the factory imply a certain amount of supervision by the management. The Court held that the nature and extent of control varied in different industries and that when the operation was of a simple nature the control could be exercised at the end of the day by the method of rejecting the bidis which did not come up to the proper standard.

12. In the present case, the prosecution relied on (1) Exs. P-7 to P-12, (2) the testimony of P.W. 1 and (3) Exs. P-1 and P-5 to prove that the persons working at the company's premises at Eluru were employed by the management. Exhibits P-7 to P-12 are monthly returns for July to December 1966 submitted by the company's Eluru establishment to the Regional Provident Fund Commissioner under paragraph 38 (2) of the Employees' Provident Fund Scheme, 1952. The returns disclosed the number and names of about 200 persons employed every month and the recoveries from the wages and the company's contributions on account of the provident fund of each employee. At the top of each return it was stated that the employees were contract employees. Section 2 (f) of the Employees' Provident Funds Act 1952 defines "employee" as including any person employed by or through a contractor. Paragraphs 29 and 30 of the Employees' Provident Fund Scheme 1952 show that the employer is required to pay contributions in respect of all such employees. Paragraph 26 of the Scheme shows that employees who have actually worked for not less than 12 months or less in the factory or establishment are entitled and required to become a member of the Fund. In view of the fact that the returns are in respect of all persons employed in the establishment either by the management or by or through a contractor they are not of much help in determining whether the employees were employed by the management

or were employed by the contractors. They only show that in the months of July to December 1966, 200 workers had been working in the establishment for not less than 240 days.

13. The testimony of P.W. 1, A. Subharao, the Assistant Inspector of Factories shows that on December 20, 1965 he found 120 workmen working in the premises. He is corroborated by his inspection report Ex. P-1. In his reply Ex. P-5 the appellant did not dispute the fact that 120 persons were working there. P.W. 1 found workmen doing the work of stripping stalks from the tobacco leaves. The work of stripping was being done under the supervision of the management's clerk J. Satyanarain Rao. At the end of the day the clerk collected the stripped tobacco and noted the quantity of work done in the work sheet allotted to the worker. P.W. 1 found some workmen doing other work.

14. The onus of proving that the workmen were employed by the management was on the prosecution. We think that the prosecution has discharged this onus. It is not disputed that more than 20 persons worked in the premises regularly every day. There is the positive evidence of P.W. 1 that the work of stripping stalks from the tobacco leaves was done under the supervision of the management. There is no evidence to show that the other work in the premises was not done under the like supervision. The prosecution adduced *prima facie* evidence showing that the relationship of master and servant existed between the workmen and the management. The appellant did not produce any rebutting evidence. In the cross-examination of P.W. 1, it was suggested that the workmen were employed by independent contractors, but the suggestion is not borne out by the materials on the record. We hold that the persons employed are workers as defined in Section 2 (1). The High Court rightly held that the company's premises at Eluru were a factory.

15. In the Courts below the appellant produced (1) an order of the Chief Inspector of Factories, Madras, and (2) a letter of Superintendent of Central Excise I. D. O., Vijaywada. Mr. Setalvad conceded, and in our opinion rightly, that these documents throw no light on the question whether in 1966 the premises were a factory within the meaning of Section 2 (m). We therefore say nothing more with regard to these documents.

16. In the result, the appeal is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 70
(V 57 C 17)

(From Allahabad; AIR 1967 All 430)

J. M. SHELAT AND V. BHARGAVA, JJ.
Tulsipur Sugar Co. Ltd., Appellant v. The State of U. P. and others, Respondents.

Civil Appeal No. 480 of 1967, D/- 18-8-1969.

(A) U. P. Industrial Disputes Act (28 of 1947), Ss. 6 and 6A — Finality of award and its enforceability are distinct — Words "subject to provisions of S. 6A" in sub-sec. (5) mean that award on becoming final does not automatically begin to be operative.

The two characteristics of the award, i.e., its finality on publication and its enforceability under Sec. 6A, are distinct, having different points of time and should not, therefore, be mixed up, for, though an award has become final on its publication under Sec. 6 it becomes enforceable in accordance with and subject to the eventualities provided in Sec. 6A. There are thus three different stages in the case of an award; (1) when it is signed by the adjudicating authority, (2) when it is published by the State Government in the prescribed manner and (3) when it becomes enforceable. Even though an award may have become final on its being published, it becomes enforceable subject to the expiry of the different periods and the events prescribed in Sec. 6A. The Scheme of Ss. 6 and 6A is to retain a certain amount of control over award, including an arbitration award, with the State Government. An award, therefore, does not become final as it ordinarily would be when the adjudicating authority signs it but becomes final when it is published in the manner prescribed by the State Government. Before such publication the Government is given the power to remit it to the adjudicating authority for reconsideration and the State Government has to publish it on its being resubmitted to it. In spite of its becoming final on such publication it becomes enforceable only on the expiry of 30 days after it has become final as laid down by sub-sec. (1) of Sec. 6A. But

JM/JM/B794/69/GGM/R

it does not so become enforceable if the Government were to make a declaration under the first proviso and an order under sub-sec. (2) or when the award specifies a date which is later than 30 days after its publication. Therefore, the word "subject to the provisions of Sec. 6A" in sub-sec. (5) of Sec. 6 must mean that though an award has become final on its being published it does not immediately or automatically begin to be operative as that finality is subject to the expiry of periods and the powers of the State Government under Section 6A. (Paras 5, 6)

(B) U. P. Industrial Disputes Act (28 of 1947), Sections 6 (6) and 6D — Correctional jurisdiction of Labour Court — There is no time limit imposed by Section 6 (6) — No such time limit can be read by implication by resorting to Section 6D. AIR 1967 All 430, Reversed. (Decision, however, upheld on another ground).

Section 6 (6) does not lay down in any express terms any time limit within which such jurisdiction is to be exercised. It contemplates a correction both before and after the publication of the award, i.e., after it has become final. If it is corrected before its publication the correction would be carried out without anything further having to be done. But if it is corrected after its publication and after it has become final, a copy of the order of correction has to be sent to the State Government and the provisions as to publication of an award under Sec. 6 (3) are mutatis mutandis applicable. The correctional jurisdiction is limited only to cases where clerical or arithmetical mistakes or errors arising from an accidental slip or omission have occurred. The two extremities of time provided in Sec. 6D cannot be used as a ground for inferring a time limit for the correctional jurisdiction under Section 6 (6). The correctional jurisdiction conferred on the adjudicating authority under Section 6 (6) is in terms identical with the one conferred under Section 152 of Civil P. C. and Rule 28 of the Industrial Disputes (Central) Rules 1957 and is in consonance with the first and foremost principle that no party should suffer any detriment on account of a mistake or an error committed by an adjudicating authority. The circumstance that the proceedings before a labour Court and a tribunal are deemed to be concluded under Sec. 6D when their award becomes enforceable or that thereupon they become functus officio would

also be no ground for inferring any limitation of time in Sec. 6 (6), for, that would also be the case in the case of a Civil Court or an adjudicating authority under the Industrial Disputes Act, 1947 even without a provision like Sec. 6D and yet the legislature has not chosen in the case of either of them to lay down any limitation of time for exercising its correctional jurisdiction. There are no compelling reasons to read into Sec. 6 (6) any such limitation by implication.

Where the dispute referred to the Labour Court was as to whether the company should fit the workmen named in the reference in the revised categories and in the new wage scales and if so, with effect from what date and the Labour Court in its award omitted to answer the second question,

Held that the error which the Labour Court corrected clearly fell within Section 6 (6) and could be corrected even after the award had become final as a result of its having been published and had become enforceable under Sec. 6A. AIR 1967 All 430, Reversed. (Decision, however, upheld on another ground).

(Paras 7, 8 and 10)

Dr. L. M. Singhvi, Senior Advocate (M/s. B. Datta and D. N. Misra, Advocates, and M/s. J. B. Dadachanji and O. C. Mathur, Advocates of M/s. J. B. Dadachanji and Co., with him), for Appellant; Mr. O. P. Rana, Advocate, for Respondent No. 1; M/s. J. P. Goyal Sobhag Mal Jain and S. P. Singh, Advocates, for Respondent No. 4.

The following Judgment of the Court was delivered by

SHELAT, J.: Two questions arise for determination in this appeal, by special leave, against the judgment of the Appellate Bench of the High Court of Allahabad, namely, (1) whether a correction in its award by the Labour Court, Lucknow, was one of an error arising from an accidental omission within the meaning of Sec. 6 (6) of the U. P. Industrial Disputes Act XXVIII of 1947 (hereinafter referred to as the Act), and (2) whether, even if it was so, it could so correct after its award was published and had become enforceable.

2. The Central Wage Board for sugar industry, appointed by the Union Government for determining a wage-structure, revision of categories of workmen, their fitment into such categories and for fixing the principles governing the grant of bonus, had made certain recommenda-

tions. Amongst its recommendations, the Wage Board had recommended that its decision should be brought into effect as from November 1, 1960. By its notification dated April 27, 1961, the U. P. Government accepted those recommendations including the one that they should be brought into force with effect from November 1, 1960. On a dispute having arisen between the appellant-company and its workmen on the company failing to implement the said recommendations, the State Government referred it to the Labour Court for adjudication under Section 4 (k) of the Act. The dispute involved two questions (1) whether the company should fit the workmen named in the reference in the revised categories and in the new wage scales and (2) if so, with effect from what date. By its award dated November 6, 1963 the Labour Court held that two of the said workmen should be fitted in Grade II (B) and Grade IV respectively and directed the company to do so within one month after the award became enforceable. It, however, omitted to fix the date from which such fitment should have the effect. On December 7, 1963 the said award was published in the State Gazette. The company thereafter fitted the two workmen in the said two grades from a date one month hence after the award became enforceable and not from November 1, 1960. The workmen's union thereupon applied to the Labour Court to amend its award on the ground that it had omitted to answer the second question arising under the reference and the Labour Court accordingly amended its award directing that the two workmen should be placed in the said grades with effect from November 1, 1960. The order amending the said award was gazetted on June 20, 1964. The company filed a petition in the High Court for certiorari and for quashing the said order of amendment. Nigam J., who heard the petition in the first instance dismissed it holding that (1) the Labour Court had made an error arising from an accidental omission to answer the said second question and therefore had the power to correct it under Section 6 (6) of the Act, and (2) even if there was no such error arising from accidental omission, the amendment merely provided what was already contained in the notification dated April 27, 1961, that once the Labour Court had directed the company to fit the workmen in the said grades, such fitment had, under the force of that notification, to take effect from

November 1, 1960 and that that result was arrived at not by reason of the correction of the award but by force of the original award read with the said notification. On a Letters Patent appeal having been filed against the said judgment, the Appellate Bench of the High Court agreed with Nigam J., that the correction amounted to one of an error arising from the accidental omission to answer the said second question within the scope of Section 6 (6) of the Act. The Appellate Bench, however, proceeded to examine the various provisions and the scheme of the Act and held (1) that the jurisdiction of the Labour Court under the Act was of a limited character, (2) that it gets seisin of an industrial dispute only when its jurisdiction is invoked by a reference under Section 4 (k) or by a voluntary reference to arbitration under Section 5B, (3) that under Section 4D proceedings before it are deemed to commence from the date of such reference and are deemed to be completed on the date when its award becomes enforceable, (4) that its jurisdiction which emanates from the reference gets exhausted on the completion of the proceedings before it and the Labour Court itself becomes functus officio on the date when its award becomes final and enforceable, (5) that it cannot thereafter reconstitute itself or take seisin of a dispute, which it has already adjudicated and proceedings relating to it have become concluded, without a fresh reference and (6) that, therefore, its correctional jurisdiction under Sec. 6 (6), unlike that of a Civil Court under Section 152 of the Code of Civil Procedure, is not unlimited. The Appellate Bench on this reasoning held that the two extreme points during which the Labour Court could correct its award were the date of its signing it and the date when the award becomes final and enforceable. Consequently, the Labour Court had no jurisdiction to correct the award after it became final and enforceable, i.e., after January 7, 1964, on expiry of 30 days from December 7, 1963 when it was published and the correction, therefore, was in excess of its jurisdiction and invalid. The Appellate Bench, however, declined to issue the writ on the ground that the correction did no more than doing justice to the workmen by ordering implementation of the said notification of April 27, 1961 and observing that equity was on the side of the two workmen dismissed the appeal as also the said petition.

3. Dr. Singhvi, who, on behalf of the company, disputed the correctness of the judgment, contended that (a) no clerical or arithmetical error through any accidental slip or omission had arisen, that Section 6 (6), therefore, did not apply to the facts of this case, and if at all, the application ought to have been under Sec. 11B, which however, was never invoked; (b) that power under Section 6 (6) could be exercised only until the date on which the said award became enforceable and not thereafter, that the correctional jurisdiction under Section 6 (6) is not without any limit as to time within which it could be invoked or exercised and expired or exhausted itself when the award became final; (c) that the principles of industrial law postulate the finality of an award made under it and that subject to exceptions as in Section 6A, once the award had become final it did not contemplate any disturbance of it by amendment or otherwise, and (d) that the High Court was in error in refusing remedy on a supposed consideration of equity once it found lack of jurisdiction in the Labour Court as it in fact did and, therefore, ought to have issued the remedial writ and quashed the impugned order of correction.

4. As already stated, the Wage Board had recommended revised wage scales, revised categories and fitment of workmen in their respective categories on the revised wage scales as from November 1, 1960. The State Government had accepted those recommendations fully including the date of their implementation and the consequent fitment of workmen in appropriate categories and revised wage scales. Its notification made it clear that such fitment on the revised wage scales should be as recommended by the Wage Board as from November 1, 1960. In the belief, perhaps, that the said recommendations and their acceptance by the Government were not binding on it, the company did not implement them and hence the union raised the dispute which was ultimately referred to the Labour Court. The terms of that reference leave no doubt that it comprised of two questions, (1) of fitment and (2) the date from which it was to have effect. The award of the Labour Court that the company was liable to fit the two workmen in grades II and IV respectively and pay them at the revised scales in respect of these grades was binding and therefore the company was liable to carry out the fitment and pay

the revised scales in accordance with such fitment. But the award did not decide or fix the date from which the said fitment, when made, was to have effect. As rightly held by the High Court, the Labour Court thus omitted to answer the second question as it was bound to do and the reference remained partly unadjudicated. The Labour Court, no doubt, did direct that the award should be implemented within one month after it became enforceable under the Act, i.e., on or before February 7, 1964. But that direction meant only that the company should fit the two workmen in the two grades it had ordered and still left the question, as to the date from which such fitment was to have effect, unanswered. Thus, the fact that the Labour Court failed to answer the second question admits of no doubt. There can also be no doubt that since the first question was answered by it in accordance with the Wage Board's recommendations and the Government's notification accepting them fully, if its attention had been drawn it would in all probability have answered the second question also in consonance with those recommendations and the said notification. There is, therefore, no question that there was an error in the award due to an accidental omission on the part of the Labour Court, which error it undoubtedly had the jurisdiction to correct under Section 6 (6). The error was that there was no direction in the award as to the date from which the fitment of the two workmen in the said grades and the revised scales should take effect, arising from an accidental omission to answer that part of the reference.

5. The next question is whether there is under the Act any time limit within which the correction of the award can be made. The impugned correction, no doubt, was made by the Labour Court after its award had become final and enforceable. The principal premise in the High Court's reasoning as also in that of counsel for the company was that the jurisdiction of the Labour Court to correct the award ceased when the award became final and enforceable. It may be observed at the very outset that no time limit within which such correction can be made has been laid down in any express terms in Section 6 (6). The question, therefore, is whether any such time limit can be inferred either from Section 6 or from the other provisions of the Act. Section 4 (k) enables the State Government

to refer an industrial dispute which either exists or is apprehended to the Labour Court if the matter of the industrial dispute is one of those contained in the First Schedule to the Act or to a Tribunal if it is one contained in the first or the Second Schedule. Even if the dispute relates to a matter in the second Schedule, if it is not likely to affect more than 100 workmen, the Government can, if it so thinks fit, refer such a dispute to the Labour Court. Under Section 5B where any industrial dispute exists or is apprehended and the employer and the workmen agree, they may refer the dispute to arbitration of such person or persons including the presiding officer of a Labour Court or a Tribunal as may be specified in the arbitration agreement. Section 6 (1) enjoins upon the Labour Court and the Tribunal to which an industrial dispute is referred for adjudication to hold its proceedings expeditiously and submit its award to the State Government as soon as it is practicable on the conclusion thereof. Sub-section (3) provides that subject to the provisions of sub-section (4) every arbitration award and the award of a Labour Court or a Tribunal shall, within 30 days from the date of its receipt by the State Government, be published in such manner as the State Government thinks fit. Sub-section (4) to which sub-section (3) is made subject, authorises the State Government before publication of an award of a Labour Court or a Tribunal to remit it or its reconsideration and provides that after such reconsideration it shall submit its award to the Government and the State Government shall thereupon publish it in the manner provided in sub-section (3). Sub-section (5) provides that subject to the provisions of Sec. 6A an award published under sub-section (3) shall be final and shall not be called in question in any Court in any manner whatsoever. Section 6A, to the provisions of which Section 6 (5) is made subject, provides by its sub-section (1) that an award, including an arbitration award, shall become enforceable on the expiry of 30 days from the date of its publication. The first proviso thereof empowers the State Government, if it is of the opinion that it is inexpedient on public grounds affecting national or State economy or social justice to give effect to the whole or any part of the award, to declare by notification in the official gazette that it shall not become enforceable on the expiry of the said period of 30 days. The second proviso provides that an arbitra-

tion award shall not become enforceable if the State Government is satisfied that it was given or obtained through collusion, fraud or misrepresentation. Thus, even though an award has been published under Section 6 (3) and has become final and would ordinarily become enforceable on expiry of 30 days from such publication, the State Government can make a declaration under the first proviso and under sub-section (2) can within 90 days from its publication make an order either rejecting or modifying it, in which event it has to lay the award and its said order before the State Legislature. Sub-section (3) provides that if an award is rejected or modified by an order under sub-section (2) and is laid before the Legislature, it shall become enforceable within 15 days from the date it is so laid. But where no such order under sub-section (2) has been made, it shall become enforceable on the expiry of 90 days referred to in sub-section (2). Sub-section (4) provides that subject to sub-sections (1) and (3), an award shall come into operation with effect from such date as may be specified therein but where no such date is specified it shall come into operation on the date when the award becomes enforceable under sub-section (1) or sub-section (3), as the case may be. The provisions of Section 6 and Section 6A thus make it clear that whereas the former provides for the award becoming final, the latter provides for its enforceability and the time from which it has to be implemented. The two characteristics of the award, i.e., its finality on publication and its enforceability under Section 6A, are distinct, having different points of time and should not, therefore, be mixed up, for, though an award has become final on its publication under Section 6 it becomes enforceable in accordance with and subject to the eventualities provided in Section 6A. There are thus three different stages in the case of an award; (1) when it is signed by the adjudicating authority, (2) when it is published by the State Government in the prescribed manner and (3) when it becomes enforceable. Even though an award may have become final on its being published, it becomes enforceable subject to the expiry of the different periods and the events prescribed in Section 6A.

6. The scheme of Sections 6 and 6A is to retain a certain amount of control over award, including an arbitration award, with the State Government. An

award, therefore, does not become final as it ordinarily would be when the adjudicating authority signs it but becomes final when it is published in the manner prescribed by the State Government. Before such publication the Government is given the power to remit it to the adjudicating authority for reconsideration and the State Government has to publish it on its being resubmitted to it. In spite of its becoming final on such publication it becomes enforceable only on the expiry of 30 days after it has become final as laid down by sub-section (1) of Section 6A. But it does not so become enforceable if the Government were to make a declaration under the first proviso and an order under sub-section (2) or the award specifies a date which is later than 30 days after its publication. Therefore, the words "subject to the provisions of Section 6A" in sub-section (5) of Section 6 must mean that though an award has become final on its being published it does not immediately or automatically begin to be operative as that finality is subject to the expiry of periods and the powers of the State Government under Section 6A.

7. Having seen the effect of the provisions of Sections 6 and 6A, we have next to consider the scope of the correctional jurisdiction conferred on the adjudicating authority under sub-section (6) of Section 6. As already observed, the sub-section does not lay down in any express terms any time limit within which such jurisdiction is to be exercised. It contemplates a correction both before and after the publication of the award. i.e., after it has become final. If it is corrected before its publication the correction would be carried out without anything further having to be done. But if it is corrected after its publication and after it has become final, a copy of the order of correction has to be sent to the State Government and the provisions as to publication of an award under Section 6 (3) are mutatis mutandis applicable. The correctional jurisdiction is limited only to cases where clerical or arithmetical mistakes or errors arising from an accidental slip or omission have occurred. Though Section 6 (6) does not expressly provide for any time limit, the High Court appears to have been much impressed by Section 6D which lays down the two points as to the commencement and the completion of proceedings before a labour Court and a tribunal. From these two limits it came to the conclusion that though no time limit is expressly provided in Sec-

tion 6 (6) it must be inferred that the correctional jurisdiction under Section 6 (6) can only be exercised upto the time that the award becomes final and enforceable. It will be observed that though Sec. 6 (6) empowers all the three adjudicating authorities, namely, a Labour Court, a tribunal and an arbitrator, to correct the award, Section 6D lays down the two points of commencement and completion of proceedings only in the case of a Labour Court and a tribunal. Section 6D, therefore, does not furnish an indication or a ground for inferring a time limit in Section 6 (6) in the case of an award by an arbitrator. Would that mean that though, according to the High Court, there is a period within which a Labour Court and a tribunal can exercise the correctional jurisdiction, there would be no such limit in the case of an award by an arbitrator? In our view no such result could have been contemplated. It would thus, appear that the two extremities of time provided in Section 6D cannot be used as a ground for inferring a time limit for the correctional jurisdiction under Section 6 (6).

8. Acceptance of the High Court's reasoning becomes still more difficult when we examine the premises of that reasoning. The High Court does not appear to be sure whether the limit as to time is to be the date of finality of the award or its enforceability, for, it states that the correctional jurisdiction can be exercised until the award has become final and enforceable. As already stated, the concepts of finality and enforceability of an award are distinct and have been dealt with by the Legislature separately in Sections 6 and 6A. If it is to be reasoned that the correctional jurisdiction can be exercised till the date when the award is published and becomes final, such a reasoning would be contrary to the provisions of Section 6 (6) themselves which envisage correction of an award even after it is published and has become final. Sub-section (6) expressly provides that when so corrected, the order correcting it has to be published in the manner prescribed under and within the time provided in Section 6 (3). It is, therefore, manifest that the date when an award becomes final cannot be the date within which the power under Section 6 (6) has to be exercised. If, it is to be held, on the other hand, that the power to correct is to be exercised until the award has become enforceable, the difficulty would

be that there is nothing either in Section 6 or Section 6A or Section 6D which warrants such a limitation by implication. Is it that an award is really final when it becomes enforceable? Such a conclusion would, firstly, be contrary to the clear language of Sec. 6 and, secondly, would lead to a curious result that though it has become final on publication, it is not really so, as that finality is subject to the provisions of Section 6A. In that case, an award can be challenged in a Court during the interval between its publication and the date when it becomes enforceable. That would be so, despite the clear language of Section 6 (5) that an award becoming final on publication cannot then be challenged in any Court whatsoever. Laying down by implication the time limit during which the correctional jurisdiction under Section 6 (6) can be exercised upto the time of the award becoming final under Section 6 (5) or becoming enforceable under Sec. 6A creates difficulties, besides, it would appear, being contrary to the provisions of these two sections and is therefore not commendable. The correctional jurisdiction conferred on the adjudicating authority under Section 6 (6) is in terms identical with the one conferred under Sec. 152 of the Code of Civil Procedure and R. 28 of the Industrial Disputes (Central) Rules 1957 and is in consonance with the first and foremost principle that no party should suffer any detriment on account of a mistake or an error committed by an adjudicating authority. The circumstance that the proceedings before a Labour Court and a tribunal are deemed to be concluded under Section 6D when their award becomes enforceable or that thereupon they become functus officio would also be no ground for inferring any limitation of time in Section 6 (6), for, that would also be the case in the case of a Civil Court or an adjudicating authority under the Industrial Disputes Act, 1947 even without a provision like Section 6D and yet the legislature has not chosen in the case of either of them to lay down any limitation of time for exercising its correctional jurisdiction. In our view, there are no compelling reasons to read into Section 6 (6) any such limitation by implication.

9. We are also not impressed with the difficulty which the High Court supposed would result in case Section 6 (6) is interpreted as not having by implication any time limit within which the correctional power can be exercised by any of the

three adjudicating authorities. The High Court felt that if there is no such time limit an award, even after it has become enforceable and in some cases even implemented, would be rendered unsettled. But as already stated, the power is a limited one which can be exercised only in cases where a mistake, clerical or arithmetical or an error arising from an accidental slip or omission has occurred. The award thus would have to be corrected only within this circumscribed field. It may be that the correction of an award might to a certain extent have an unsettling effect to what has already become settled, but the correction is made not due to any fault of the parties but of the adjudicating authority whose accidental slip or omission cannot be allowed to prejudice the interests of the parties. We do not visualise any substantial hardship resulting from the exercise of this power which the High Court thought might arise if an award is allowed to be amended even after it has become enforceable or even if it has been enforced. A similar difficulty can also be imagined when a Civil Court exercises a similar power under Section 152 of the Code of Civil Procedure. But no one has so far suggested that because of that difficulty a limitation must be inferred in that section. A similar difficulty would also arise under Rule 28 of the Industrial Disputes (Central) Rules, 1957. But so far no one has read a similar limitation in the correctional power provided by that rule.

10. In our view the error which the Labour Court corrected clearly fell within Section 6 (6) and could be corrected even after the award had become final as a result of its having been published and had become enforceable under Sec. 6A. In this view it is not necessary to consider Section 11B or its effect especially as it is nobody's case that it was at any stage invoked or resorted to. In the view that we have taken it was Section 6 (6) and not Section 11B which could on the facts of this case be resorted to. The appeal, therefore, is dismissed though for reasons different from those given by the High Court. The appellant-company will pay the costs of this appeal to the respondents.

Appeal dismissed.

AIR 1970 SUPREME COURT 77
(V 57 C 18)

(From Calcutta: AIR 1969 Cal 180)

M. HIDAYATULLAH, C. J. AND
G. K. MITTER, J.

Debesh Chandra Das, Appellant v.
Union of India and others, Respondents.

Civil Appeal No. 2065 of 1968, D/- 8-4-1969.

Constitution of India, Arts. 310 and 311 — Reduction in rank — State cadre officer of Indian Administrative Service — Promotion to tenure post under Government of India — Reversion to State Service before expiry of tenure period — Reason for reversion, unsatisfactory performance — Reversion amounts to reduction in rank AIR 1969 Cal 180, Reversed.

The petitioner, the Chief Secretary of Assam and a member of the Indian Civil Service attached to the State Cadre, was appointed as Secretary under the Government of India, a tenure post, the tenure period of which was to expire in July, 1969. This appointment was subsequently approved by the Appointments Committee of the Cabinet. On 20-9-66 the Cabinet Secretary wrote to the petitioner that in view of the challenges which had arisen due to the new developments in the country the Government had to examine whether the several persons in top administrative posts were fully capable of meeting those challenges and that as a result of the examination it has been decided to ask him to elect between reverting to the State service or going on leave preparatory to retirement or serving under the Government of India in a post lower than that of a secretary. His representations made to the Cabinet Secretary and the Prime Minister came to nothing and he was informed that the Government had decided to revert him to the parent State or he might go on leave preparatory to retirement. The post of the Chief Secretary which was a super time scale post carried the highest pay under the State service of Rs. 3500/- a month while the pay of a Secretary under the Government of India was Rs. 4000/- a month. The petitioner complained that this reversion with a stigma attached to it amounted to a reduction in rank and inasmuch as the procedure under Art. 311 (2) had not been followed the reversion was not sustainable:

Held that the order of reversion of the petitioner could not be sustained as he

had been reduced in rank with a stigma upon him without taking action under Art. 311 (2): AIR 1969 Cal 180, Reversed. (Para 16)

Reduction in rank accompanied by a stigma must follow the procedure of Art. 311 (2). (Para 13)

The petitioner held a tenure post under the Government of India and his tenure in that post was ordinarily five years. There was nothing in the notification of his appointment to the tenure post to indicate that the appointment was one which could be terminated at any time and nothing turned on the use of the words "until further orders" in the notification because all appointments to tenure posts had the same kind of order. (Paras 11 and 14)

Cadres for the Indian Administrative Services are to be found in the States only. There is no cadre in the Government of India. A few of these persons are, however, intended to serve at the centre. When they do so they enjoy better emoluments and better status. The appointments to the Centre are not in any sense a deputation. They mean promotion to a higher post. The only safeguard is that many of the posts at the centre are tenure posts. (Para 10)

It is true that reversion to a lower post does not per se amount to a stigma. But in the case of the petitioner there was evidence that his reversion was accompanied by stigma. The letters which the cabinet secretary wrote to him clearly told him that his demotion was not due to exigencies of service but because he was found wanting. Only a few months of the tenure period remained and the fact that it was found necessary to break into his tenure period close to its end must be read in conjunction with the three alternatives offered to him. They clearly demonstrated that the intention was to reduce him in rank by sheer pressure of denying him a secretaryship. (Paras 12, 14)

Mr. B. Sen, Senior Advocate (M/s. B. P. Maheshwari, A. N. Parikh and S. M. Jain, Advocates, with him), for Appellant; Mr. D. Narasaraju, Senior Advocate (M/s. R. H. Dhebar and S. P. Nayar, Advocates, with him), for Respondents (Nos. 1 and 2).

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: This is an appeal against the judgment of the High Court of Calcutta dismissing a writ petition filed by the appellant Debesh Chan-

dra Das. This appeal is by certificate against the judgment dated September 18, 1966.

2. The appellant is a member of the Indian Civil Service. He qualified in 1933 and arrived in India in 1934 and was allotted to Assam. In 1940 he came to the Government of India and became in turn Under-Secretary and Deputy-Secretary, Home Ministry. In 1947 he went back to Assam where he held the post of Development Commissioner and Chief Secretary. In 1951 he again came to the Government of India as Secretary, Public Service Commission. In 1955 he became Joint Secretary to the Government of India and continued to hold that post till 1961. From 1961 to 1964 he was Managing Director of Central Warehousing Corporation. On July 29, 1964, he was appointed Secretary, Department of Social Security with effect from July 30, 1964 and until further orders. On March 6, 1965 the Appointments Committee of the Cabinet approved the proposal to continue him as Secretary, Department of Social Security. He continued in that Department, which is now renamed as the Department of Social Welfare. On June 20, 1966, he received a letter from the Cabinet Secretary which was to the following effect:

My dear Debesh:

For sometime, the Government has been examining the question of building up a higher level of administrative efficiency. This is much more important in the context of the recent developments in the country. The future is also likely to be full of problems. In this connection, the Government examined the names of those who are at present occupying top level administrative posts with a view to ascertaining whether they were fully capable of meeting the new challenges or whether they should make room for younger people. As a result of this examination, it has been decided that you should be asked either to revert to your parent State or to proceed on leave preparatory to retirement or to accept some post lower than that of Secretary of Government. I would be glad if you would please let me know immediately as to what you propose to do so that further action in the matter may be taken.

Your sincerely,

(Sd.) DHARMA VIRA."

He asked for interview with the Cabinet Secretary and the Prime Minister and represented his case but nothing seems to

have come of it. On September 7, 1966 he received a second letter from the Cabinet Secretary which said *inter alia* as follows:

".... I am now directed to inform you that after considering your oral and written representations in the matter Government has decided that your services may be placed at the disposal of your parent State, namely, Assam. In case, however, you like to proceed on leave preparatory to retirement, will you please let me know?

3. The appellant treated these orders as reduction in his rank and filed a writ petition in the High Court of Calcutta on September 19, 1966. According to him the order amounted to a reduction in rank since the pay of a Secretary to the Government of India (I.C.S.) is Rs. 4,000 and the highest pay in Assam (I.C.S.) is Rs. 3,500. There being no equal post in the Government of Assam his reversion to the Assam Service meant a reduction not only in his emoluments but also in his rank. He also contended that he held a 5 years' tenure post and the tenure was to end on July 29, 1969 but was wrongly terminated before the expiry of five years. He also alleged that there was a stigma attached to his reversion as was clear from the three alternatives which the letter of the Cabinet Secretary gave him. The highest post in the Government of Assam being equivalent to the Joint Secretary of Government of India, his reversion to the highest post i.e., Chief Secretary to the Government of Assam, amounted to a reduction in rank. He contended, if this was the case, the procedure under Article 311 (2) of the Constitution ought to have been followed and without following that procedure the order was not sustainable.

4. When the appellant filed the writ petition he was appointed as a Special Secretary on October 15, 1966 but under one of his juniors. It may be mentioned here that the appellant is next only to the Cabinet Secretary in the matter of seniority. He also received a letter from the Government of India dated October 20, 1966 in which it was said that Government was considering giving him a post equal to that of a Secretary. The writ petition was dismissed by Justice A. N. Ray on May 19, 1967. The following day the appellant was again reported to Assam but he filed an appeal and obtained a stay. On March 21, 1968 he was appointed Secretary in the Department of

Statistics in the Central Government. The appeal was heard by Justice P. B. Mukharji and Justice A. N. Sen who differed, the former was in favour of dismissing the appeal while the latter was in favour of allowing it. The appeal was then laid before Sankar Prosad Mitra, J., who agreed with Justice Mukharji and the appeal was dismissed on September 18, 1968. On September 20, 1968 the appellant was reposted to Assam. He, however, filed the present appeal and has proceeded on leave although no orders on leave application seemed to have been passed when we heard the appeal.

5. In this appeal also, it is contended that the reversion of the appellant to the Assam Service amounts to a reduction in rank. This is on the ground that he held a higher post in the Government of India and there is no post equal to it under the Assam Government. The post of the Chief Secretary in the Assam Government is equal to the post of a Joint Secretary in the Government of India and his reversion would therefore indirectly mean a reduction in his rank and also in his emoluments because the highest post in Assam does not carry a salary equal to that of a Secretary in the Government of India. He also contends that under Article 311 (2) an enquiry had to be made and he had to be given a chance of explaining his case if the reduction in rank amounted to a penalty. He contends that the letters of the Cabinet Secretary speak for themselves and clearly show that he was being offered a lower post even in the Government of India if he was to continue here denoting thereby a desire to reduce him in rank. The letters also speak of his unsatisfactory work and, therefore, cast a stigma on him and therefore his reversion must be treated as a penalty and if the procedure laid down under Article 311 (2) is not followed, the order of the Government of India could not be sustained. This, in short, is the case which he had put up before the High Court and has now put up before us.

6. The Government of India contends that he was on deputation and the deputation could be terminated at any time; that his orders of appointment clearly show that the appointments were "until further orders" and that he had no right to continue in the Government of India if his services were not required and that his reversion to his parent State did not amount either to any reduction in rank

or a penalty, and, therefore, the order was quite legal.

7. Prior to 1946 the members of the Indian Civil Service were in a Civil Service of the Secretary of State. As a result of a conference between Chief Ministers and the Government of India an All India Administrative Service was constituted in October 1946. This agreement was entered into under Section 263 of the Government of India Act, 1935. The Indian Administrative Service was common to the Centre and the Provinces. On January 25, 1950 rules were framed under Sections 241 (2) and 247 of the Government of India Act, 1935. These rules were known as the Indian Civil Administrative (Cadre) Rules, 1950. Under these rules cadres were constituted. A 'cadre' is defined in Fundamental Rule 9 (4) as the strength of a service or a part of a service sanctioned as a separate unit. In these rules 'cadre officer' meant an officer belonging to any of these categories specified in Rule 4 and 'cadre post' meant any duty post included in the Schedule to the Rules. In Rule 4, it was provided that every cadre post shall be filled *inter alia* by an officer who is a member of the Indian Civil Service. In the Schedule Assam was to have 20 senior posts under the Provincial Government, 6 senior posts under the Central Government and 37 posts for direct recruitment, and junior posts and certain reserves. After 1954 a number of Rules were framed and we are concerned in this case with the Indian Administrative Service (Cadre) Rules, 1954, Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955 and Indian Administrative Service (Pay) Rules, 1954. Under the Pay Rules were shown the posts carrying pay above the time-scale pay in the Administrative Service under the State Governments. In Assam there were four such posts — Chief Secretary (Rs. 3,000), Member, Board of Revenue, Commissioners and Development Commissioners (Rs. 2,500—125/2—2,750). These four were the only posts above the time-scale and the highest pay possible was that of a Chief Secretary carrying Rs. 3,000 p. m. (vide All India Services Manual (1967), p. 248). The lower posts in Assam were: Secretaries, Additional Secretaries, Joint Secretaries, etc., who were on a time-scale with ceiling of Rs. 2,250 p.m. (*ibid* p. 263). As against this the posts carrying pay above the time-scale or special pay in addition to pay in the time-scale under the Central Government when held by Indian Admini-

nistrative Service men were Secretaries to the Government of India with a pay of Rs. 3,500 (Rs. 4,000 for Indian Civil Service men) and so on in a downward position. There was no separate cadre in the Government of India as defined in the Fundamental Rule mentioned above. There were only cadres in the States. Posts beyond the State cadre limit were only to be found in the Government of India. The Indian Administrative Service (Cadre) Rules, 1954 provided an elaborate machinery for getting persons to fill the posts in the Government of India. Similarly, the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955 provided for these matters. Rule 3 of the Indian Administrative Service (Cadre) Rules provided as follows:

"3. Constitution of Cadres.—

(1) There shall be constituted for each State or group of States an Indian Administrative Service Cadre.

(2) The cadre so constituted for a State or a group of States is hereinafter referred to as a 'State Cadre' or as the case may be, a 'Joint Cadre'."

Rule 4 next provided:

"Strength of Cadres.—

(1) The strength and composition of each of the cadres constituted under R. 3 shall be as determined by regulations made by the Central Government in consultation with the State Governments in this behalf and until such regulations are made, shall be as in force immediately before the commencement of these rules.

(2) The Central Government shall, at the interval of every three years, re-examine the strength and composition of each such cadre in consultation with the State Government or the State Governments concerned and may make such alterations therein as it deems fit:

Provided that nothing in this sub-rule shall be deemed to affect the power of the Central Government to alter the strength and composition of any cadre at any other time:

Provided further that the State Government concerned may add for a period not exceeding one year and with the approval of the Central Government for a further period not exceeding two years, to a State or Joint Cadre one or more posts carrying duties or responsibilities of a like nature to cadre posts."

Rule 6 then provided for deputation of cadre officers. It reads as follows:

"6. Deputation of cadre officers.—

(1) A cadre officer may, with the concurrence of the State Government or the

State Governments concerned and the Central Government, be deputed for service under the Central Government, or another State Government or under a company, association or body of individuals, whether incorporated or not, which is wholly or substantially owned or controlled by the Government.

(2) A cadre officer may also be deputed for service under:—

(i) a Municipal Corporation or a Local Body, by the State Government on whose cadre he is borne, or by the Central Government with the concurrence of the State Government on whose cadre he is borne, as the case may be; and

(ii) an international organisation, an autonomous body not controlled by the Government, or a private body, by the Central Government in consultation with the State Government on whose cadre he is borne;

Provided that no cadre officer shall be deputed to any organisation or body of the type referred to in item (ii) of this sub-rule except with his consent."

It may be pointed out here that 'permanent post' is defined by the Fundamental Rules as a post carrying a definite rate of pay and sanctioned without limit of time; a 'temporary post' is defined as a post carrying definite rate of pay sanctioned for a limited time and a 'tenure post' means a permanent post which an individual Government servant may not hold for more than a limited period. All cadre posts were to be filled by cadre officers (rule 8), but temporary appointments of non-cadre officers to cadre posts were possible under certain circumstances (rule 9).

8. Under the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955, Assam was to have a total of 117 cadre posts. Of these, 55 were under the Government of Assam and 22 senior posts were to be under the Central Government. 19 were promotion posts and 58 were to be filled by direct recruitment. There were certain reserved posts for leave reserves, deputation reserves, training reserves and finally there were junior posts. By the agreement which formed an annexure to the Indian Civil Administrative (Cadre) Rules, 1950, Assam was to have 20 senior posts under the Provincial Government and 6 senior posts under the Central Government with some provision for direct recruitment posts, junior posts and reserves. These posts denoted combined Service between the

THE

All India Reporter

1970

U. S. Supreme Court

AIR 1970 USSC (V 57 C 1)

(1969-23 L Ed 2d 101)*

Immigration and Naturalization Service,
Petitioner v. Veljko Stanisic, Respondent.

No. 297 decided on 19-5-1969.

†Constitution of India, Arts. 14 and 22—
American Case — Alien crewman with a
temporary landing permit apprehending
physical persecution on return to his
country informing Immigration and
Naturalisation Service that he would not
return to his ship — District Director of
services revoking the permit and the Dis-
trict Court of Oregon holding that crew-
man was not entitled to a hearing before
special inquiry Officer — Court of appeal
holding that the ship having left, crew-
man was entitled to hearing before special
inquiry Officer — On certiorari, U. S.
Supreme Court reversed — Held, that an
alien crewman whose temporary landing
permit was properly revoked did not
become entitled to a hearing before a
special inquiry Officer merely because
his deportation was not finally arranged
or effected when his vessel left — Under
these circumstances the Attorney General
may provide for the crewman's request
for political asylum to be heard by a Dis-
trict Director of the Immigration and
Naturalization Service.

(Paras 30, 25 and 28)

Cases Referred: Chronological Paras
(1968) 392 US 206=20 L Ed 2d 1037
=88 S Ct 1970, Cheng Fan Kwok
v. I. N. S. 23

*Reproduced from 1969-23 L Ed 2d 101
with the kind permission of the pub-
lishers.

†Reference is given to a parallel Indian
provision for the convenience of Indian
Lawyers.

JM/JM/E630/69/GGM/P

1970 U. S. S. C./1 I G—7-10

(1968) 393 F 2d 539, Stanisic v.
I. N. S. 11, 26, 38
(1968) 393 US 912=21 L Ed 2d 197
=89 S Ct 235 2
(1967) 386 F 2d 232, Kordic v.
Esperdy 2, 17, 19
(1965) 240 F 2d 91 17
(1965) 243 F Supp 113, Vucinic v.
I. N. S. 8
(1963) 225 F Supp 24, Glavic v.
Beechie 17
(1960) 188 F Supp 491, Szlajmer v.
Esperdy 15
(1958) 357 US 185=2 L Ed 2d 1246
=78 S Ct 1072, Leng May Ma v.
Barber 15
(1945) 325 US 410=89 L Ed 1700=
65 S Ct 1215, Bowles v. Semi-
nole Rock Co. 17
Joseph J. Connolly, for Petitioner; G.
Bernard Fedde, for Respondent.

SUMMARY

After an alien crewman who had ob-
tained a temporary landing permit in-
formed the Immigration and Naturaliza-
tion Service that he feared persecution
upon return to his homeland, Yugoslavia,
and that he would not return to the ship
which had brought him to the United
States, a District Director of the Service
revoked the crewman's temporary permit
and held that he did not show that he
would be physically persecuted if he re-
turned to Yugoslavia. The United States
District Court for the District of Oregon
held that the District Director's findings
were supported by the record, and re-
jected the crewman's claim that he was
entitled to a hearing before a special in-
quiry officer (243 F Supp 113). When the
crewman subsequently reasserted his
claim of persecution and again requested
a hearing before a special inquiry officer,
he was again denied relief by both the
Immigration and Naturalization Service
and the District Court. The Court of Ap-

peals for the Ninth Circuit reversed, noting that the crewman's ship had long since left the United States, and holding that he was entitled to a hearing before a special inquiry officer (393 F2d 539).

On certiorari, the United States Supreme Court reversed the judgment of the Court of Appeals and remanded the case. In an opinion by Harlan, J., expressing the view of five members of the court, it was held that an alien crewman whose temporary landing permit was properly revoked did not become entitled to a hearing before a special inquiry officer merely because his deportation was not finally arranged or effected when his vessel left, and that under such circumstances it was proper for the crewman's request for political asylum to be heard by a District Director without being heard by a special inquiry officer.

BLACK, J., joined by Douglas and Marshall, JJ., dissented on the ground that since the crewman's ship had already gone and there was no longer any need for haste in completing the procedures, there was no reason to deprive him of the vital procedural safeguards involved in a hearing before a special inquiry officer.

OPINION OF THE COURT

Mr. JUSTICE HARLAN delivered the opinion of the Court.

2. This case involves the type of hearing to which an alien crewman is entitled on his claim that he would suffer persecution upon deportation to his native land. The Court of Appeals sustained the respondent crewman's contention that he must be heard by a special inquiry officer (1) in a proceeding conducted under S. 242(b) of the Immigration and Nationality Act (2). Petitioner, the Immigration and Naturalization Service, argues that res-

(1) A special inquiry officer is "any officer who the Attorney General deems specially qualified to conduct specified classes of proceedings" Immigration and Nationality Act, S. 101(b)(4). 66 Stat 171, 8 USC S. 1101(b)(4). The special inquiry officer has no enforcement duties. He performs "no functions other than the hearing and decision of issues in exclusion and deportation cases, and occasionally in other adjudicative proceedings." 1 C. Gordon & H. Rosenfield, Immigration Law, and Procedure S. 5.7b, at 5-49 (1967); see generally id., S. 5.7.

(2). 66 Stat 209, 8 USC S. 1252(b);

"A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of

pondent's claim was properly heard and determined by a district director(3). We brought the case here, (1968) 393 US 912, 21 L Ed 2d 197, 89 S Ct 235, to resolve the conflict on this score between the decision below and that of the Court of Appeals for the Second Circuit in *Kordic v. Esperdy*, (1967) 386 F 2d 232.

I

3. Respondent, a national of Yugoslavia, was a crewman aboard the Yugoslav vessel, M/V Sumadija, when it docked at Coos Bay, Oregon, in late December 1964. He requested and was issued a "D-1" temporary landing permit, in accordance with 8 CFR S. 252.1(d)(1) and S. 252 (a)(1) of the Immigration and Nationality Act(4). Under these provisions, the Ser-

deportation No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this sub-section) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that —

"(1) the alien shall be given notice, reasonable under the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

"(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

"(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

"(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

"The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

(3) A district director is the officer in charge of a district office of the Immigration and Naturalization Service. He performs a wide range of functions. See 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure S. 1.9c (1967); 8 CFR S. 103.1(f).

(4) Section 252(a), 68 Stat 220, 8 USC S. 1282(a) provides: "No alien crewman shall be permitted to land temporarily in the United States except as provided in this section If an immigration officer finds upon examination that an alien crewman is a non-immigrant. . . .

vice may allow a non-immigrant alien crewman temporary shore leave for "the period of time (not exceeding twenty-nine days) during which the vessel or aircraft on which he arrived remains in port, if the immigration officer is satisfied that the crewman intends to depart on the vessel or aircraft on which he arrived" Ibid.

4. On January 6, 1965, while on shore leave, respondent appeared at the Portland, Oregon, office of the Immigration and Naturalization Service. He claimed that he feared persecution upon return to Yugoslavia, and he flatly stated that he would not return to the M/V Sumadija. On the basis of the latter statement, and in accordance with S. 252(b) of the Act, the District Director revoked respondent's landing permit. Section 252(b) provides:

"... [A]ny immigration officer may, in his discretion, if he determines that an alien . . . does not intend to depart on the vessel or aircraft which brought him, revoke the conditional permit to land which was granted such crewman under the provisions of sub-section (a)(1), take such crewman into custody, and require the master or commanding officer of the vessel or aircraft on which the crewman arrived to receive and detain him on board such vessel or aircraft, if practicable, and such crewman shall be deported from the United States at the expense of the transportation line which brought him to the United States Nothing in this section shall be construed to require the procedure prescribed in Section 242 of this Act to cases falling

and is otherwise admissible and has agreed to accept such permit, he may, in his discretion, grant the crewman a conditional landing permit to land temporarily pursuant to regulations prescribed by the Attorney General, subject to revocation in subsequent proceedings as provided in sub-section (b), and for a period of time, in any event, not to exceed —

"(1) The period of time (not exceeding twenty-nine days) during which the vessel or aircraft on which he arrived remains in port, if the immigration officer is satisfied that the crewman intends to depart on the vessel or aircraft on which he arrived; or

"(2) twenty-nine days, if the immigration officer is satisfied that the crewman intends to depart, within the period for which he is permitted to land, on a vessel or aircraft other than the one on which he arrived."

"D-1" and "D-2" landing permits are permits issued pursuant to 8 CFR Ss. 252.1(d)(1) and 252.1(d)(2), which implement Ss. 252(a)(1) and 252(a)(2) of the Act.

within the provisions of this sub-section [sic].

5. Section 252(b) makes no express exception for an alien whose deportation would subject him to persecution. However, S. 243(h) permits the Attorney General to withhold the deportation of any alien to a country in which he would be subject to persecution, and analogously, 8 CFR S. 253.1(e) then provided: (5)

"Any alien crewman . . . whose conditional landing permit issued under S. 252.1 (d) (1) of this chapter is revoked who alleges that he cannot return to a Communist, Communist-dominated, or Communist-occupied country because of fear of persecution in that country on account of race, religion, or political opinion may be paroled into the United States for the period of time and under the conditions set by the district director having jurisdiction over the area where the alien crewman is located."

Thus, although respondent was admittedly deportable under the terms of S. 252 (b), he was not immediately returned to his vessel. On January 7, he was offered the opportunity to present evidence to the District Director in support of his claim of persecution.

6. Respondent presented no evidence to the District Director. Rather he contended that he had not been given sufficient time to prepare for the hearing, and he also argued that he was entitled to have his claim heard by a special inquiry officer in accordance with the general provisions of S. 242(b). The District Director ruled against respondent and, in the absence of any evidence of probable persecution, ordered him returned to the M/V Sumadija, which was then still in port.

7. Respondent immediately sought relief in the United States District Court for the District of Oregon. (6) which, without opinion, temporarily stayed his deportation and referred the matter back to the District Director for a hearing on the merits of respondent's claim. On January 25, 1965, after a hearing at which respondent was represented by counsel and presented evidence, the District Director held that respondent "has [not] shown that he

(5) 26 Fed Reg 11797 (December 8, 1961). Effective March 22, 1967, the section was amended and redesignated S. 253.1(f), 32 Fed Reg 4341-4342.

(6) Because the District Director's determination was not pursuant to S. 242 (b), the District Court had jurisdiction to review his action. See *Cheng Fan Kwok v. INS*, 392 US 206, 20 L Ed 2d 1037, 38 S Ct 1970 (1968); *Stanisic v INS*, 393 F2d 539, 542 (1968); *Vucinic v INS*, 243 F Supp 113, 115-117 (1965); 5 USC S 1009 (1954).

would be physically persecuted if he were to return to Yugoslavia." Appendix 22.

8. On respondent's supplemental pleadings, District Court held that the District Director's findings were supported by the record. The court rejected respondent's claim that he was entitled to a S. 242 (b) hearing before a special inquiry officer, relying on the last sentence of S. 252(b), which provides: "Nothing in this section shall be construed to require the procedure prescribed in Section 242 of this Act to cases falling within the provisions of this sub-section." *Vucinic v. INS*, 243 F Supp 113 (1965).

9. Respondent did not appeal from the District Court's decision. Instead, in July 1965, he petitioned Congress for a private bill, pending action on which the Service stayed his deportation. Respondent's effort proved unsuccessful, and on June 21, 1966, the Service ordered him to appear for deportation to Yugoslavia.

10. The following day, respondent reasserted his claim of persecution before the Service, and requested that the matter be heard by a special inquiry officer to S. 242. The Service, and subsequently the District Court, denied retho holding that this issue had already been determined adversely to

11. The Court of Appeals for the Ninth Circuit reversed, *Stanisic v. INS* (1966) 393 F2d 539, holding that the matter was not res judicata because of a significant change of circumstances: the District Director's adverse determination in 1965, and the District Court's unappealed approval thereof, were based on the unstated premise that the M/V Sumadlja was still in port; (7) but now the ship had long since sailed, and respondent still had not been deported. The court held that S. 252 (b) only authorized respondent's "summary deportation aboard the vessel on which he arrived or, within a very limited time after that vessel's departure, aboard another vessel pursuant to arrangements made before [his] vessel departed." 393 F2d, at 542-543. Since neither of these conditions was met, respondent could no longer be deported pursuant to the District Director's 1965 determination; he was entitled to a de novo hearing before a special inquiry officer under S. 242 (b) of the Act.

(7) Actually, the ship sailed from the United States on or about January 16, 1965, or between the date on which the District Director revoked respondent's landing permit (January 6, 1965), and the date on which after a hearing, he denied respondent's persecution claim (January 25, 1965). This fact was not in the record before the Court of Appeals.

II

12. At the outset, it is important to recognize the distinction between a determination whether an alien is statutorily deportable — something never contested by respondent — and a determination whether to grant political asylum to an otherwise properly deportable alien.

13. Section 242 (b) provides a generally applicable procedure "for determining the deportability of an alien". Section 252(b) provides a specific procedure for the deportation of alien crewmen holding D-1 landing permits. Neither of these sections is concerned with the granting of asylum.

14. Relief from persecution, on the other hand, is governed by Ss. 212 (d) (5) and 243(h). The former section authorizes the Attorney General, in his discretion, to "parole into the United States under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States". The latter authorizes the Attorney General "to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

15. No statute prescribes by what delegate of the Attorney General, or pursuant to what procedure, relief shall be granted under these provisions. By regulation, the decision to grant parole pursuant to S. 212(d)(5) rests with a district Director, 8 CFR Ss. 212.5(a), 253.2; and by regulation, the decision to withhold deportation of most aliens pursuant to S. 243(h) is presently made by a special inquiry officer (8), 8 CFR Ss. 242.8(a), 242.17 (c).

Prior to 1960, no regulation provided relief to an alien crewman whose D-1 landing permit was revoked but who claimed that return to his country would subject him to persecution. In *Szajmer v. Esperdy*, (1960) 188 F Supp 491, a district court held that a crewman in this situation was entitled to be heard. The Service responded by promulgating 8 CFR S. 253.1(e), supra, at 4, the regulation which it applied in the case at bar. 8 CFR S 253.1 (e) is a hybrid. The grounds for relief are, for present purposes, identical to those of S. 243(b) of

(8) This was not always so. Until 1962, the final determination was made by a regional commissioner of the Service. 8 CFR S. 243.3(b)(2) (1958) (rev); see *Fott v. INS*, 375 US 217, 230 n 16, 11 L Ed 2d 281, 290, 84 S Ct 306 (1963).

the Act. (9) However, because the Service adheres to the view that a crewman whose D-1 permit has been revoked is not "within the United States" in the technical sense of that phrase, see *Leng May Ma v. Barber*, (1958) 357 US 185, 2 L Ed 2d 1246, 78 S Ct 1072 it terms the relief "parole" into the United States rather than "withholding deportation." Whatever terminological and conceptual differences may exist, the substance of the relief is the same. (10)

16. The Service could provide that all persecution claims be heard by a district director, and we see no reason why Service cannot validly provide that the persecution claim of an alien crewman whose D-1 landing permit has been revoked be heard by a district director, whether or not the ship has departed. It might be argued however, that the Service has not done so that 8 CFR S. 253.1(e) was designed to govern the determination of persecution claims only when S. 252(b) of the Act governed determinations of deportability; and that if departure of the vessel renders S. 252(b) inapplicable (a suggestion we consider and reject in Part III, below), then 8 CFR S. 253.1(e) likewise becomes inapplicable.

17. 8 CFR S. 253.1(e) applies, however, to "any alien crewman . . . whose conditional landing permit issued under S. 252.1(d) (1) [of the Act] . . . is revoked" — precisely respondent's situation—and makes no reference to the departure, vel non, of the vessel. Granting that this regulation and its successor provision are not free from ambiguity, we find it dispositive that the agency responsible for promulgating and administering the regulation has interpreted it to apply even when the vessel has departed. E. g., *Kordic v. Esperdy* (1967) 386 F 2d 232; *Glavic v. Beechie*, 225 F Supp 24 (1963), aff'd, 240 F2d 91 (1955). "The ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock Co.* (1945) 325 US 410, 414: 89 L Ed 1700, 1702: 65 S Ct 1215.

(9) The only substantial difference is that the regulation, but not the statute, is limited to Communist-inspired persecution.

(10) For this reason, we have no occasion to decide whether or not respondent was "within the United States." Compare *Szljajmer v. Esperdy*, 188 F Supp 491 (1960), with *Kordic v. Esperdy*, 386 F 2d 232 (1967), and *Glavic v. Beechie*, 225 F Supp 24 (1963), aff'd, 240 F2d 91 (1955). It may further be noted that S. 243(h), by its terms, "authorizes" but does not require the consideration of persecution claims.

18. In sum, it is immaterial to the decision in this case whether S. 252(b)'s exception to the S. 242(b) procedure is, or is not, applicable to respondent. These two provisions govern only the revocation of temporary landing permits and the determination of deportability, and we reiterate that respondent does not contest the District Director's action on either of these scores. These sections do not state who should hear and determine a request for asylum. That is a matter governed by regulation, and under the applicable regulation the respondent received his due.

III

19. We do not rest on this ground alone, however. Both the court below and the Court of Appeals for the Second Circuit in *Kordic v. Esperdy*, (1967) 386 F2d 232 assumed that a crewman's statutory entitlement to a Sec. 242(b) hearing on his request for asylum was co-extensive with his right to a S. 242(b) hearing on his statutory deportability, and the case was argued here primarily on that basis. For the balance of the opinion we thus make, arguendo, the same assumption. We conclude, contrary to the court below, that an alien crewman may properly be deported pursuant to S. 252(b) even after his ship has sailed.

A

20. Section 242(b) of the Immigration and Nationality Act provides a generally applicable administrative procedure pursuant to which a special inquiry officer determines whether an alien is deportable.

21. The history of S. 252(b)'s narrow exception to the S. 242(b) deportation procedure is found in the Report of the Senate Committee on the Judiciary, S. Rep. No. 1515 81st Cong, 2d Sess, which preceded the enactment of the Immigration and Nationality Act. Alien crewmen had traditionally been granted the privilege of temporary admission or shore leave "because of the necessity of freeing international commerce and considerations of comity with other nations. . . ." Id., at 546. A serious problem was created, however, by alien crewmen who deserted their ships and secreted themselves in the United States. The Committee found that:

"[T]he temporary shore leave of alien seamen who remain illegally constitutes one of the most important loopholes in our whole system of restriction and control of the entry of aliens into the United States. The efforts to apprehend these alien seamen for deportation are encumbered by many technicalities invoked in behalf of the alien seaman and create many conditions incident to enforcement of the laws which have troubled the authorities for many years." Id., at 550.

To ameliorate this problem, the Committee recommended that:

"Authority should be granted to immigration officers in a case where the alien crewman intends to depart on the same vessel on which he arrived, upon a satisfactory finding that an alien is not a bona fide crewman, to revoke the permission to land temporarily, to take the alien into custody, and to require the master of the vessel on which he arrived to remove him from the country." *Id.*, at 558.

22. Unlike S. 242(b), S. 252(b) does not prescribe the procedures governing the determination of the crewman's deportability, nor does it confine that determination to a special inquiry officer.

B.

23. As the Court of Appeal noted, the S. 252(b) procedure governs a narrow range of cases only. It is entirely inapplicable to persons other than alien crewmen. It does not apply to an alien crewman who enters the United States illegally without obtaining any landing permit at all, or who enters on a "D-2" permit allowing him to depart on a different vessel. See n. 4, *supra*. The Service has held S. 252(b) to be inapplicable even to a crewman issued a D-1 permit unless formal revocation — as distinguished from actual deportation — takes place before his vessel leaves American shores. (11) *Matter of M*, 5 I. & N. 127 (1953); 8 CFR S. 252.2; see *Cheng Fan Kwok v. INS* 392 US 206, 207, 20 L Ed 2d 1037, 1039, 88 S Ct 1970 (1968).

24. Section 252(b) most plainly governs the situation in which a D-1 landing permit is revoked and the alien crewman is immediately returned to the vessel on which he arrived which, by hypothesis, is still in a United States port. At the time of revocation, the crewman usually has not traveled far from the port, (12) so the burden of transporting him back to

the vessel is small; there is a readily identifiable vessel and place to return him to; and during his brief shore leave, which cannot exceed 29 days, the crewman is unlikely to have established significant personal or business relationships in the United States. In short, the crewman's deportation may be expedited, with minimum hardship and inconvenience to him, to the transportation company responsible for him, (13) and to the Service.

25. That this is not the only situation to which the S. 252(b) procedure applies, however, is evident from the language of S. 252(b) itself and the related provisions of S. 254. (14) Section 252(b) requires that where an alien crewman's landing permit is revoked his transportation company must detain him aboard the vessel on which he arrived, and deport him. Section 254(a) imposes a fine on the company and ship's master, *inter alia*, for failure to detain or deport the crewman "if required to do so by an immigration officer."

However, S. 252(b)'s requirement is modified by the term, "if practicable", and S. 254(c) correlatively provides:

"If the Attorney General finds that deportation of an alien crewman . . . on the vessel or aircraft on which he arrived is impracticable or impossible, or would cause undue hardship to such alien crewman, he may cause the alien crewman to be deported from the port of arrival or any other port on another vessel or aircraft of the same transportation line, unless the Attorney General finds this to be impracticable."

These provisions contemplate that an alien crewman whose temporary landing permit is revoked pursuant to S. 252(b) may be deported on a vessel other than the one on which he arrived. The other vessel should preferably be one owned by the transportation company which brought him to the United States. (15) but if this is not feasible, the Attorney General may order him deported by other means, at the company's expense.

26. The Court of Appeals recognized that an alien crewman might properly be deported on a vessel other than the one which brought him. It noted, however, that S. 254(c) holds the owner of that vessel responsible for all of the expenses of his deportation and further provides that the vessel shall not be granted departure clearance until those expenses are

(11) This is responsive to the language of S. 252(b). Permission to land terminates upon the vessel's departure, and thereafter there is nothing to "revoke."

(12) 8 CFR S. 252.2(d) provides that a "crewman granted a conditional permit to land under section 252(a) (1) of this Act . . . is required to depart with his vessel from its port of arrival and from each other port in the United States to which it thereafter proceeds coastwise without touching at a foreign port or place; however, he may rejoin his vessel at another port in the United States before it touches at a foreign port or place if he has advance written permission from the master or agent to do so." In the latter case the crewman may journey some distance from the port at which he arrived.

(13) See *infra*, at —, 23 L Ed 2d at 111.

(14) 66 Stat 222, 8 USC S. 1284.

(15) This is doubtless an accommodation made in the light of the transportation company's liability for the expenses of deportation.

paid or their payment is guaranteed. (16) From this it concluded that "that section contemplates that the alternative arrangement shall be made while the vessel upon which the crewman arrived is still in port" 393 F2d, at 546. Since arrangements for respondent's deportation had not been made before the M/V Sumadija departed, the S. 254(c), and hence the S. 252(b), procedures were no longer applicable: with the ship's departure, respondent became entitled to a hearing pursuant to S. 242(b).

27. We agree that the "clearance" provision of S. 254(c) contemplates that the crewman's departure on another vessel may sometimes be accomplished or arranged before the vessel that brought him departs. If, however, the crewman's vessel sails before its owner has paid or guaranteed the expenses of deportation, the owner's liability under S. 254(c) is in no way diminished. The Government has merely lost a useful means of compelling payment of costs which may still be collected by other methods. (17) Indeed, as the Court of Appeals itself noted, S. 254(c)'s financial responsibility provision is not limited to instances of deportation pursuant to S. 252(b), but applies to the deportation of alien crewmen in a variety of situations, including those in which a S. 242(b) proceeding has been held, and thus those in which the crewman's vessel may long since have departed. (18)

28. Strong policies support the conclusion that a properly commenced S. 252(b) proceeding does not automatically abort upon the departure of the crewman's vessel. If the crewman whose landing permit has been revoked pursuant to

(16) "All expense incurred in connection with such deportation, including expenses incurred in transferring an alien crewman from one place in the United States to another under such conditions and safeguards as the Attorney General shall impose, shall be paid by the owner or owners of the vessel or aircraft on which the alien arrived in the United States. The vessel or aircraft on which the alien arrived shall not be granted clearance until such expenses have been paid or their payment guaranteed to the satisfaction of the Attorney General . . . "S. 254(c).

(17) Thus, if and when respondent is deported, the owners of the M/V Sumadija had been responsible for the related expenses incurred by the United States.

(18) And, although we do not decide this question, S. 254(c) would appear to allow the Attorney General to require security for the payment of anticipated expenses of deporting an alien crewman, even though no final arrangements have been made before the vessel that brought him departs.

S. 252(b) attacks the District Director's action in a federal court, the court would usually stay his deportation pending at least a preliminary hearing. Even courts with dockets less crowded than those of most of our major port cities (19) may not be able to hear the matter for several days or more, during which time the vessel may often have departed according to schedule. It requires little legal talent, moreover, to manufacture a colorable case for a temporary stay out of whole cloth, and to delay proceedings once in the federal courts. The Ninth Circuit's construction would, thus, encourage frivolous applications and intentional delays designed to assure that the crewman's vessel departed before the case was heard. Alternatively, it would so dispose federal judges against granting stays that persons presenting meritorious applications might be deported without the opportunity to be heard.

29. We agree with the court below that S. 252(b) is a provision of limited applicability. But we conclude that the court's construction would restrict its scope to a degree neither intended by Congress nor supported by the language of the Act, and that it would, as a practical matter, render S. 252(b) useless for the very function it was designed to perform.

30. We hold that an alien crewman whose temporary landing permit is properly revoked pursuant to S. 252(b) does not become entitled to a hearing before a special inquiry officer under S. 242(b) merely because his deportation is not finally arranged or effected when his vessel leaves, and that under these circumstances the Attorney General may provide — as he did in 8 CFR S. 253.1(e), now 8 CFR S. 253.1(f) — that the crewman's request for political asylum be heard by a district director of the Immigration and Naturalization Service.

31. At the time of respondent's January 1965 hearing before the District Director, S. 243(h) of the Immigration and Nationality Act provided:

"The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to 'physical persecution' . . . " (20) (Emphasis (here in ' ') added).

By the Act of October 3, 1965, S. 11 (f), 79 Stat 918, this section was amended by substituting for "physical persecution" the phrase "persecution on account of race, religion, or political opinion." Although 8 CFR S. 253.1(e), the regulation

(19) See generally Annual Report of the Director of the Administrative Office of the United States Courts, Tables C, D, and X (1968).

(20) 66 Stat 214.

under which respondent's 1965 hearing was conducted, did not itself contain any restriction to "physical persecution", it is apparent from the District Director's findings that he read such a limitation into the regulation.(21)

32. We believe, therefore, that it is appropriate that respondent be given a new hearing before the District Director under the appropriate standard, and we remand the case for that purpose.(22)

33. The judgment of the United States Court of Appeals for the Ninth Circuit is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

34. It is so ordered.

SEPARATE OPINION

35. Mr. JUSTICE BLACK, with whom Mr. Justice Douglas and Mr. Justice Marshall join, dissenting.

36. Two procedures for the deportation of aliens are relevant in this case. The first is set forth in S. 242 (b) of the Immigration and Nationality Act, 66 Stat 209, 8 USC S. 1252 (b), and is the procedure required in most instances when the Government seeks to deport an alien. Under S. 242(b) a number of procedural safeguards are specified to insure that an alien is given the full benefit of a complete and fair hearing before the harsh consequence of deportation can be imposed on him.(1) The second procedure

(21) See supra, at —, 23 L Ed 2d at 107; Appendix 18-22 passim.

(22) Respondent contends that his 1965 proceeding was infected with various constitutional errors, including the District Director's alleged bias and his combination of prosecutorial, investigative, and adjudicatory functions. Because that proceeding is not before us, and because we remand for a new hearing, we have no occasion to consider these arguments, except to note that neither S. 252(b) of the Immigration and Nationality Act nor 8 CFR S. 253.1(f), under which respondent will be heard on remand, is unconstitutional on its face. Likewise, it is premature to consider whether, and under what circumstances, an order of deportation might contravene the Protocol and Convention Relating to the Status of Refugees, to which the United States acceded on November 1, 1968. See Department of State Bulletin, Vol. LIX, No. 1535, p. 538.

(1) Section 242(b) provides as follows:

"A special inquiry officer shall conduct proceedings under this Section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including

involved in this case is set forth in S. 252(b). It is applicable only under very special circumstances involving alien seamen who enter this country under conditional landing permits. Section 252(b) provides for a short, summary procedure.(2) Unlike S. 242(b), the first

orders of deportation. . . . No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that —

"(1) the alien shall be given notice, reasonable under the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

"(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel authorized to practice in such proceedings, as he shall choose;

"(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

"(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

"The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

(2) Section 252(b) provides as follows:

"Pursuant to regulations prescribed by the Attorney General, any immigration officer may, in his discretion, if he determines that an alien is not a bona fide crewman, or does not intend to depart on the vessel or aircraft which brought him, revoke the conditional permit to land which was granted such crewman under the provisions of sub-section (a)(1), take such crewman into custody, and require the master or commanding officer of the vessel or aircraft on which the crewman arrived to receive and detain him on board such vessel or aircraft, if practicable, and such crewman shall be deported from the United States at the expense of the transportation line which brought him to the United States. Until such alien is so deported, any expenses of his detention shall be borne by such transportation company. Nothing in this section shall be construed to require the pro-

provision mentioned, this second provision does not require that the hearing officer be someone unconnected with the investigation and prosecution of the case. It does not require specific trial safeguards such as the rights to notice, counsel, and cross-examination of witnesses. Indeed, S. 252(b) apparently does not require that the alien be given any hearing at all but would seem to authorize an immigration officer to order immediate arrest and summary deportation on the basis of any information coming to him in any way at any time. The question before the Court is therefore not the apparently insignificant question suggested by the Court's opinion—namely, whether this alien's case was properly determined by an official with one title, "District Director," rather than another title, "special inquiry officer." Instead, the question is the crucially significant one whether an alien seaman about to be forced to leave the country is entitled under the circumstances of this case to the benefit of safeguards that were carefully provided by Congress to insure greater fairness and reliability in deportation proceedings.

37. The regulations relied on by the Court in Part II of its opinion do not provide an independent basis for its holding. Among the relevant regulations, 8 CFR S. 242.8(a) applies "in any proceeding conducted under this part," namely "Part 242 — Proceedings to Determine Deportability of Aliens in the United States: Apprehension, Custody, Hearing, and Appeal." The regulation is thus designed to spell out further the details of proceedings required to be conducted under S. 242 of the statute, and this regulation explicitly authorizes the special inquiry officer "to order temporary withholding of deportation pursuant to S. 243 (h) of the Act [the political persecution provision]." In contrast, the regulations relied upon by the Court as authorizing a District Director to decide this issue, in particular former 8 CFR S. 253.1(e), apply by their own terms only to the procedure for "parole" of an alien under S. 212(d)(5), a remedy distinct from the withholding of deportation under S. 243 (h), and by the Government's own admission these regulations are applicable only to "requests for asylum made by crewmen against whom proceedings under Section 252(b) have been instituted." Brief for Petitioner, p. 37. Thus, the regulation serve only to spell out the procedures to be followed under both S. 242(b) and S. 252(b) and do not even purport to specify when one of these sections rather than the other is in fact applicable. The fact that the Immigration and Naturalization

cedure prescribed in Section 242 of this Act to cases falling within the provisions of this sub-section."

Service has applied the regulation differently does not change this meaning. As the Court concedes, the regulation is "not free from ambiguity," ante, p. —, 23 L. Ed 2d p. 109, and of course the ambiguity in the regulation is precisely the same as the ambiguity in the statutory provision from which the wording of the regulation was drawn. It seems clear that the way in which the Service has applied the regulation has been determined by its interpretation of the statute, an interpretation that is in no way binding on us. Both the statute and the regulation are ambiguous, and there is no doubt in my mind that this ambiguity should be resolved in favour of the alien who is seeking a full and fair hearing. With all due respect, I think the Court's involved argument based upon the regulations, which goes beyond anything suggested by the Government itself in this case, provides no basis whatsoever for avoiding the fundamental question of statutory interpretation as to which of the two procedures, S. 242(b) or S. 252(b), was required to be followed in this case.

38. The Government contends that respondent, the alien seaman involved here, could be properly deported under the special summary procedures of S. 252(b) because his conditional landing permit was revoked and because S. 252 (b) authorizes summary deportation after this permit is revoked. Respondent, however, argued in the Court of Appeals that he should have been given the benefit of the careful hearing procedures spelled out by Congress in S. 242(b) because the ship on which he came had departed before the decision of the District Director was made, and therefore the only justification for the fast but ordinarily less desirable procedure of S. 252(b) no longer existed. The Court of Appeals held that S. 252(b) proceedings were authorized only prior to the departure of the ship. I agree with the Court of Appeals. As that Court noted in its opinion:

"The section [252(b)] exception [to the general procedural requirements of S. 242(b)] is very narrowly drawn. It does not apply to the deportation of crewmen who have 'jumped ship' and entered the United States illegally, with no permit at all. As noted above, it does not apply to crewmen issued landing permits authorizing them to depart on vessels other than those on which they arrived. It does not apply to crewmen who have overstayed the twenty-nine day leave period without revocation of their landing permits. It does not apply to crewmen who were to leave on the vessel on which they arrived if their vessels have departed before their landing permits were revoked. In all of these situations crewmen may be deported only in accordance

with [S. 242(b)] procedures." 393 F2d 539, 544 (CA9th Cir, 1968).

39. As the legislative history of the Act, quoted in the opinion of the Court of Appeals, shows, the special truncated procedure of S. 252(b) was intended to be used only when the need for speed was truly pressing — when the ship was about to leave port. But the seaman in this case was subjected to this truncated, summary procedure even though his ship had already gone and the need for haste in completing these important legal proceedings no longer existed. There is no reason to suspect that Congress wanted a seaman to be deprived under these circumstances of the vital procedural safeguards so carefully specified in S. 242(b) of the Act.

40. I would affirm the judgment of the Court of Appeals.

Order accordingly.

AIR 1970 USSC 10 (V 57 C 2)

(1969-23 L Ed 2d 274)*

Edward Boykin Jr., Petitioner v. State of Alabama, Respondent.

(No. 642) decided on 2-6-1969.

†Evidence Act (1872), Ss. 24, 115 — Case from USA — Confession must be voluntary — Plea of guilty is confession — It involves waiver of constitutional rights—Waiver cannot be presumed from silent record — (Criminal P. C. (1898), S. 255) — (Constitution of India, Arts. 20 and 21).

Admissibility of a confession must be based on a reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant.

(Para 8)

A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.

(Para 8)

The same standard must be applied to determining whether a guilty plea is voluntarily made. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.

(Para 9)

Several constitutional rights are involved in a waiver that takes place when

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†Reference is given to a parallel Indian provision for the convenience of Indian Lawyers.

JM/JM/F13/69/RGD/P

a plea of guilty is entered in a criminal trial. First is the privilege against compulsory self-incrimination. Second is the right to trial by jury. Third, is the right to confront one's accusers.

Court cannot presume a waiver of these three important rights from a silent record. (Para 10)

Cases Referred: Chronological Paras

(1967) 391 US 145=20 L Ed 2d 491	
=88 S Ct 1444, Duncan v. Louisiana	10
(1966) 386 US 605=18 L Ed 2d 326	
=87 S Ct 1209, Specht v. Patterson	11
(1964) 380 US 400=13 L Ed 2d 923	
=85 S Ct 1065, Pointer v. Texas	10
(1964) 380 US 415=13 L Ed 2d 934	
=85 S Ct 1074, Douglas v. Alabama	9
(1963) 42 Ala App 314 n 6=163 So 2d 477, Douglas v. State	7
(1963) 378 US 1=12 L Ed 2d 653	
=84 S Ct 7489, Malloy v. Hogan	10
(1963) 378 US 368=12 L Ed 2d 908	
=84 S Ct 1774=1 ALR 3d 1205, Jackson v. Denno	8, 18
(1961) 369 US 506=8 L Ed 2d 70	
=82 S Ct 884, Carnley v. Cochran	8
(1961) 368 US 157=7 L Ed 2d 207	
=82 S Ct 248, Garner v. Louisiana	11
(1961) 368 US 487=7 L Ed 2d 473	
=82 S Ct 510, Machibroda v. United States	15
(1957) 265 Ala 623=93 So 2d 757, Lee v. State	7
(1942) 316 US 101=86 L Ed 1302	
=62 S Ct 984, Waley v. Johnston	18
(1926) 274 US 220=71 L Ed 1009	
=47 S Ct 582, Kercheval v. United States	8
278 Ala 145=176 So 2d 840, Duncan v. State	7
E. Graham Gibbons, for Petitioner; David W. Clark, for Respondent.	

SUMMARY

The defendant, on pleading guilty, was convicted of common-law robbery in the Circuit Court of Mobile County, Alabama, and after a trial by jury to determine the punishment, was sentenced to die. On automatic appeal the Alabama Supreme Court affirmed, and unanimously rejected the defendant's argument that a sentence of death for common-law robbery was cruel and unusual punishment within the meaning of the Federal Constitution, but four of the seven judges on their own motion discussed the constitutionality of the process by which the trial judge had accepted the defendant's guilty plea, and three of these four judges dissented from the affirmation on the ground that the record was inadequate to show that the defendant had intelligently and knowingly pleaded guilty (281 Ala 659, 207 So 2d 412).

On certiorari, the United States Supreme Court reversed. In an opinion by Douglas, J., it was held (1), expressing the unanimous view of the court, that the federal constitutional question of the voluntary character of the defendant's guilty plea was properly before the Supreme Court notwithstanding the defendant failed to raise the question below and the State court failed to pass upon it and (2), expressing the view of six members of the court, that there was reversible error under the due process clause of the Fourteenth Amendment where the record did not disclose that the defendant voluntarily and understandingly entered such plea.

Harlan, J., joined by Black, J., dissented on the grounds that (1) the court's holding in effect fastened upon the States, as a matter of federal constitutional law, the rigid prophylactic requirements of Rule 11 of the Federal Rules of Criminal Procedure governing the duty of the trial judge before accepting a guilty plea; (2) this was done at the behest of a defendant who never alleged that his guilty plea was involuntary or made without knowledge of the consequences; and (3) the result of the case was wholly unprecedented and was inconsistent with recent decisions of the court.

OPINION OF THE COURT

Mr. JUSTICE DOUGLAS delivered the opinion of the Court.

In the Spring of 1966, within the period of a fortnight, a series of armed robberies occurred in Mobile, Alabama. The victims, in each case, were local shopkeepers open at night who were forced by a gunman to hand over money. While robbing one grocery store, the assailant fired his gun once, sending a bullet through a door into the ceiling. A few days earlier in a drugstore, the robber had allowed his gun to discharge in such a way that the bullet, on ricochet from the floor, struck a customer in the leg. Shortly thereafter, a local grand jury indicted petitioner, a 27 year-old Negro, on five counts of common-law robbery—an offense punishable in Alabama by death.

2. Before the matter came to trial the court determined that petitioner was indigent and appointed counsel (1) to represent him. Three days later, at his arraignment, petitioner pleaded guilty to all five indictments. So far as the record shows, the judge asked no questions of petitioner concerning his plea, and petitioner did not address the Court.

3. Trial strategy may of course make a plea of guilty seem the desirable course. But the record is wholly silent on that point and throws no light on it.

4. Alabama provides that when a defendant pleads guilty, "the Court must cause the punishment to be determined by a jury" (except where it is required to be fixed by the court) and may "cause witnesses to be examined to ascertain the character of the offense." Ala Code 1958, Tit 15, S. 277. In the present case a trial of that dimension was held, the prosecution presenting its case largely through eyewitness testimony. Although counsel for petitioner engaged in cursory cross-examination, petitioner neither testified himself nor presented testimony concerning his character and background. There was nothing to indicate that he had a prior criminal record.

5. In instructing the jury, the judge stressed that petitioner had pleaded guilty to five counts of robbery(2), defined as "the felonious taking of money . . . from another against his will . . . by violence or by putting him in fear . . . [carrying] from ten years minimum in the penitentiary to the supreme penalty of death by electrocution. The jury, upon deliberation, found petitioner guilty and sentenced him severally to die on each of the five indictments.

6. Taking an automatic appeal to the Alabama Supreme Court, petitioner argued that a sentence of death for common-law robbery was cruel and unusual punishment within the meaning of the Federal Constitution, a suggestion which that Court unanimously rejected. 281 Ala 659, 207 So 2d 412. On their own motion, however, four of the seven judges discussed the constitutionality of the process by which the trial judge had accepted petitioner's guilty plea. From the order affirming the trial court, three judges dissented on the ground that the record was inadequate to show that petitioner had intelligently and knowingly pleaded guilty. The fourth member concurred separately, conceding that "a trial judge should not accept a guilty plea unless he was determined that such a plea was voluntarily and knowingly entered by the defendant," but refusing "for aught appearing . . . to presume that the trial judge failed to do his duty." 281 Ala 662-663, 207 So 2d, at 414-415. We granted certiorari. 393 US 820, 21 L Ed 2d 93, 89 S Ct 200.

7. Respondent does not suggest that we lack jurisdiction to review the voluntary character of petitioner's guilty plea

(1) *Hamilton v. Alabama*, 368 US 52, 7 L Ed 2d 114, 82 S Ct 157; Ala Code 1958, as amended, Tit 15, S. 318(1-12) (Supp 1967).

(2) The elements of robbery, in Alabama, are derived from the common law, but the possible penalties are fixed by statute, Ala Code, Tit 14, S. 415 (1958).

because he failed to raise that federal question below and the state court failed to pass upon it(3). But the question was raised on oral argument and we conclude that it is properly presented. The very Alabama statute (Ala Code Tit 15, S. 382 (10) (1958)) that provides automatic appeal in capital cases also requires the reviewing court to comb the record for "any error prejudicial to the appellant, even though not called to our attention in brief of counsel." *Lee v. State*, (1957) 265 Ala 623, 630, 93 So 2d 757, 763. The automatic appeal statute "is the only provision under the Plain Error doctrine of which we are aware in Alabama criminal appellate review." *Douglas v. State*, (1962) 42 Ala App 314, n. 6, 331, n. 6, 163 So 2d 477, 494. In the words of the Alabama Supreme Court:

"Perhaps it is well to note that in reviewing a death case under the automatic appeal statute, we may consider any testimony that was seriously prejudicial to the rights of the appellant and may reverse thereon, even though no lawful objection or exception was made thereto. [Citations omitted]. Our review is not limited to the matters brought to our attention in brief of counsel." *Duncan v. State*, 278 Ala 145, 157, 176 So 2d 840, 851.

It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary. That error, under Alabama procedure, was properly before the court below and considered explicitly by a majority of the justices and is properly before us on review.

8. A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. See *Kercheval v. United States*, (1926) 274 US 220, 223, 71 L Ed 1009, 1012, 47 S Ct 582. Admissibility of a confession must be based on a "reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant." *Jackson v. Denno*, (1963) 378 US 368, 387, 12 L Ed 2d 908, 922, 84 S Ct 1774, 1 ALR3d 1205. The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In *Carnley v. Cochran*, (1961) 369 US 506, 516, 8 L Ed 2d 70, 77, 82 S Ct 884, we dealt with a problem of

(3) This is unlike *Cardinale v. Louisiana*, 394 US—, 22 L Ed 2d 398, 89 S Ct 1162, in which the state court was perhaps unacquainted with the federal question at issue. For, as already stated, four of the seven judges on the court below (a majority) discussed the matter and its implications for Alabama law,

waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

9. We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction(4). Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. *Douglas v. Alabama*, (1964) 380 US 415, 422, 13 L Ed 2d 934, 938, 85 S Ct 1074.

10. Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy v. Hogan*, (1963) 378 US 1, 12 L Ed 2d 653, 84 S Ct 1489. Second is the right to trial by jury. *Duncan v. Louisiana*, (1967) 391 US 145, 20 L Ed 2d 491, 88 S Ct 1444. Third, is the right to confront one's accusers. *Pointer v. Texas*, (1964) 380 US 400, 13 L Ed 2d 923, 85 S Ct 1065. We cannot presume a waiver of these three important federal rights from a silent record(5).

(4) "A plea of guilty is more than a voluntary confession made in open court. It also serves as a stipulation that no proof by the prosecution need be advanced It supplies both evidence and verdict, ending the controversy." *Woodard v. State*, 42 Ala App 552, 558, 171 So 2d 462, 469.

(5) In the federal regime we have Rule 11 of the Federal Rules of Criminal Procedure which governs the duty of the trial judge before accepting a guilty plea. See *McCarthy v. United States*, 394 US — 22 L Ed 2d 418, 89 S Ct 1166. We said in that case:

"A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege'. *Johnson v. Zerbst*, 304 US 458, 464, [82 L Ed 1461, 1466, 58 S Ct 1019, 146 ALR 357] (1938). Consequently, if a de-

11. What is at stake for an accused facing death or imprisonment demands utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought(6) (*Garner v. Louisiana*, (1961) 368 US 157, 173, 7 L Ed 2d 207, 219, 82 S Ct 248; *Specht v. Patterson*, (1966) 386 US 605, 610, 18 L Ed 2d 326, 330, 87 S Ct 1209), and forestalls the spin-off of collateral proceedings that seek to probe murky memories(7).

12. The three dissenting justices in the Alabama Supreme Court stated the law accurately when they concluded that there was reversible error "because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty." 281 Ala, at 663, 207 So 2d, at 415.

13. Reversed.

SEPARATE OPINION

Mr. JUSTICE HARLAN, whom Mr. Justice Black joins dissenting.

Defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Id.*, at —, 22 L Ed 2d at 425.

(6) Among the States requiring that an effective waiver of the right to plead not guilty appear affirmatively in the record are Colorado, *Colo Rev Stat Ann. S. 39-7-8*; Illinois, *Ill Stat Ann c 38, Ss. 113-114* (1964); Missouri, *State v. Blaylock*, — Mo—, 394 SW 2d 364 (1965); New York, *People v. Seaton*, 19 NY2d 406, 407, 280 NYS 2d 370, 371 (1967). Wisconsin, *State v. Burke*, 22 Wis 2d 486, 494, 126 NW2d 91, 96 (1964); and Washington, *Woods v. Rhay*, 68 Wash 2d 601, 605, 414 P2d 601, 604 (1966).

(7) "A majority of criminal convictions are obtained after a plea of guilty. If these convictions are to be insulated from attack, the trial court is best advised to conduct on the record examination of the defendant which should include, *inter alia*, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged, and the permissible range of sentences." *Commonwealth ex rel. West v. Rundle*, 428 Pa 102, 105-106, 237A 2d 196, 197-198 (1967).

14. The Court today holds that petitioner Boykin was denied due process of law, and that his robbery convictions must be reversed outright, solely because "the record [is] inadequate to show that petitioner . . . intelligently and knowingly pleaded guilty." Ante, at —, 23 L Ed 2d 280. The Court thus in effect fastens upon the States, as a matter of federal constitutional law, the rigid prophylactic requirements of Rule 11 of the Federal Rules of Criminal Procedure. It does so in circumstances where the Court itself has only very recently held application of Rule 11 to be unnecessary in the federal courts. See *Halliday v. United States*, (1969) 394 US—, 23 L Ed 2d 16, 89 S Ct —. Moreover, the Court does all this at the behest of a petitioner who has never at any time alleged that his guilty plea was involuntary or made without knowledge of the consequences. I cannot possibly subscribe to so bizarre a result.

I.

15. In June 1966, an Alabama grand jury returned five indictments against petitioner Boykin, on five separate charges of common-law robbery. He was determined to be indigent, and on July 11 an attorney was appointed to represent him. Petitioner was arraigned three days later. At that time, in open Court and in the presence of his attorney, petitioner pleaded guilty to all five indictments. The record does not show what inquiries were made by the arraigning judge to confirm that the plea was made voluntarily and knowingly(1).

16. Petitioner was not sentenced immediately after the acceptance of his plea. Instead, pursuant to an Alabama statute, the court ordered that "witnesses be examined, to ascertain the character of the offense," in the presence of a jury which would then fix petitioner's sentence. See 14 Ala Code S. 415 (1940); 15 *id.*, S. 277. That proceeding occurred some two months after petitioner pleaded guilty. During that period, petitioner made no attempt to withdraw his plea. Petitioner was present in court with his attorney when the witnesses were examined. Petitioner heard the judge state the elements of common-law robbery; heard him announce that petitioner had pleaded guilty to that offense and might be sentenced to death. Again, petitioner made no effort to withdraw his plea.

(1) The record states only that:

"This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney. Evbn Austill, and the defendant in open court on this day being arraigned on the indictment of these cases charging him with the offense of Robbery and plead guilty". Joint Appendix 4.

17. On his appeal to the Alabama Supreme Court, petitioner did not claim that his guilty plea was made involuntarily or without full knowledge of the consequences. In fact, petitioner raised no questions at all concerning the plea(2). In his petition and brief in this Court, and in oral argument by counsel, petitioner has never asserted that the plea was coerced or made in ignorance of the consequences.

II

18. Against this background, the Court holds that the Due Process Clause of the Fourteenth Amendment requires the outright reversal of petitioner's conviction. This result is wholly unprecedented. There are past holdings of this Court to the effect that a federal habeas corpus petitioner who makes sufficiently credible allegations that his state guilty plea was involuntary is entitled to a hearing as to the truth of those allegations. See, e. g., *Waley v. Johnston*, (1942) 316 US 101, 86 L Ed 1302, 62 S Ct 964; cf. *Machibroda v. United States*, (1961) 368 US 487, 7 L Ed 2d 473, 82 S Ct 510. These holdings suggest that if equally convincing allegations were made in a petition for certiorari on direct review, the petitioner might in some circumstances be entitled to have a judgment of affirmance vacated and the case remanded for a state hearing on voluntariness. Compare *Jackson v. Denno*, (1963) 378 US 368, 393-394, 12 L Ed2d 908, 923, 926, 84 S Ct 1774, 1 ALR 3d 1205. However, as has been noted, this petitioner makes no allegations of actual involuntariness.

19. The Court's reversal is therefore predicated entirely upon the failure of the arrainging state judge to make an "adequate" record. In holding that this is a ground for reversal, the Court quotes copiously from *McCarthy v. United States* (1969) 394 US—, 23 L Ed 2d 418, 89 S Ct 1166, in which we held earlier this Term that when a federal district judge fails to comply in every respect with the procedure for accepting a guilty plea which is prescribed in Rule 11 of the Federal Rules of Criminal Procedure, the plea must be set aside and the defendant permitted to replead, regardless of lower-court findings that the plea was in fact voluntary. What the Court omits to mention is that in *McCarthy* we stated that our decision was based "solely upon our construction of Rule 11", and explicitly disavowed any reliance upon the Constitution. *Id.*, at—, 22 L Ed 2d at 424. Thus *McCarthy* can provide no support whatever for today's constitutional edict.

(2) However, I am willing to accept the majority's view that we do have jurisdiction to consider the question.

III

20. So far as one can make out from the Court's opinion, what is now in effect being held is that the prophylactic procedures of Criminal Rule 11 are substantially applicable to the States as a matter of federal constitutional due process. If this is the basis upon which Boykin's conviction is being reversed, then the Court's disposition is plainly out of keeping with a sequel case to *McCarthy*, decided only last month. For the Court held in *Halliday v. United States*, (1969) 394 US—, 23 L Ed 2d 16, 89 S Ct —, that "in view of the large number of constitutionally valid convictions that may have been obtained without full compliance with Rule 11, we decline to apply *McCarthy* retroactively." *Id.*, at—, 23 L Ed 2d at 20. The Court quite evidently found *Halliday's* conviction to be "constitutionally valid." For it affirmed the conviction even though *Halliday's* guilty plea was accepted in 1954 without any explicit inquiry into whether it was knowingly and understandingly made, as now required by present Rule 11. In justification, the Court noted that two lower courts had found in collateral proceedings that the plea was voluntary. The Court declared that:

"[A] defendant whose plea has been accepted without full compliance with R. 11 may still resort to appropriate post-conviction remedies to attack the plea's voluntariness. Thus, if his plea was accepted prior to our decision in *McCarthy*, he is not without a remedy to correct constitutional defects in his conviction." 394 US, at—, 23 L Ed 2d at 20.

21. It seems elementary that the Fifth Amendment due process to which petitioner *Halliday* was entitled must be at least as demanding as the Fourteenth Amendment process due petitioner *Boykin*. Yet petitioner *Halliday's* federal conviction has been affirmed as "constitutionally valid," despite the omission of any judicial inquiry of record at the time of his plea, because he initiated collateral proceedings which revealed that the plea was actually voluntary. Petitioner *Boykin*, on the other hand, today has his Alabama conviction reversed because of exactly the same omission, even though he too "may . . . resort to appropriate post-conviction remedies to attack the plea's voluntariness" and thus "is not without a remedy to correct constitutional defects in his conviction." In short, I find it utterly impossible to square to-day's holding with what the Court has so recently done.

I would hold that petitioner *Boykin* is not entitled to outright reversal of his conviction simply because of the "inadequacy" of the record pertaining to his guilty plea. Further, I would not vacate the judgment below and remand for a

state Court hearing on voluntariness. For even if it is assumed for the sake of argument that petitioner would be entitled to such a hearing if he had alleged that the plea was involuntary, a matter which I find it unnecessary to decide, the fact is that he has never made any such claim. Hence, I consider that petitioner's present arguments relating to his guilty plea entitle him to no federal relief(3).

(3) Petitioner advances two additional constitutional arguments: that imposition of the death penalty for common law robbery is "cruel and unusual punishment" in violation of the Fourteenth Amendment; and that to permit a jury to inflict the death penalty without any "standards" to guide its discretion amounts to a denial of due process. I do not reach these issues because the Court has not done so.

AIR 1970 USSC 15 (V 57 C 3)

(1969-23 L Ed 2d 284)*

Glenn Martin Harrington, Petitioner v. State of California, Respondent.

(No. 750) decided on 2-6-1969.

†(A) Constitution of India, Art. 226—Fair trial — Infraction of constitutional right — Trial, when vitiated.

Although there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, not all trial errors which violate the Constitution automatically call for reversal. (Para 1)

(B) Evidence Act (1872), S. 133 — Confession of co-accused inculcating accused — Co-accused not testifying — Right of accused under confrontation clause of Sixth Amendment of Constitution of America are violated — Violation does not, however, warrant reversal of conviction when there is other overwhelming evidence — Constitution of India, Art. 21 — Constitution of America, Sixth Amendment.**

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†Reference is given to a parallel Indian provision for the convenience of Indian lawyers.

**Constitution of America, Sixth Amendment — In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained

Where in a joint trial, confession of co-accused inculcating the accused is admitted against the accused and the confessing co-accused does not testify, the accused's rights under confrontation clause of the Sixth Amendment of the American Constitution are violated, notwithstanding instructions to the jury to consider the confession as evidence only against the co-accused. (Para 3)

But where there is other overwhelming evidence of accused's guilt, and where the evidence supplied through confession is only cumulative, the constitutional error of violation of confrontation clause is harmless beyond a reasonable doubt so as not to warrant reversal of accused's conviction. (Para 10)

(C) Criminal P. C. (1898), Ss. 34, 149 — Penal Code (1860), S. 302 — Persons aiding and abetting commission of robbery — One of them killing a person while acting in furtherance of common design — All are guilty of murder. (Para 10)

(D) Criminal P. C. (1898), S. 423 — Erroneous admission of co-accused's confession — Effect on jurors — Reviewing Court not knowing the jurors who sat, must base its judgment on its own reading of the record and on what seems to it to have been the probable impact of confession on minds of average jury. (Para 11)

Cases Referred: Chronological Paras

- (1968) 391 US 123=20 L Ed 2d 476
=88 S Ct 1620, Bruton v. United States 3, 16
(1967) 386 US 18=17 L Ed 2d 705=
87 S Ct 824=24 ALR2d 1065, Chapman v. California 1, 10, 11, 14, 15, 17
(1967) 388 US 218=18 L Ed 2d 1149
=87 S Ct 1926, United States v. Wade 16
(1966) 384 US 436=16 L Ed 2d 694
=86 S Ct 1602=10 ALR3d 974, Miranda v. Arizona 16
(1965) 380 US 609=14 L Ed 2d 106
=85 S Ct 1229, Griffin v. California 16
(1964) 380 US 400=13 L Ed 2d 923
=85 S Ct 1065, Pointer v. Texas 3
(1961) 367 US 643=6 L Ed 2d 1081
=81 S Ct 1684=84 ALR2d 933, Mapp v. Ohio 16
Roger S. Hanson, for Petitioner; James H. Kline, for Respondent.

SUMMARY

At a murder trial in a California state court, confessions of the petitioner's three

by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence.

co-defendants were introduced in evidence, with limiting instructions that the jury was to consider each confession only against the confessor. Although one of the co-defendants testified and was cross-examined by the petitioner's attorney, the other two co-defendants failed to testify. The petitioner was convicted of murder, the California Court of Appeal affirmed (256 Cal App 2d 209, 64 Cal Rptr 159), and the California Supreme Court denied a petition for hearing.

On certiorari, the United States Supreme Court affirmed. In an opinion by Douglas, J., expressing the view of five members of the Court, it was held that although the use of confessions by co-defendants who did not testify amounted to a denial of the petitioner's constitutional right of confrontation, the evidence supplied through such confessions was merely cumulative, and the other evidence against the petitioner was so overwhelming that the court could conclude beyond a reasonable doubt that the denial of the petitioner's constitutional rights constituted harmless error.

Brennan, J., joined by Warren, Ch. J., and Marshall, J., dissented on the ground that the state did not carry its burden of demonstrating beyond a reasonable doubt that the confessions by the co-defendants who did not testify did not contribute to the petitioner's conviction.

OPINION OF THE COURT

Mr. JUSTICE DOUGLAS delivered the opinion of the Court.

We held in *Chapman v. California*, (1967) 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR2d 1065, that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." We said that although "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" (id., at 23, 17 L Ed 2d at 710), not all "trial errors which violate the Constitution automatically call for reversal." Ibid.

2. The question whether the alleged error in the present case was "harmless" under the rule of *Chapman* arose in a state trial for attempted robbery and first degree murder. Four men were tried together—Harrington, a Caucasian, and Bosby, Rhone, and Cooper, Negroes—over an objection by Harrington that his trial should be severed. Each of his three co-defendants confessed and their confessions were introduced at the trial with limiting instructions that the jury was to consider each confession only against the confessor. Rhone took the stand and Harrington's counsel cross-examined him.

The other two did not take the stand(1).

3. In *Bruton v. United States*, (1968) 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620, a confession of a co-defendant who did not take the stand was used against Bruton in a federal prosecution. We held that Bruton had been denied his rights under the Confrontation Clause of the Sixth Amendment. Since the Confrontation Clause is applicable as well in state trials by reason of the Due Process Clause of the Fourteenth Amendment (*Pointer v. Texas*, (1964) 380 US 400, 13 L Ed 2d 923, 85 S Ct 1065), the rule of *Bruton* applies here.

4. The California Court of Appeal affirmed the convictions, 256 Cal App 2d 209, 64 Cal Rptr 159, and the Supreme Court denied a petition for hearing. We granted the petition for certiorari to consider whether the violation of *Bruton* was on these special facts harmless error under *Chapman*.

5. Petitioner made statements which fell short of confession but which placed him at the scene of the crime. He admitted that Bosby was the trigger man, that he fled with the other three, and that after the murder he dyed his hair black and shaved off a moustache. Several eyewitnesses placed petitioner at the scene of the crime. But two of them had previously told the police that "four Negroes committed the crime." Rhone's confession, however, placed Harrington inside the store with a gun at the time of the attempted robbery and murder.

6. Cooper's confession did not refer to Harrington by name. He referred to the fourth man as "the White boy" or "this White guy." And he described him by age, height, and weight.

7. Bosby's confession likewise did not mention Harrington by name but referred to him as a blond-headed fellow or "tha White guy" or "the Patty".

8. Both Cooper and Bosby said in their confessions that they did not see "the White guy" with a gun, which is at variance with the testimony of the prosecution witnesses.

9. Petitioner argues that it is irrelevant that he was not named in Cooper's and Bosby's confessions, that reference to "the White guy" made it as clear as pointing and shouting that the person referred to was the white man in the dock with the three Negroes. We make the same assumption. But we conclude that on these special facts the lack of

(1) All four were found to have participated in an attempted robbery in the course of which a store employee was killed. Each was found guilty of felony murder and sentenced to life imprisonment.

THE All India Reporter

1970

Allahabad High Court

AIR 1970 ALLAHABAD 1 (V 57 C 1)

FULL BENCH

BISHAMBHAR DAYAL, SATISH

CHANDRA AND

B. N. LOKUR JJ.

Duryodhan, Appellant v. Sitaram and others, Respondents.

First Appeal No. 255 of 1965, D/-19-11-1968 against order of Member Election Tribunal Kanpur, D/-27-4-1965.

(A) Representation of the People Act (1951), Ss. 90 (1) and (3), 92, 90 (a), 99 and S. 116-A — Election petition — Trial of — Meaning — Trial commences from its first seisin by Tribunal and concludes when Tribunal passes an order putting end to proceedings — Procedure provided in O. 9 and O. 17, Civil P. C. is attracted by virtue of S. 90 (1) — Dismissal of election petition for default of appearance of petitioner under O. 9, R. 8 — Tribunal can restore it under O. 9, R. 9 — Tribunal however dismissing it on merits — Appeal under S. 116-A — No relief can be granted to appellant if sufficient cause for non-appearance is not made out — 1964 All LJ 155 and AIR 1964 All 181 Overruled and AIR 1960 J & K 25 (FB), Dissented from — (Per Satish Chandra and Lokur, JJ.) — (Civil P. C. (1908), O. 9 and O. 17) — (Words and Phrases — Trial).

Per Satish Chandra, J.:— The word "trial" has been used in the same sense in Section 90 (1) and Section 98 (a) of the Act. For purposes of both these provisions the trial of an election petition commences on the reference of the petition to the Tribunal. The trial concludes when the Tribunal makes an order which in fact puts an end to or closes the proceedings before it arising out of the election petition. The trial of an election petition is the entire process of the litigation from its first seisin by the Tribunal to its dis-

posal, and includes matters prior to the actual hearing of the petition. The matters relating to the service of summons, calling for and finalising the pleadings, and settling the issues, are all constituent stages of the trial. The 'procedure' provided by the Code of Civil Procedure in relation to these various matters would govern the proceedings arising out of an election petition, in virtue of Section 90 (1) of the Act. AIR 1957 SC 444 and AIR 1959 SC 827 and AIR 1959 SC 837, Rel. on. (Para 28)

The matters mentioned in Section 92 appertain to the procedure for trial and are also attracted by virtue of Section 90 (1). They were separately stated in Section 92 to make them operate in spite of any provision to the contrary in the Act or the Rules, and not with a view to curtail the amplitude of Section 90 (1). The provisions of O. 9, Rr. 8 and 9, Civil P. C., even if they deal with powers, would be procedural powers and be attracted by virtue of Section 90 (1). AIR 1957 SC 444, Rel. on; AIR 1958 SC 698 Explained and Distinguished. (Para 36)

Sections 90 (1) and 92 severally as well as jointly authorise the Election Tribunal to dismiss the proceedings arising out of an election petition for default of appearance of the election petitioner. AIR 1964 All 181, Overruled. (Para 39)

Section 98 does not contemplate an order on merits alone and an order of dismissal for default would be an order dismissing the election petition under Section 98 (a) of the Act. AIR 1964 All 181 and 1964 All LJ 155, Overruled; AIR 1959 SC 837, Rel. on. (Para 43)

An order under Section 90 (3) would be an order under Section 98 (a) and an order under Section 99 would not be inappropriate. An order of dismissal for default of appearance would stand identically on the same footing. AIR 1959 SC 827, Rel. on. (Para 45)

Orders 9 and 17 of the Code of Civil Procedure are applicable to the trial of an election petition both under S. 90 (1) as well as Section 92 (e) of the Representation of the People Act. AIR 1965 Pat 378 & AIR 1968 Puni 152 (FB). Rel. on: AIR 1960 J & K 25 (FB). Diss. from: AIR 1964 All 181. Overruled.

(Paras 37, 38, 49)

Per Lokur J. :— An Election Petition ought to be dismissed if the petitioner remains absent on the date of its hearing. If, however, the Tribunal dismisses the petition on merits, the dismissal would remain in law a dismissal for default of the petitioner's appearance. The petitioner will then be at liberty either to approach the Tribunal to have the order of dismissal set aside or to go in appeal to the High Court. If he chooses the latter course, he must, to get relief, satisfy the High Court that he had sufficient cause to be absent on the date of hearing. Where no attempt has been made by the petitioner to explain the reasons which compelled him to be absent at the hearing it is not a fit case to relieve the petitioner from the consequences of the order of the Tribunal. (Para 58)

Where the tribunal after holding that he could not dismiss the petition for default of appearance of the petitioner dismissed it on merits and the petitioner who remained absent throughout the proceeding did not apply for setting aside the ex parte order but filed an appeal under Section 116-A of the Act without taking any ground that the appellant had sufficient cause for non-appearance and that the dismissal of the election petition in default was either wrong or improper.

Held (Per Full Bench) that the appeal should be dismissed. (Para 60)

Per Dayal, J. :— The question whether the Election Tribunal has power to dismiss an election petition under O. 9, R. 8, C. P. C. for default of appearance of the petitioner and also restore it under O. 9, R. 9 is merely of academic interest in this case and it is not necessary to decide it. Though the appeal filed under S. 116-A was competent, no such ground having been taken in the appeal nor any such application for setting aside the ex parte decision having been made before the Tribunal no relief could be given in the appeal. (Paras 2, 4, 6, 7)

(B) Civil P. C. (1908), Pre. — Precedents — Decision of a three-Judge Bench cannot be construed as overruling express opinion of a four-Judge Bench of same Court — Per Satish Chandra, J.

(Para 36)

(C) Representation of the People Act (1951), Ss. 90, 109, 110 — Election petition — Order dismissing election petition for default in appearance of petitioner — Provisions of Ss. 109 and 110 which are intended to apply in case of withdrawal of

petition are not attracted — Lacuna in the Act in this respect pointed out — Per Satish Chandra J. (Para 50)

(D) Representation of the People Act (1951), S. 116-B — Finality of order contemplated by S. 116-B is to be read as subject to other provisions of Act which provide for setting aside of specified orders — Section to be so construed as to harmonise with Ss. 90 (2), 92 (e) and O. 9, R. 9, Civil P. C. Per Satish Chandra J. — (Civil P. C. (1908), Pre. — Interpretation of Statutes). (Para 46)

Cases Referred Chronological Paras
(1968) AIR 1968 Puni 152 (V 55) =
ILR (1967) 2 Puni 820 (FB), Jugal Kishore v. Baldev Parkash 48, 50
(1965) AIR 1965 Pat 378 (V 52),
Sawalia Behari Lal v. Tribik Ram
Deo Narain Singh 48
(1964) AIR 1964 All 181 (V 51),
Vishwanath Prasad v. Malkhan
Singh Sharma 1, 9, 10, 15,
18, 40, 41,
42, 48

(1964) 1964 All LJ 155 = ILR (1964)
1 All 498, B. P. Mauriya v. Elec-
tion Tribunal 1, 9, 10, 18,
41, 42, 46

(1963) AIR 1963 All 518 (V 50) =
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Dayal v. Sub Divisional Officer
Ghatampur 16

(1960) AIR 1960 J & K 25 (V 47)
(FB), Dina Nath Kaul v. Election
Tribunal J. & K. 46

(1959) AIR 1959 SC 827 (V 48) =
1959 Supp (2) SCR 527, Chandrika
Prasad Tripathi v. Shiv Prasad
Chanpuria 28, 41, 43
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(1959) AIR 1959 SC 837 (V 46) =
(1959) Supp (2) SCR 518, Om
Prabha Jain v. Gian Chand 27
41, 42

(1958) AIR 1958 SC 687 (V 45) =
1959 SCR 583, K. Kamaraja Nadar
v. Kunju Thevar 19, 47

(1958) AIR 1958 SC 698 (V 45) =
1959 SCR 611, Inamati Mallappa
Basappa v. Desai Basavaraj
Ayyappa 32, 36, 54

(1958) AIR 1958 Madh Pra 260
(V 45) = ILR (1957) Madh Pra
627, Sunderlal Mannalal v.
Nandramdas Dwarka Das 18, 18, 47

(1957) AIR 1957 SC 444 (V 44) =
1957 SCR 370, Harish Chandra
Bajpai v. Trilok Singh 26, 27, 35
36, 42, 54

(1955) AIR 1955 SC 425 (V 42) =
1955-2 SCR 1, Sangram Singh v.
Election Tribunal Kotah 29, 38, 42

(1954) AIR 1954 SC 210 (V 41) =
1954 SCR 892, Jagan Nath v.
Jaswant Singh 19, 26, 47

(1953) AIR 1953 Bom 293 (V 40) =
ILR (1953) Bom 865, Sitaram v.
Yograj Singh 35

(1941) AIR 1941 FC 16 (V 28) =
1940 FCR 110, United Provinces
v. Atiqa Begum 37

S. C. Khare, for Appellant; K. N. Singh;
A. P. Misra; R. K. Shukla and K. L. Misra,
for Respondents.

B. DAYAL J.:— This appeal under Section 116-A of the Representation of the People Act, 1951 has been referred to this Full Bench because there appeared to be an apparent conflict between two Division Bench cases of this Court reported in *Vishwanath Prasad v. Malkhan Singh Sharma*, AIR 1964 All 181 and *B. P. Maurya v. Election Tribunal*, 1964 All LJ 155 on the question whether the Election Tribunal while hearing an election petition had the power to dismiss the election petition under O. 9, R. 8 of the Civil Procedure Code for default of appearance of the election-petitioner and also to restore it in a proper case under O. 9, R. 9 of the same Code.

2. After hearing learned counsel for both the sides at length, I have come to the conclusion that in this appeal this question is of a mere academic interest and it is unnecessary to decide it.

3. The facts of the case may be briefly stated. Respondent No. 1 (Shri Sitaram) (hereinafter referred to as the respondent) was elected a member of the Council of the State (Rajya Sabha) from the Uttar Pradesh State Assembly constituency on the 29th of March, 1962. The appellant was a member of the Uttar Pradesh Legislative Assembly and was, as such, a voter in the Constituency. This election petition was, therefore, filed by a voter on the 14th of May, 1962 alleging, *inter alia*, several instances of corrupt practices of bribery and undue influence. A written statement was filed on the 30th of July, 1962 denying the allegations of corrupt practices, etc. Issues were framed on the 25th January, 1963 and thereafter several dates were fixed for hearing which had to be postponed for some reason or the other. Ultimately on the 27th of January, 1965, on which date the election-petition was fixed for final hearing, neither the election-petitioner nor his counsel appeared. The clerk of the counsel asked for an adjournment of the case. The case was fixed for the 1st of February 1965 and on that date in the presence of the counsel for both the sides, the case was fixed for the 19th of April, 1965. On this date again the petitioner did not appear and the counsel stated that he had no instructions. Although the counsel did not withdraw his vakalatnama from the case yet on account of his statement that he had no instructions to proceed with the matter, the position was that the petitioner was neither himself present nor was he represented before the Election Tribunal on that date.

The Tribunal then asked the respondent's counsel as to what was the proper procedure, whereupon the respondent's counsel suggested that the petition be dismissed for default. But the Tribunal, on a review of law, came to the conclusion that it could not dismiss the petition finally merely for default of the petitioner but had to go into the facts of the case and decide it on merits. The Tribunal, therefore, by an order dated the 20th of April, 1965, directed the case to be listed on the 22nd of April, 1965 for decision on merits.

On the 22nd of April, 1965, the Tribunal recorded the statement of the respondent and reserved judgment. On the 27th of April, 1965, the Tribunal passed an order dismissing the election-petition as there was no evidence on record to support the allegations of the petition and which allegations had been denied both in the written statement and in the statement on oath by the respondent and which the Tribunal believed. It will thus be seen that from the 27th January, 1965 till the 27th of April, 1965, when the order under appeal was delivered, the election-petitioner remained absent and did not take any steps or appeared in the case. The petitioner thereafter did not file any application before the Tribunal asking it to set aside the *ex parte* order showing any grounds which could be sufficient for his non-appearance. Instead he filed the present appeal on the 5th of July, 1965. In this appeal as many as twelve grounds have been taken but none of them even suggests that the petitioner-appellant had sufficient reason for his non-appearance on the relevant dates before the Tribunal.

4. It has now been argued in this appeal that the Tribunal had jurisdiction under O. 9, R. 8 of the Civil P. C. to dismiss the petition in default and the Tribunal erred in not dismissing the election-petition in default but in deciding the same on merits. It is contended that if the petition had been dismissed in default, the petitioner-appellant would have had an opportunity of making an application for restoration under O. 9, R. 9 of the Code. On this ground, the order of the Tribunal is assailed. In the circumstances of the present case, it is quite clear that the decision of the Tribunal was given in the absence of the election-petitioner and was, therefore, in fact, an *ex parte* decision. The mere fact that the Tribunal while dismissing the election-petition also went into the facts of the case and held that the allegations had not been proved, would not make the decision other than an *ex parte* one. For instance, when an *ex parte* decree is passed in the absence of a defendant the judgment on which the decree is based is on merits, after considering the plaintiff's evidence, in the absence of the defendant and yet the decree is an *ex parte* decree and can be set aside

under O. 9, R. 13 of the Civil P. C., If the defendant shows sufficient cause for his non-appearance. The decision of the Tribunal in the present case thus being apparently an ex parte decision, the election-petitioner should have filed an application under O. 9, R. 9 of the Civil P. C. to set aside the ex parte decision. If the petitioner was advised that O. 9, R. 9 of the Civil P. C. was applicable and the Tribunal could set aside its order on being satisfied that the petitioner had sufficient cause not to appear. But no such application was made and in the absence of any such application, the argument advanced in this Court that such an application could have been made, is a mere academic discussion and it is wholly unnecessary to decide that point in this case.

5. Learned counsel for the appellant contended that the Tribunal having already expressed its view that the Tribunal could not dispose of the election petition in default, it was no use making an application for restoration. It is, no doubt, true that the Tribunal had expressed its opinion but that opinion was expressed in the absence of the election-petitioner and it was open to the election-petitioner to make an application for restoration and to try and convince the Tribunal that its view was wrong. I am, therefore, not satisfied that this was a good reason for not filing an application for restoration.

6. It is, however, true that under Section 116-A of the Representation of the People Act, 1951, an appeal lies to this Court against every order of the Tribunal under Sections 98 and 99 of the said Act and the present appeal is, therefore, competent. But in this appeal, there being no evidence on the record to prove the allegations of the petition, the only ground on which the appellant could show that the order of the Tribunal dismissing the election-petition in default was either wrong or improper, could have been, that the petitioner-appellant had sufficient cause for non-appearance before the Tribunal. No such ground has been taken in the appeal, nor has any basis for such a ground been laid by making a request to the Tribunal to set aside the ex parte order and to hear the petitioner again on sufficient cause being shown.

7. In these circumstances, the question of law regarding the power of the Tribunal to dispose of the election-petition in default of the election-petitioner does not really fall for consideration. Even if the Tribunal had such a power, as alleged by the appellant, no case has been made out to set aside the order of the Tribunal dismissing the election-petition. The petition was by a mere voter and he apparently lost interest in the petition at the crucial moment and seems to have

revived interest in it after several months when he filed the present appeal. He apparently had no good reason to show for his non-appearance at the relevant time. In such a case, I think it is unnecessary to go into the question of law raised, particularly as the Tribunals have now been abolished and such a question will not crop up in future.

8. The appeal is accordingly dismissed with costs on parties.

9. SATISH CHANDRA, J.: Being of the opinion that there was a conflict of opinion between AIR 1964 All 181 and 1964 All LJ 155, a Division Bench of this Court referred this appeal to a Full Bench for decision. The question is whether an Election Tribunal is possessed of the power to dismiss an election petition for default of appearance under O. 9, R. 8, Civil P. C.

10. At the election for 12 seats in the Rajya Sabha held in March 1962, respondent No. 1, Sita Ram Jaipuria, was declared elected to one of them on 29th March, 1962. The appellant, Duryodhan, a member of the U. P. Legislative Assembly, challenged the election of respondent No. 1 by an election petition. The petition was referred to the Election Tribunal and on 25th January, 1963, issues were framed in it. The matter remained pending because of stay orders issued in writ proceedings against the interlocutory orders passed by the Tribunal. Ultimately the Tribunal fixed 19th April, 1965, and the subsequent days for the final hearing of the election petition. The election petitioner-appellant did not appear. The appellant's counsel stated that he had no instructions from the petitioner to conduct the case and so he was unable to appear on behalf of the petitioner but that did not mean that he was retiring from the case. The counsel appearing for the respondent contended before the Tribunal that O. 9, Civil P. C., was applicable to these proceedings and the petition may be dismissed for default of appearance of the petitioner. The Tribunal heard arguments and directed that orders would be announced the next day. On 26th April, 1965, the Tribunal passed an order that an Election Tribunal has no power to dismiss the election petition for default of appearance of the petitioner, and that the hearing of the petition, therefore, must proceed according to law and conclude on the merits. It directed the case to be put up the next day for final hearing. The Tribunal noticed that this was the view of the Allahabad High Court in Vishwanath Prasad's case, AIR 1964 All 181 (supra). The other decision in B. P. Maurya's case, 1964 All LJ 155 (supra) does not appear to have been cited before the Tribunal.

11. The case was taken up the next day, namely on 21st April, 1965. After

hearing further arguments on behalf of the respondents regarding the procedure to be followed, the Tribunal held that the procedure contemplated by Sections 108 to 110 and 112 to 116 of the Representation of the People Act, 1951, of giving a public notice of the absence of the petitioner to the electorate, and to invite any of them to come and apply for being substituted in place of the election petitioner and then to conduct it, was applicable only where the election petitioner is permitted to withdraw from the election petition, and that procedure will not be applicable where the election petitioner had failed to appear. The case was then taken up on the next day, namely, the 22nd April, 1965. The Tribunal asked the contesting respondent if he wished to examine any witness. Respondent No. 1 examined himself on oath. Since the election petitioner was absent on all these dates, respondent No. 1 was not cross-examined. Thereafter the Tribunal heard arguments on behalf of the respondents and reserved orders. Ultimately the Election Tribunal by its judgment dated 27th April, 1965, dismissed the petition after recording findings on the various issues in favour of respondent No. 1 solely on the basis of his deposition. The election petition was dismissed with costs to the contesting respondent which were assessed at Rs. 300.

12. The election petitioner came to this Court in appeal under Section 116-A of the Representation of the People Act against the order dated 27th April, 1965, dismissing the election petition. The principal grievance expressed in the memorandum of appeal was that the view of the Tribunal that the procedure prescribed by Sections 108 to 110 and 112 to 116 was not applicable where the election petitioner failed to appear, was erroneous. The findings recorded by the Tribunal on the various issues were also challenged. Ground No. 11 expressed a grievance that the Tribunal ought to have given notice to the petitioner before deciding the election petition behind the back of the petitioner. The last ground, namely ground No. 12, was a general ground that the judgment of the Election Tribunal is against law and is liable to be set aside. It is noticeable that the memorandum of appeal did not question the detailed order passed by the Tribunal on 20th April, 1965, holding that an Election Tribunal had no power to dismiss an election petition for default in appearance of the parties.

13. When the appeal came up for hearing before a Bench, a contention was raised on behalf of the appellant that the petition ought to have been dismissed for default of prosecution and not on the merits. It was also urged that the procedure prescribed by Sections 112 to 116

ought to have been followed before deciding the election petition. The Bench entertained the first point and considered that there was a difference between the two Division Benches mentioned at the beginning of this judgment. It observed that since no disputed question of fact arises for consideration it was desirable that the conflict be settled by a Full Bench. The Hon'ble the Chief Justice then constituted this Full Bench for resolving the conflict mentioned in the order of reference.

14. The learned Advocate General, appearing for the contesting respondent, raised a preliminary objection that the question whether an Election Tribunal possessed the power to dismiss an election petition for default of appearance not having been raised in the memorandum of appeal does not arise for consideration. The question is purely one of law which requires no investigation of facts. It is settled that a litigant can raise a pure question of law for the first time in appeal. The Division Bench which heard the appeal entertained this question; and the Hon'ble the Chief Justice thought it a fit case for constituting a Full Bench, obviously to settle the problem. In these circumstances it will not be fair either to the referring Bench or to the Hon'ble the Chief Justice or to the members of the Bar, who were heard at length on the merits of the problem, to decline to decide the question.

15. In Vishwanath Prasad's case, AIR 1964 All 181 (supra) the Election Tribunal framed some preliminary issues. November 2, 1962, was fixed for their decision only. On that date the Tribunal felt that evidence was necessary to be recorded on those preliminary issues. Kamla Kant, one of the petitioners, was examined as a witness. The hearing was then postponed to 16th November, 1962, for his cross-examination. On that day Kamla Kant did not appear. The other election petitioners as well as the respondents also did not appear before the Tribunal. The Tribunal then dismissed the petition for default of the parties. Later in the day Kamla Kant appeared and made an application for setting aside the order dismissing the petition. The Tribunal being satisfied with the cause shown, set aside the order of dismissal on 1st December, 1962. This latter order was challenged in this Court by a writ petition. The principal contention of the applicant was that an order dismissing the petition for default of appearance was an order of dismissal under Section 98 (a) of the Representation of the People Act. Such an order was appealable under Section 116 of the Act, but the Tribunal had not been conferred by the Act any jurisdiction to set aside such an order. The Bench rejected the submission. It held that the

scheme of the Act was not to confer all the powers under the Code of Civil Procedure which a Court possesses, upon the Tribunal. The only power possessed by the Election Tribunal to dismiss the election petition without deciding the questions raised in it on merits, was to be found in Section 90 (3), which confers powers to dismiss a petition for non-compliance of Sections 81 and 82. Non-appearance of the parties was not within either of these two sections. Under Section 98 (a) the Tribunal could make an order dismissing the election petition only at the conclusion of the trial. The Bench observed:—

"It is noteworthy in this section that the orders mentioned in Clauses (a), (b) and (c) are to follow conclusion of the trial and the trial has to conclude after deciding the issues that have been raised in the petition. If there are issues which require evidence then after taking the evidence the Tribunal can come to the conclusion that the evidence proves a particular fact or not and if there are questions of law for which mere arguments are sufficient, then after hearing the arguments, the trial could conclude. There thus appears to be no provision in the Representation of the People Act empowering the Tribunal to dismiss a petition simply because one of the witnesses or one of the parties to the petition did not appear when the case is called on for hearing."

The Bench then held that the order dismissing the petition for default was on facts improper. The date on which the petition was dismissed was not fixed for hearing the whole petition, but only for cross-examination of one witness. The Tribunal could at the most decide the preliminary issue on that date. It could not dismiss the entire petition.

16. The Bench, relying upon *Rameshwar Dayal v. Sub Divisional Officer Ghatampur*, AIR 1963 All 518, also held that an Election Tribunal does not possess inherent powers. It has jurisdiction to do only what it has been expressly empowered to do. The Election Tribunal has not been empowered to dismiss the election petition without deciding the issues raised therein. It dissented from the view expressed by the Madhya Pradesh High Court in *Sunderlal Mannalal v. Nandramdas Dwarka Das*, AIR 1958 Madh Pra 260 wherein it was held that though the Act does not give any power of dismissal, it is an inherent power which every Tribunal possesses. The Bench also felt that the Tribunal having no power to dismiss the petition in default of appearance, in the eye of law the petition remained pending and undisposed of. The notification by the Election Commission treating the order of dismissal for default to

be under Section 98 (a) of the Act would be without jurisdiction and would not prevent the Tribunal from continuing with the election petition and disposing of it on the merits. On these grounds the writ petition was dismissed.

17. The Bench, therefore, held that an Election Tribunal has no inherent powers. It possesses only such powers as have been expressly conferred on it. Sec. 90 (3) and Section 98 (a) are the only provisions authorising dismissal of the petition. Section 90 (3) does not apply to default of appearance. Section 98 (a) entitles dismissal on the conclusion of the trial which happens on the decision of the issues. Thus the Tribunal has no power to dismiss the petition for non-appearance of the petitioner. The Bench did not express any opinion on the effect of Cl. (e) of Section 92.

18. B. P. Maurya's case, 1964 All LJ 155 (supra) was decided by another Division Bench of this Court. There the recording of the evidence of the parties in the election petition commenced on 15th July, 1963, and continued from day to day. On 24th July, 1963, the election petitioner did not appear. The Tribunal dismissed the petition for default. Later the same day an application for the setting aside of the order of dismissal was presented. The Tribunal allowed the application and set aside the order of dismissal. This latter order was challenged by way of a writ petition in this Court. It was urged that the Election Tribunal having dismissed the election petition though for default of the petitioner, the Tribunal became not only *functus officio* but ceased to exist. It had, therefore, no jurisdiction to pass the impugned order and to continue the proceedings. The Bench rejected this submission. The Bench appears to have been of the opinion that the effect of Section 90 of the Act directing that every election petition shall be triable by the Tribunal as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits was to enable the Tribunal to dismiss an election petition for default under O. 9, R. 8, Civil P. C. It then emphasised and held that if O. 9, R. 8, Civil P. C., was applicable, O. 9, R. 9 would equally be applicable because the two provisions are the inverse and reverse sides of the power. It approved the decision of the Madhya Pradesh High Court in *Sunderlal's case*, AIR 1958 Madh Pra 260 which had been disapproved by the other Division Bench in *Vishwanath Prasad's case*, AIR 1964 All 181 mentioned above. The Bench dismissed the writ petition on the ground that there were no merits in it. It did not proceed on the basis that the Tribunal initially had no jurisdiction to dismiss the election petition for default of

appearance, as was done by the other Bench in Vishwanath Prasad's case, AIR 1964 All 181. There does, therefore, appear to be a divergence of opinion on the question whether the Tribunal possesses the power to dismiss the petition for default of appearance, either inherently or in virtue of the provisions of the Act.

19. In *K. Kamaraja Nadar v. Kunju Thevar*, AIR 1958 SC 687 relying upon *Jagan Nath v. Jaswant Singh*, AIR 1954 SC 210 the Supreme Court after examining the scheme of the Representation of the People Act held that an election contest is not an action at law or a suit in equity but is purely a statutory proceeding unknown to the common law and that the Tribunal possesses no common law powers. The Election Tribunal would not, hence, possess inherent powers other than those which may be ancillary to the powers conferred on it by the statute.

20. Part VI of the Representation of the People Act deals with "Disputes regarding election." Chapter I of this part is the definition chapter. Chapter II deals with preliminary matters and reference of the election petition to a Tribunal. Chapter III relates to the trial of election petitions. It consists of 21 sections. Section 90 prescribes the procedure to be followed by the Tribunal. Sub-section (1) thereof says:

"Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Civil P. C. 1908 (V of 1908) to the trial of suits."

Sub-section (3) provides:—

"(3) The Tribunal shall dismiss an election petition which does not comply with the provisions of Section 81, or S. 82 notwithstanding that it has not been dismissed by the Election Commission under Section 85.

Explanation— An order of the Tribunal dismissing an election petition under this sub-section shall be deemed to be an order made under Cl. (a) of S. 98."

21. Section 92 is also material. It states:—

"92. Powers of the Tribunal—
The Tribunal shall have the powers which are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters:—

- (a) discovery and inspection;
- (b) enforcing the attendance of witnesses, and requiring the deposit of their expenses;
- (c) compelling the production of documents;
- (d) examining witnesses on oath;
- (e) granting adjournments;

(f) reception of evidence taken on affidavit; and

(g) issuing commissions for the examination of witnesses,

and may summon and examine suo motu any person whose evidence appears to it to be material; and shall be deemed to be a Civil Court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1898.

Explanation— For the purpose of enforcing the attendance of witnesses, the local limits of the jurisdiction of the Tribunal shall be the limits of the State in which the election was held."

22. Section 97 provides for recrimination proceedings. Section 98 deals with the decision of the Tribunal. It reads:

"At the conclusion of the trial of an election petition the Tribunal shall make an order—

- (a) dismissing the election petition; or
- (b) declaring the election of all or any of the returned candidates to be void; or
- (c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected."

23. Section 99 provides for the other orders to be made by a Tribunal at the time of making an order under S. 98.

24. Section 90 (1) provides that the trial of an election petition is to be governed as nearly as may be, by the procedure applicable to the trial of suits under the Code of Civil Procedure. For the appellant it was urged that Sec. 90 (1) makes all those provisions of the Code of Civil Procedure applicable to election petitions as deal with the day to day progress of the election petition from the commencement of the trial till their conclusion and accordingly O. 9, Rr. 8, 9 and 13 apply. For the respondents Mr. Advocate General laid emphasis on Sec. 92 and urged that in view of the specification of "powers" by Section 92, the "procedure" contemplated by Section 90 (1) would not include "powers". The matter of dismissal for default of appearance appertains to the "powers" of the Court or the Tribunal, and not to the "procedure", which only regulates the conduct and continuance of the proceedings. It was also submitted by him that Section 90 (1) makes the provision of the Code of Civil Procedure applicable to the trial of election petitions "subject to the provisions of the Act and the Rules" made thereunder. Section 98 provides for the dismissal of an election petition at the conclusion of a trial. A trial can be said to conclude only after there has been a hearing, and the issues raised in the petition decided. So, the dismissal of an election petition in any other manner would be contrary

to Section 98 (a) and so would not be within Section 90 (1). In the alternative, Section 98 (a) makes a provision on the topic of dismissal of the election petition. The Act would be deemed to provide for that topic, and the same matter could not be imported by way of the procedure contemplated by Section 90 (1).

25. These submissions, therefore, require consideration of the questions whether the trial commences prior to hearing and would a dismissal for default prior to the hearing conclude it, and what does the Legislature intend by using the words "procedure" in Section 90 and "powers" in Section 92. In my opinion all these aspects are no longer *res integra*. They are concluded by the decisions of the Supreme Court.

26. In *Harish Chandra Bajpal v. Triloki Singh*, AIR 1957 SC 444 it was urged that the word "trial" must be understood in a limited sense, as meaning the final hearing of the petition, consisting of examination of witnesses, filing documents and addressing arguments. Venkatarama Ayyar, J. speaking for the Court rejected this submission. It was held (paragraph 16) that the provisions of Chapter III read as a whole clearly show that "trial" is used as meaning the entire proceedings before the Tribunal from the time when the petition is transferred to it under Section 86 until the pronouncement of the award. His Lordship referred to the decision of the Supreme Court in AIR 1954 SC 210, where it had been held that the Tribunal had power to pass an order for addition of the parties under O. 1, Rr. 9, 10 and 13, and observed that this was a direct authority for the proposition that "trial" for purposes of Section 90(1) includes the stages prior to the hearing of the petition. Then, in *Chandrika Prasad Tripathi v. Shiv Prasad Chanpuria*, AIR 1959 SC 827 Gajendragadkar, J. held that dismissal of a petition under Section 90 (3) for non-compliance with the provisions of Section 117 would be a dismissal at the conclusion of the trial within meaning of Sec. 98 (a) of the Act. His Lordship held that once the petition has passed the scrutiny of the Election Commission under S. 85 and it has been referred to the Election Tribunal 'for trial' any further action taken by the parties or any order passed by the Tribunal under the said petition would constitute a part of the trial of the said petition. The Court affirmed its decision in *Harish Chandra's case*, AIR 1957 SC 444 (*Supra*), mentioned above, that the word "trial" in Section 90 is used as meaning the entire proceedings before the Tribunal from the time the petition is transferred to it under Section 86 until the pronouncement of the award. It was held that an order dismissing the peti-

tion under Section 90 (3) would be an order passed at the conclusion of the trial because it in fact concludes the trial. The conclusion was formed by the Supreme Court independently of the explanation added to sub-section (3) of Section 90.

27. The same view was expressed by another Bench of the Supreme Court in *Om Prabha Jain v. Gian Chand*, AIR 1959 SC 837. In paragraph 7, Sarkar J. rejected the submission that an order dismissing a petition under Section 90 (3) is not an order passed at the conclusion of the trial within meaning of Section 98 (a). His Lordship observed (paragraph 7):—

"We see no justification for this view. An order made under the powers contained in Section 90 (3) brings to an end the proceedings arising out of a petition: after it is made nothing more remains for the Election Tribunal to try or do in respect of that petition. Therefore, it would appear that it is made at the conclusion of the proceedings before the Tribunal. It follows that such an order is made at the conclusion of the trial by the Tribunal for, as will be presently seen, the sole duty of the Tribunal is to try the petition; the proceeding before it is the trial before it."

In paragraph 8 his Lordship observed that under Section 85 the Election Commission has to refer the petition "for trial" to an Election Tribunal constituted by it for that purpose. The Election Tribunal was an ad hoc body created under Section 86 for this purpose only. When it passes an order which closes the proceedings before it arising out of an election petition, it must be deemed to have tried the petition and passed the order at the conclusion of such trial. The Court relied upon its previous decision in *Harish Chandra's case*, AIR 1957 SC 444 (*supra*), for the proposition that the word "trial" carries the same meaning under Sec. 90 of the Act also (Paragraph 11). In this case the provisions of Section 90 (3) of the Representation of the People Act as they stood prior to the addition of the explanation by Act 18 of 1958 were considered.

28. On these decisions it is apparent that the word "trial" has been used in the same sense in Section 90 (1) and Section 98 (a) of the Act. For purposes of both these provisions the trial of an election petition commences on the reference of the petition to the Tribunal. The trial concludes when the Tribunal makes an order which in fact puts an end to or closes the proceedings before it arising out of the election petition. The trial of an election petition is the entire process of the litigation from its first seisin by the Tribunal to its disposal, and includes matters prior to the actual hearing of the petition. The matters relating to the

service of summons, calling for and finalising the pleadings, and settling the issues, are all constituent stages of the trial. The 'procedure' provided by the Code of Civil Procedure in relation to these various matters would govern the proceedings arising out of an election petition, in virtue of Section 90 (1) of the Act.

29. The next question would be, what is the "procedure" under Section 90 (1), and whether Orders 9 and 17, Civil P. C., are included in it. The question as to what is meant by procedure has also been spoken of by the Supreme Court. Referring to Section 90 (2) (which after the amendment of 1956 was Section 90 (1) Bose, J., in *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 425 speaking for the Court observed:

"We must, therefore, direct our attention to that portion of the Civil Procedure Code that deals with the trial of suits."

Before adverting to the provisions themselves his Lordship observed that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Then his Lordship observed (paragraph 17):—

"Of course, there must be exceptions and where they are clearly defined they must be given effect to."

In paragraph 21 he referred to O. 9 which is headed "Appearance of parties and consequence of non-appearance." In paragraph 22 his Lordship emphasised that the word "consequence" as opposed to the word "penalty" used in Section 32 of the Code is significant. Then in paragraph 24 it was observed that R. 1 of O. 9 starts by saying "on the day fixed in the summons for the defendant to appear and answer....." It was observed: "and the rest of the rules in that order are consequential on that". This shows that it was held that the rules relating to appearance of parties and the consequence of non-appearance are part of the procedure prescribed by the Code of Civil Procedure for the trial of suits and are consequently applicable to the trial of election petitions. The fact that O. 9, R. 13 is applicable is further clear from paragraph 27 where it was observed that the first hearing is either for the settlement of issues or for final hearing. If it is only for the settlement of issues, then the Court cannot pass an ex parte decree on that date because of the proviso to O. 15 R. 3 (1) which provides that that can be done when "the parties or their pleaders are present and none of them

objects". On the other hand if it is for final hearing, an ex parte decree can be passed, and if it is passed, then O. 9, R. 13 comes into play and before the decree is set aside the Court is required to make an order to set it aside. In paragraph 29, O. 17 which deals with adjourned hearing was mentioned.

30. In that case the procedure contemplated by Section 90 (1) of the Act was exhaustively dealt with in order to bring out the proper effect of O. 9, R. 6 of the Code. Then in paragraph 32, O. 8, R. 10 was dealt with whereunder the Court may pronounce judgment against the defendant if he fails to comply with an order to file a written statement of his defence. That would indicate that in the opinion of the Supreme Court the provisions which confer a power even of pronouncing final judgment for the default of the defendant were within the concept of the procedure contemplated by Section 90 (1).

31. From this decision it would be clear that the provisions of O. 9 which deal with appearance of parties and consequence of non-appearance and O. 17 which deals with adjournment, relate to procedure and are attracted to the trial of an election petition. Order 9, Rule 8 provides the consequence of non-appearance by the plaintiff when the suit is called on for hearing. The consequence is that the Court shall make an order that the suit be dismissed. This is not a penalty. It would be a matter of procedure just as the pronouncing of judgment against the defendant under O. 8, Rule 10 is. R. 9 of O. 9 is a provision properly consequential upon an order passed under R. 8. Both will stand on the same footing. They do not militate against any provision in the Act or the Rules. There is nothing in their purpose or effect which may make them inherently inapplicable to proceedings arising out of an election petition. Their applicability cannot be excluded either on the ground that Section 90 (1) is subject to the provisions of the Act and the Rules, or that it makes the provisions of the Act applicable in so far as they may be applicable.

32. For the respondents Mr. Advocate General referred to the decision of the Supreme Court in *Inamati Mallappa Basappa v. Desai Basavaraj Ayyappa*, AIR 1958 SC 698 and urged that there was a clear distinction between the "procedure" provided by Section 90 (1) and the "powers" conferred upon the Tribunal by Section 92. In that case the question for consideration was whether O. 23, R. 1, C. P. C., enabling a party to abandon a part of the claim was applicable to an election petition by virtue of S. 90 (1). It was held that that provision was not applicable, because, in view of the scheme of the Representation of the People Act an

election petitioner cannot withdraw a part of the claim. That would defeat recrimination proceedings. Then, the Act especially provided for withdrawal of the election petition. Section 90 (1) being subject to the Act, the topic of withdrawal could not be brought in under Section 90 (1). Further, O. 23, R. 1 (2) provides for liberty being given by the Court to a party withdrawing or abandoning a part of his claim to file a fresh suit on the same cause of action, if so advised. In the very nature of things such liberty could not be reserved to a petitioner in an election petition. The provisions of the Act in regard to withdrawal of petitions do not provide for liberty to file a fresh election petition. For these reasons it was held that O. 23, R. 1 was inherently inapplicable to election petitions.

23. Bhagwati J. who spoke for the Court, referred to the various provisions of the Act to show that their effect was to constitute the Act a self-contained Code governing the trial of election petitions. He observed that Section 90 only provides for the procedure for trial of election petitions. The powers are, however, separately dealt with in Section 92. His Lordship then observed:—

"It will be noticed that the procedure for trial before the Tribunal and the powers of the Tribunal are treated separately, thus distinguishing between the procedure to be followed by the Tribunal and the powers to be exercised by it." His Lordship then mentioned various other provisions governing the trial and observed that the effect of all these provisions really is to constitute the Act a self-contained Code governing the trial of election petitions, and it would appear that in spite of Sec. 90 (1) of the Act, the provisions of O. 23, R. 1, Civil P. C., would not be applicable to the trial of election petitions by the Tribunal.

34. It was argued by the learned Advocate General that one reason for the exclusion of Order 23, Rule 1 was that powers of the Tribunal were separately dealt with by Section 92, which did not include O. 23, R. 1, and that would lead to the conclusion that the powers mentioned in Section 92 were not included in the procedure provided for by Section 90 (1). It is noticeable that though it was mentioned that the provisions distinguished between the procedure to be followed by the Tribunal and the powers conferred upon the Tribunal, yet his Lordship did not hold that they were mutually exclusive provisions or that the matters provided for by Section 92 were completely independent of and outside the purview of Section 90.

35. There are several reasons for taking this view. The Court was not in that case concerned with or adjudicating upon

any antithesis between Sections 90 and 92. Then, the exact point as to the interrelations of these two provisions had been the subject of an express declaration of law by the Supreme Court in a previously decided case to which Bhagwati J. himself was a party. I am referring to the case of Harish Chandra, AIR 1957 SC 444 (supra). In paragraph 20 Venkatarama Ayyar J speaking for the Court held that in *Sitaram v. Yograjsingh*, AIR, 1953 Bom 293 it was held that "procedure" in Section 90 and "powers" in Section 92 were inter-changeable terms and held that the law was correctly laid down in that case. In paragraph 17 his Lordship dealt with the argument that if the provisions of the Code of Civil Procedure are held to be applicable then there was no need to provide in Section 92 that the Tribunal was to have powers of Courts under the Code of Civil Procedure in respect of the matters mentioned therein, as those powers would pass to it under Section 90 (2). It was held:

"But this argument overlooks that the scope of Section 90 (2) is in a material particular, different from that of Sec. 92. While under Section 90 (2) the provisions of the Civil Procedure Code are applicable only subject to the provisions of the Act and the rules made thereunder, there is no such limitation as regards the powers conferred by Section 92. It was obviously the intention of the Legislature to put the powers of the Tribunal in respect of the matters mentioned in Section 92 as distinguished from the other provisions of the Code on a higher pedestal and as observed in AIR 1953 Bom 293, they are the irreducible minimum which the Tribunal is to possess."

His Lordship then specifically dealt with the supposed distinction between "procedure" and "powers" in paragraph 18 and observed:—

"It is then argued that Section 92 confers powers on the Tribunal in respect of certain matters, while Section 90 (2) applies the Civil P. C. in respect of matters relating to procedure, that there is a distinction between power and procedure, and that the granting of amendment being a power and not a matter of procedure, it can be claimed only under Section 92 and not under S. 90 (2)."

Rejecting this argument it was held:—

"We do not see any antithesis between 'procedure' in Section 90 (2) and 'power' under Section 92. When the respondent applied to the Tribunal for amendment he took a procedural step, and that, he was clearly entitled to do under Sec. 90 (2). The question of power arises only with reference to the order to be passed on the petition by the Tribunal. Is it to be held that the presentation of petition is competent, but the passing of any order thereon is not? We are of opinion that

there is no substance in this contention either."

36. The case of Harish Chandra, AIR 1957 SC 444 was decided by a four-Judge Bench of the Supreme Court (Bhagwati, Venkatarama Ayyar, Sinha and S. K. Das, JJ.). The case of Inamati Malappa, AIR 1958 SC 698 (supra), relied on by the respondent, was decided by a three-Judge Bench of the Supreme Court (Bhagwati, Kapur and Sarkar, JJ.). Bhagwati, J. was a party to both the decisions. If his Lordship was intending to lay down a rule contrary to Harish Chandra's case, AIR 1957 SC 444 he would have certainly referred to it and dealt with it. Then, a decision of a three-Judge Bench cannot be construed as overruling the express opinion of a four-Judge Bench decision of the same Court. For all these reasons, the observations of Bhagwati, J. in paragraph 17 of the judgment in Inamati Malappa's case, AIR 1958 SC 698 ought not be construed to mean that Sections 90 (1) and 92 are mutually exclusive so that the matters referred to in Section 92 are outside the purview of Section 90. In my opinion, the matters mentioned in Section 92 appertain to the procedure for trial, and are also attracted by virtue of Section 90 (1). They were separately stated in Section 92 to make them operate in spite of any provision to the contrary in the Act or the Rules, and not with a view to curtail the amplitude of Sec. 90 (1). The provisions of O. 9, Rr. 8 and 9, Civil P. C., even if they deal with powers, would be procedural powers and be attracted by virtue of Section 90 (1).

37. But assuming that the submission of the learned Advocate General on the interpretation of Section 92 was correct, it would, in my opinion, not advance his case on this point. Section 92 states that the Tribunal shall have the powers which are vested in a Court when trying a suit "in respect of" the following "matters"; one of which under Cl. (e) is, granting adjournments. So the Tribunal possesses the powers in respect of the matter of granting adjournments. The matter of granting adjournments is the field or the topic in respect of which the Tribunal is to have all powers provided by the Code of Civil Procedure. The use of the phrase "in respect of" would bring in all those provisions which deal with or provide for the subject-matter of granting adjournments. The provisions which provide for matters ancillary or consequential to the granting of adjournments would equally be applicable to the Tribunal. The Government of India Act, 1935, uses the phrase "with respect to" in a large number of items in the legislative lists mentioned in the Seventh Schedule. In *United Provinces v. Atiqa Begum*, AIR 1941 FC 16 at p. 25 the Federal Court held that the expression "with respect to"

includes all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in that topic or category of legislation. So, the provisions of the Code of Civil Procedure dealing with the granting or refusing of adjournments as well as providing for the consequence of the grant of or refusal to grant adjournments would be within the purview of Section 92 and the Tribunal shall have all such powers. Order XVII of the Code, is headed as "adjournments." It would clearly apply. Rule 1 authorises the court to adjourn the hearing of the suit from time to time. Rules 2 and 3 provide for the consequence of non-appearance on the date to which the hearing has been adjourned. Under Rule 2 if the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit. This brings in O. 9 of the Code of Civil Procedure. Order 9, therefore, would clearly be available to the Tribunal. Rules 8, 9 and 13 of O. 9 provide the modes in which the Court may proceed to dispose of the suit. The Tribunal thus would have the power to proceed in one of those modes.

38. Order 9, Rule 1 states:—

"On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court."

This rule directly deals with the topic of granting an adjournment. It would be attracted. In AIR 1955 SC 425 Bose, J. specifically observed that the rest of the rules in O. 9 are consequential on R. 1 (vide paragraph 24). Thus, under Section 92 (e) of the Act the provisions of O. 17 and O. 9 of the Code of Civil Procedure would confer the relevant power to dismiss for default, and the power to set aside that order on sufficient cause being shown, on the Election Tribunal.

39. In my opinion Sections 90 (1) and 92 severally as well as jointly authorise the Election Tribunal to dismiss the proceedings arising out of an election petition for default of appearance of the election petitioner.

40. I would, respectfully, differ from the decision of a Bench of this Court in *Vishwanath Prasad's case*, AIR 1964 All 181.

41. It was also urged that an order dismissing the proceedings for default in appearance would not be an order under Section 98 (a). For this reliance was placed upon the Bench decision in *Vishwanath Prasad's case*, AIR 1964 All 181 as well as the decision in *B. P. Maurya's*

case, 1964 All LJ 155. In Vishwanath Prasad's case, AIR 1964 All 181 it was observed that Cl. (a) of Section 98 requires an order of dismissal after the conclusion of the trial and the trial has to conclude after the decision of the issues that have been raised in the petition. That view does not appear to be in line with the various decisions of the Supreme Court mentioned earlier in this judgment, viz. Chandrika Prasad, AIR 1959 SC 827 and Om Prabha Jain, AIR 1959 SC 837, wherein it has been held that the trial commences prior to the hearing of the petition and an order which in fact concludes the trial even before the issues have been framed, would also be an order within Section 98 (a), for instance an order of dismissal under Section 90 (3) for non-compliance with the provisions of Sections 81, 82 and 117. The reason for that conclusion was not the explanation added subsequently to Section 90 (3) of the Act, but the view that the trial commences from the moment the petition is referred to the Tribunal and that the trial concludes when an order has been passed which in fact closes the proceedings arising out of the election petition.

42. According to Saogram Singh's case, AIR 1955 SC 425, O. 8, R. 10, Civil P. C. is by virtue of Section 90 (1) attracted to the trial of election petitions. Under it if the Court had required the defendant to file a written statement and he fails to do so, it can pass judgment. This would be a stage prior to the settling of issues. If the view expressed in Vishwanath Prasad's case, AIR 1964 All 181 be correct an order under O. 8, R. 10, Civil P. C., would not be within Section 98 (a). The result would be that the Tribunal would be obliged to proceed on with the election petition to frame issues and then to decide them even though there is no written statement. Similarly, O. 7, R. 11, Civil P. C., entitles the Court to reject a plaint if it discloses no cause of action. That is a stage even prior to the issuance of summons to the defendant. If such an order, even though it completely concludes the proceedings arising out of the election petition be not treated as an order of dismissal under Section 98 (a), the result would be startling. The Tribunal would be bound to proceed with the election petition, call for a written statement, settle issues, record all the evidence that may be adduced by the parties, hear arguments and then dismiss the petition on the ground that it discloses no cause of action. The Legislature could not, in my opinion, be attributed an intention to force the Tribunal to keep on flogging a dead horse knowing full well that no useful result would follow. On the other hand orders under O. 7, R. 11, Civil P. C., O. 8, R. 10, Civil P. C., as well as O. 9, R. 8, Civil P. C., in fact bring to a close the

proceedings before the Tribunal. They are, therefore, passed at the conclusion of the trial. The only condition mentioned in Section 98 is that the order dismissing the election petition should be one which is passed at the conclusion of the trial. That test is amply satisfied in all these cases.

In B. P. Maurya's case, 1964 All LJ 155 (page 159) the Bench observed that obviously Section 98 does not contemplate an order of dismissal for default. It distinguished the Supreme Court decision in Om Prabha Jain's case, AIR 1959 SC 837 on the ground that under Section 90 (3) the Tribunal has no option but to pass an order of dismissal, but in the case of a dismissal for default the order dismissing the petition is passed subject to its being set aside under O. 9, R. 9, Civil P. C. on sufficient cause being shown and the Court has a discretion in respect of it. With respect, I am unable to endorse this view-point. Order 9, R. 8, Civil P. C. provides that where the plaintiff does not appear "the Court shall make an order that the suit be dismissed". The Court has no discretion in the matter. Further, it cannot be said that the Tribunal has no option but to dismiss the petition for non-compliance with the provisions of Sections 81, 82 and 117. In Harish Chandra's case, AIR 1957 SC 444, at para. 18 p. 453 it was observed:—

"Section 90 (4) enacts that when an election petition does not comply with the provisions of S. 81, S. 83 or S. 117 the Tribunal may dismiss it. But if it does not dismiss it, it must necessarily have the powers to order rectification of the defects arising by reason of non-compliance with the requirements of S. 81, S. 83 or S. 117."

This observation would suggest that the Tribunal has a discretion in the matter. It can order rectification of the defects. The case of Om Prabha Jain, AIR 1959 SC 837 (supra) would not, in my opinion, be distinguishable on this ground. I am, therefore, unable to uphold the view that Section 98 contemplates an order on merits alone, or that an order of dismissal for default would not be an order dismissing the election petition under Section 98 (a) of the Act.

43-44. It was then urged that Sections 103, 106 and 107 of the Act require only an order dismissing a petition under Section 98 (a) to be communicated to the Election Commission under Section 103 and then transmitted by the Election Commission to the appropriate authority under Section 106 for being notified. An order of dismissal otherwise is not required to be notified and so even though an election petition may be dismissed for default of appearance the order would remain uncommunicated and unnotified,

The same argument was advanced in relation to an order of dismissal under S. 90(3) in Chandrika Prasad's case, AIR 1959 SC 827. There the case arose prior to the amendment of Section 90 (3) by Act 18 of 1958 whereunder the explanation was added. The Supreme Court considered the provisions as they stood prior to the addition of the explanation. It was held that an order under Section 90 (3) would be an order within meaning of Section 98 (a). Gajendragadkar J. observed (paragraph 9):—

"It cannot be suggested that the order passed by the tribunal dismissing the election petition for non-compliance of Section 117 is not required to be communicated to the Election Commission under Section 103 or transmitted by the Election Commission to the appropriate authority under Section 106. Similarly it cannot be said that such an order would not take effect as soon as it is pronounced by the tribunal under Section 107. It would thus be noticed that though the provisions of these sections are obviously applicable to an order dismissing the election petition on the ground of non-compliance of Section 117, in terms the said sections refer to orders passed under Section 98 or Section 99. Therefore, we think it would be reasonable to hold that, where the tribunal dismisses an election petition by virtue of the provisions contained in Section 90, sub-section (3), the order of dismissal must be deemed to have been made under Section 98."

The same line of reasoning would apply to an order of dismissal for default of appearance. In the premises, such an order of dismissal must also be deemed to have been made under S. 98.

45. It was then suggested that in the case of dismissal for default of appearance an order under Section 99 would be inappropriate. The same submission was made in relation to an order under Section 90 (3) in Chandrika Prasad's case, AIR 1959 SC 827 (supra). It was rejected on the view:

"Similarly Section 99 (1) (b) which empowers the tribunal to fix the total amount of costs payable and to specify the person by and to whom that shall be paid in terms refers to cases where an order is made under Section 98. It cannot be suggested that, where an order of dismissal is passed under Section 90, sub-section (3), the tribunal cannot make an appropriate order of costs. This provision also indicates that the order passed under Section 90, sub-section (3) is in law and in substance an order passed under Section 98 (a). It is true that in cases where such an order is passed Section 99 (1) (a) would not come into operation, but that can hardly affect the position that an order under Section 90, sub-section

(3) is nevertheless an order under Section 98." An order for dismissal in default of appearance would stand identically on the same footing.

46. It was then urged that S. 116-B of the Act provides:

"The decision of the High Court on appeal under this Chapter and subject only to such decision, the order of the Tribunal under Section 98 or Section 99 shall be final and conclusive"

and hence an order under O. 9, R. 8, Civil P. C., would be final and conclusive if it was treated an order under Section 98. In that situation such an order could not be set aside under O. 9, R. 9, Civil P. C. This submission was rejected by a Bench in B. P. Maurya's case, 1964 All LJ 155 (supra). The Bench held that:—

"It is trite that a decree passed by a regular Civil Court is final subject to its being reversed but no one has so far argued that the Civil Court has no power to set aside an ex parte decree under O. 9, R. 9, Civil P. C."

With respect I am in agreement with this view-point. The finality contemplated by Section 116-B is to be read along with the other provisions of the Act which provide for the setting aside of specified orders. Section 116-B does not open with the clause "notwithstanding the other provisions of the Act." It should be construed so as to harmonise with the other provisions, namely sections 90 (2), 92 (e) read with O. 9, R. 9, Civil P. C.

47. In Sunderlal Mannalal's case, AIR 1958 Madh Pra 260 it was observed that the Tribunal possesses inherent power of dismissal for non-appearance or non-prosecution. I will not go that far. The Supreme Court in Jagannath's case, AIR 1954 SC 210 and in Kamraj Nadar's case, AIR 1958 SC 687 emphasised that an Election Tribunal does not possess any common law powers. Further, in my opinion the power of dismissal for non-appearance has been expressly conferred upon the Tribunal under Sections 90 (1) and 92 (e) of the Act.

48. A Bench of the Patna High Court in Sawalia Behari Lal Verma v. Tribik Ram Deo Narain Singh, AIR 1965 Pat 378 accepted the position that Section 90 (1) of the Act imported the provisions of O. 9, Civil P. C., and the Tribunal was competent to dismiss the election petition under O. 9, Rule 8, Civil P. C. I would express my respectful dissent from the decision to the contrary by the Full Bench of Jammu and Kashmir High Court in Dina Nath Kaul v. Election Tribunal, J. & K., AIR 1960 J & K 25. A Full Bench of the Punjab High Court in Jugal Kishore v. Baldeo Parkash, AIR 1968 Punj 152 (FB) did not accept the view expressed by a Bench of this Court in Vishwanath Prasad's case, AIR 1964 All

181 and the Full Bench of Jammu and Kashmir High Court mentioned above, but agreed with the views of the Patna High Court in Sawalia Behari Lall's case, AIR 1965 Pat 378 (supra). It held that O. 9 and O. 17, Civil P. C., are applicable to the trial of election petitions.

49. In my opinion Orders 9 and 17 of the Code of Civil Procedure are applicable to the trial of an election petition both under Section 90 (1) as well as Section 92 (e) of the Representation of the People Act.

50. The second submission of the learned counsel for the appellant was that either before dismissing the petition for default of appearance of the election petitioner or after such an order had been passed, it was incumbent upon the Tribunal to have followed the procedure prescribed by Sections 109 and 110 of the Act. Under Section 109 when a petition for withdrawal is made notice thereof fixing a date for the hearing of the application shall be given to all other parties to the petition and shall be published in the Official Gazette. Under Section 110 an application for withdrawal cannot be granted if in the opinion of the Court such an application has been induced by a bargain or consideration which ought not to be allowed. But if the application is granted notice of the withdrawal is to be published in the official gazette and a person who might have been a petitioner may apply to be substituted as petitioner in place of the party withdrawing. The same procedure has to be followed under Sections 113 to 115 when an election petition abates by reason of the death of the petitioner.

It was urged that if an election petitioner has entered into any bargain or consideration which ought not to be allowed under Sec. 113, he may instead of filing an application for withdrawal, just refuse to prosecute the petition; and, if the provisions of Section 109 onwards are not held applicable to such a situation, there would be no power or machinery by which the proceedings could be continued. The intention of the Legislature that a petition should not fail by reason of any bargain or collusion between the election petitioner and the successful candidate would be frustrated. There is undoubtedly a lacuna in the Act, because it makes provision when an election petitioner is allowed to withdraw, but makes no such provision if he just refuses to prosecute it. But that reason would not, as pointed out by Grover J. in Jugul Kishore's case, AIR 1958 Puni 152 (supra) be a sufficient reason to construe the provisions beyond the purview of their language. Sections 109 to 115 apply only in the case of withdrawal or abatement. They do not apply to a dismissal

for default. For the same reason the amplitude of Section 90(1) or 92(e) of the Act could not be cut down on such considerations. It is for the Legislature to fill in the lacuna by appropriate amendment. The Courts ought not to legislate in the guise of interpretation. In my opinion the Tribunal was right in its opinion that the provisions of Sections 109 and 110 were not attracted when the election petitioner failed to prosecute the petition.

51. The position is that the Election Tribunal had power to dismiss the petition for default of appearance of the election petitioner. The order passed by it on 20th April, 1965, holding that it had no such power was erroneous. It could in its discretion adjourn the hearing or dismiss the petition for default of appearance. It adjourned the hearing more than once. But the appellant never appeared. The Tribunal ought not to have proceeded to record findings. The ultimate order of dismissal was passed ex parte. It should be deemed in law to be a dismissal for default of appearance of the petitioner. With this observation, the appeal is dismissed. The parties may bear their own costs in this Court.

52. LOKUR J.— This appeal involves the application of S. 90 (1) of the Representation of the People Act, 1951, as it stood prior to the amendment of the Act in 1966. The Section requires that subject to the provisions of the Act and any other rules made thereunder, every Election petition shall be tried by the Tribunal as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. The question is no more of general importance as the Election Tribunals have been abolished by the Amending Act of 1966 and the election disputes have now to be tried by the High Courts. The amended Act also lays down the same procedure for trial of Election Petitions by High Courts under Section 87 of the amended Act. But the High Courts being courts of record, the power of the High Courts cannot in any way be compared with those of the Election Tribunals. Nevertheless, the question has been referred to this Full Bench and we have heard arguments thereon at full length and, in fairness, I am of the view that the question should be examined by us.

53. The words "as nearly as may be" in Section 90 (1) are significant. Although the entire procedure laid down under the Code of Civil Procedure need not be followed the direction requires that that procedure should be followed to the extent possible. If there is nothing in the Act which precludes the application of O. 9, R. 8 of the Civil P. C., there would be no adequate reason why that rule should not be applied.

54. It is urged that Section 90 (1) provides for "procedure" but the dismissal of the Election Petition for default of appearance of the petitioner is exercise of a "power" and since that power is not included in Section 92 of the Act, which is said to set out the powers of the Tribunal, the Tribunal had no power to dismiss the Election Petition under O. 9, R. 8. Reference may, in this connection, be made to the observations of Venkatarama Ayyar, J., in AIR 1957 SC 444 that there is no antithesis between "procedure" in Section 90 (1) and "power" under Section 92. There is, however, a contrary observation of Bhagwati J. in the case of AIR 1958 SC 698 that there was a clear distinction between the "procedure" provided in Section 90 (1) and the "powers" conferred by Section 92. The case of Harish Chandra, AIR 1957 SC 444 was decided by a Bench of four Judges, while the case of Inamati Mallappa, AIR 1958 SC 698 was decided by a Bench of three Judges; Bhagwati J. was a party to the decision in Harish Chandra's case, AIR 1957 SC 444 also. Inamati Mallappa's case, AIR 1958 SC 698 did not refer to Harish Chandra's case and, in the circumstances, the decision in Harish Chandra's case, AIR 1957 SC 444 appears to be entitled to greater weight. Accordingly, in my opinion even if the dismissal of an Election Petition is exercise of a power it is covered by Section 90 (1).

55. It was next contended that the only orders to be made in an Election Petition are those specified in Section 98 and as such the orders have to be made "at the conclusion of the trial of Election Petition" and it cannot be said that dismissal of an Election Petition for default of appearance of the petitioner would be at the conclusion of the petition. It is however, well settled by the decision of the Supreme Court that trial before the Election Tribunal commences as soon as the Tribunal became seized of the petition on reference of the petition to it by the Election Commission under Section 86 (1). Hence the dismissal of an Election Petition for default of petitioner's appearance is covered by S. 98 (a).

56. It was further argued that on the dismissal of the petition for default of the petitioner's appearance, copies of the order have to be forwarded to the various authorities and the order will also have to be published by the Election Commission under Section 106 but there is no provision in the Act enabling this action to be annulled in the event of the Election Petition being restored on an application under O. 9, R. 13 of the Code of Civil Procedure and decided afresh. Where the petition is decided afresh, in such a situation, the Election Commission will, no doubt, make the position clear as to how the petition was decided a second time.

57. It may be observed that if the Election Petition is not dismissed for default of the petitioner's appearance but heard on merits, the only evidence available to the Tribunal for consideration is the evidence of the respondent and decision on such interested evidence on serious matters, like corrupt practices, would be travesty of justice.

58. On the whole, the better view to my mind is that the Election Petition ought to be dismissed if the petitioner remains absent on the date of its hearing. If, however, the Tribunal dismisses the petition on merits, the dismissal would remain in law a dismissal for default of the petitioner's appearance. The petitioner will then be at liberty either to approach the Tribunal to have the order of dismissal set aside or to go in appeal to the High Court. If he chooses the latter course, he must, to get relief, satisfy the High Court that he had sufficient cause to be absent on the date of hearing. In the present case no attempt has been made by the petitioner to explain the reasons which compelled him to be absent at the hearing. That being so, this is not a fit case to relieve the petitioner from the consequences of the order of the Tribunal.

59. The appeal ought, in my opinion, to be dismissed.

60. BY THE COURT: The appeal is dismissed. Parties will bear their own costs.

Appeal dismissed.

'AIR 1970 ALLAHABAD 15 (V 57 C 2) FULL BENCH

**S. N. DWIVEDI, SATISH CHANDRA
AND R. B. MISRA JJ.**

Pratap Narain Agarwal, Appellant v. Ragho Prasad and others, Respondents.

Civil Misc. Appl. No. 2348 of 1968 in Ex. First Appeal No. 114 of 1968, D/-17-12-1968.

Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 21 as amended by U. P. Civil Laws (Reforms and Amendment) Act, 1954 — U. P. Civil Laws (Reforms and Amendment) Act (24 of 1954), S. 3 — Suit instituted in 1934 and valued at less than Rs. 10,000 but more than Rs. 5,000 — Decree and execution after commencement of Amending Act — Appeal against order in execution lies to District Judge and not High Court — Civil P. C. (1908), S. 96.

Where an execution proceeding is commenced after the enforcement of the U. P. Civil Laws (Reforms and Amendment) Act, 1954, for executing a decree passed after the commencement of the said Act in a suit instituted in 1934 and

valued at less than Rs. 10,000 but more than Rs. 5,000 an appeal from an order passed in such an execution proceeding would not lie in the High Court but in the Court of the District Judge.

(Paras 1 and 21)

The right of appeal against decrees passed in execution would accrue on the date of the institution of the execution application.

(Para 7)

The right of appeal being a creature of the statute, its nature and character will be determined and controlled by the provisions of the statute. The question whether the forum of appeal is an ingredient of the substantive right of appeal, or is a matter of its procedure, is not free from doubt; but assuming that it is substantive, the question, whether it has been taken away expressly or by necessary intendment would depend on the ambit of the relevant provisions rather than on theoretical considerations.

(Para 9)

Even where the Court of appeal continues to exist, but the provision conferring the right of appeal is repealed prospectively, it shows an intention that the vested right of appeal in previously instituted cases was not to be exercised in the new Court of appeal.

(Para 11)

The Amending Act, namely, the U. P. Civil Laws (Reforms and Amendment) Act 1954, also provided a saving clause in Section 3. Sub-section (1) preserves the rights which had already accrued or had already been acquired. So, the substantive right of appeal which had accrued to a litigant would remain unaffected by any amendments introduced by the amending Act of 1954. Sub-section (2), however, seems to restrict this wide implication of sub-section (1). Under it, where the period of limitation for any suit or appeal has been modified or a different period is prescribed by the amendments, then notwithstanding the amendments, and further, notwithstanding the fact that the suit or appeal would now lie in a different Court, the period of limitation applicable to the suit or appeal in which time has begun to run before the commencement of this Act, shall continue to be the period which, but for the amendments so made, would have been available. Sub-section (2) is an exception to sub-section (1) in respect of two matters relating to the potential right of appeal (which has not become perfected by the passing of the decree), namely, the forum and the period of limitation. This Act, therefore, changes the forum of appeal against decrees or orders passed after its commencement, in suits instituted prior to its commencement.

(Paras 12-A and 14)

Where the original suit was filed in 1934 and was pending on 30th November, 1954, when the U. P. Civil Laws (Reforms

and Amendment) Act, 1954, came into force and the execution application was filed in 1965 and the order in execution sought to be appealed against was passed on 23rd December, 1967 it would be governed by the amended provision in Cl. (a) of Section 21 (1) of the Bengal, Agra and Assam Civil Courts Act and if valuation of the original suit was Rs. 7,162/8 the appeal would lie to the District Judge and not in the High Court. 1957 All LJ 495 and AIR 1957 SC 540 and AIR 1921 PC 219 and AIR 1964 SC 489, Rel. on: 1955 All LJ 307, *Distinguished*.

Quaere: Whether an execution application is so independent of the suit that it cannot be treated as a proceeding arising out of the suit.

(Para 7)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 489 (V 51) =

(1964) 1 SCR 362, Lakshmi Narain v. First Additional Dist. Judge, Allahabad 15

(1957) AIR 1957 SC 540 (V 44) =

1957 SCR 488, Garikapati Veerayya v. Subbiah Choudhury 8, 11

(1957) 1957 All LJ 495 = 1957 All

WR (HC) 450, Purshottam Lal

Tandon v. Shyam Nath Segal 6

(1955) 1955 All LJ 307 = 1955 All

WR (HC) 303, Cyril Austin Spencer

v. M. H. Spender 16

(1921) AIR 1921 PC 219 (V 8),

Canada Cement Co. Ltd. v. East

Montreal (Town of) 10

K. N. Sath and G. N. Singh, for Appellant; M. K. Saraswat and V. P. Misra, for Respondent.

SATISH CHANDRA J.— A Division Bench of this Court had referred the following question to a Full Bench:—

"Where an execution proceeding is commenced after the enforcement of the U. P. Civil Laws (Reforms and Amendment) Act, 1954, for executing a decree passed after the commencement of the said Act in a suit instituted in 1934 and valued at less than Rs. 10,000 but more than Rs. 5000, will an appeal from an order passed in such an execution proceeding lie in this Court or in the Court of the District Judge?"

The question arises in this way. Bishambharnath Khazanchi filed a suit (No. 21 of 1934) in the Court of the Subordinate Judge, Agra, for partition and possession. The suit was valued at Rs. 7162/8. On 5th September, 1959, a final decree for partition and possession of a one-fourth share of the plaintiff was pronounced. The value of the plaintiff's share was determined at Rs. 27,278. An application to execute the decree was filed on 17th February, 1965. The judgment-debtors-respondents filed an objection under Section 47, Civil P. C., which was allowed on 23rd December, 1967. The objection was valued at Rs. 27,778. The

decree-holder filed the present Execution First Appeal in this Court against the order dated 23rd December, 1967. The appeal was valued at the same figure of Rs. 27,778.

2. The respondents moved an application under R. 24 of Chapter VIII of the Rules of Court stating that an appeal against the order dated 23rd December, 1967, lay to the Court of the District Judge. The present appeal to this Court was incompetent. It was prayed that the appeal be disposed of on this preliminary point. The Division Bench hearing the matter felt that the question was of general importance and deserved to be adjudicated by a Full Bench. That is how the matter has come before this Full Bench.

3. The question whether an appeal would lie to this Court or to the Court of the District Judge in the present case depends on the impact of the settled principle that a right of appeal is a substantive right and vests on the date of the commencement of the lis, upon the amendment introduced to Section 21 of the Bengal, Agra and Assam Civil Courts Act by the U. P. Civil Laws (Reforms and Amendment) Act, 1954, considered in the context of the relevant provisions in the Code of Civil Procedure.

4. The Code of Civil Procedure, 1908, consolidates and amends the laws relating to the procedure of the Courts of civil jurisdiction. In Part I it deals with suits in general. Its Part II provides for execution. Part VII deals with appeals and Part VIII relates to reference, review and revision. Section 96 provides an appeal from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Courts. It confers a right of appeal from decrees, but does not provide the forum of appeal.

5. The Bengal, Agra and Assam Civil Courts Act, 1887, by Section 21 specifies the forum of appeals. Sub-section (1) dealt with decisions of Civil Judges. It reads:—

“21. Appeals from Civil Judges and Munsifs—

(1) Save as aforesaid, an appeal from a decree or order of a Civil Judge shall lie—

(a) to the District Judge where the value of the original suit in which or in any proceeding arising out of which the decree or order was made did not exceed ten thousand rupees, and

(b) to the High Court in any other case.”

Previously, Cl. (a) mentioned “five thousand rupees.” The U. P. Civil Laws (Reforms and Amendment) Act, 1954, which came into force on 30th November, 1954, repealed the figure five thousand

and re-enacted in its place the figure “ten thousand rupees”. So, previously an appeal lay to the District Judge where the value of the original suit did not exceed rupees five thousand, but after this amendment an appeal would so lie if the valuation did not exceed rupees ten thousand. An appeal would lie to the High Court only if the valuation exceeded rupees ten thousand.

6. Section 21 governs an appeal from a decree or order in an original suit, as well as in any proceeding arising out of it. For both these matters the test is the value of the original suit. The value for which the decree or order may be passed or the value of the subject-matter of the appeal are irrelevant. Even if a proceeding arising out of the suit is valued independently or differently, such valuation would not be material. For choosing the forum of appeal, the value of the original suit out of which the proceeding, in which the decree or order sought to be appealed against was made, arose, would be decisive. (Vide also *Purshottam Lal Tandon v. Shyam Nath Segal*, 1957 All LJ 495). In the present case, the suit was valued at Rs. 7,162/8. That would be the material and relevant valuation for determining the forum of the present appeal, and not the value of the subject-matter of the appeal.

7. The learned counsel for the judgment-debtors-respondents urged that the right of appeal is a substantive right. It vests on the date of the institution of a suit. But, proceedings in execution of a decree are entirely independent of the suit. The right of appeal against decrees passed in execution would accrue on the date of the institution of the execution application. In the present case the execution application was filed on 17th February, 1965. Section 21 (1) had been amended by then. The amended provision would apply. Under it an appeal lay to the District Judge. It was not competent in the High Court. The submission raises the problem whether an execution application is so independent of the suit that it cannot be treated as a proceeding arising out of the suit. The point is fairly controversial. Since the question referred to the Full Bench principally relates to and can properly be answered on the interpretation of the 1954 Amending Act, it is unnecessary to express an opinion on it.

8. A litigant has a common law right to institute a suit of a civil nature in some Court or the other; but he has no such right of appeal. But it is settled that the right of appeal exists only when it is clearly conferred by a statute. The right of appeal so conferred by a statute is a substantive right, and is not a mere matter of procedure. The institution of the suit carries with it the implication that the

right of appeal, then in force, is preserved to the parties thereto till the rest of the career of the suit. The right vests in the litigant on the date the lis commences. This vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary intendment (vide *Ganikapati Veeraya v. Subbiah Choudhry*, AIR 1957 SC 540, paragraph 23).

9. The right of appeal being a creature of the statute, its nature and character will be determined and controlled by the provisions. The question whether the forum of appeal is an ingredient of the substantive right of appeal, or is a matter of its procedure, is not free from doubt; but assuming that it is substantive, the question, whether it has been taken away expressly or by necessary intendment would depend on the ambit of the relevant provisions rather than on theoretical considerations.

10. The Privy Council decision in *Canada Cement Co. Ltd v. East Montreal (Town of)* AIR 1921 PC 219 is interesting. In that Canadian case, the Circuit Court of Montreal passed a decree on January 5, 1921, against the appellant. Under the Code of Civil Procedure, which was then in force, the decisions of that Court were appealable in certain cases to a Court of review. While the suit was pending, a new statute, Quebec Statute 10 Geo. 5 C. 79, was enacted. It prospectively repealed the various sections of the Code of Civil Procedure providing for an appeal from the decisions of the circuit Court of Montreal. Section 42 of the new Act provided that the Court of King's Bench would have jurisdiction in respect of all matters in which appeal lay under the law. Since the law had repealed the provisions regarding appeal from the Court of Montreal, naturally, no appeal lay against the decisions of that Court. The appellant filed the appeal in the Court of the King's Bench. The respondent took an objection that the appeal was not competent. For the appellant, reliance was placed upon Section 64 of the new Act, which provided:—

"Unless otherwise provided by this Act, all cases, matters or things which, at the time of its coming into force, were within the competence of the Court of Review, shall be within the competence of the Court of the King's Bench, sitting in appeal."

Lord Buckmaster, speaking for the Judicial Committee, upheld the objection. He observed:—

"Now this appeal had not been brought when the statute was passed, although proceedings before the circuit Court had been instituted. Consequently, the statutes giving whatever right of appeal may have existed were replaced by Sections

which gave none, and S. 64 of the Act which provided that matters within the competence of the Court of review should be subject to the King's Bench, must be regarded as qualified by the provision that the powers of the Court of review with regard to the circuit Court had been taken away and consequently to that extent the statute had 'otherwise provided'."

11. Dealing with this case, S. R. Das, C. J., speaking for the majority in *Ganikapati Veeraya's case*, AIR 1957 SC 540 held in paragraph 36 that this case was an example of the vested right of appeal being taken away, not by the abolition of the Court of appeal, but by an express or necessary intendment of the saving clause.

12. The case illustrates the principle that even where the Court of appeal continues to exist, but the provision conferring the right of appeal is repealed prospectively, it shows an intention that the vested right of appeal in previously instituted cases was not to be exercised in the new Court of appeal.

12-A. The Amending Act of 1954 also provided a saving clause in Section 3. It stated:—

"3. Savings. (1) Any amendment made by this Act shall not affect the validity, invalidity, effect or consequence of anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred or any release or discharge of or from any debt, decree, liability, or any jurisdiction already exercised, and any proceeding instituted or commenced in any Court prior to the commencement of this Act shall, notwithstanding any amendment herein made, continue to be heard and decided by such Court.

(2) Where by reason of any amendment herein made in the Indian Limitation Act, 1908, or any other enactment mentioned in column 2 of the Schedule, the period of limitation prescribed for any suit or appeal has been modified, or a different period of limitation will hereafter govern any such suit or appeal, then, notwithstanding any amendment so made or the fact that the suit or appeal would now lie in a different Court, the period of limitation applicable to a suit or appeal, as aforesaid, in which time has begun to run before the commencement of this Act shall continue to be the period which but for the amendment so made would have been available."

Sub-section (1) preserves the rights which had already accrued or had already been acquired. So, the substantive right of appeal which had accrued to a litigant would remain unaffected by any amendments introduced by the amending Act of 1954. Sub-section (2), however, seems to restrict this wide implication of sub-section (1). Under it, where the period

of limitation for any suit or appeal has been modified or a different period is prescribed by the amendments, then notwithstanding the amendments, and further, notwithstanding the fact that the suit or appeal would now lie in a different Court, the period of limitation applicable to the suit or appeal in which time has begun to run before the commencement of this Act, shall continue to be the period which, but for the amendments so made, would have been available. Two things are significant. The pre-existing period of limitation would continue to be available only where it had begun to run, that is to say in cases where the decree or order had been passed before the commencement of the Act. The previously prescribed period of limitation would not be available if the suit was pending, and the decree or order had not been passed till that date. In this way, the right of appeal was curbed and modified in respect of its period of limitation.

13. Secondly, the effect in relation to the period of limitation has been expressly stated to operate notwithstanding the fact that an appeal would now lie in a different Court. Sub-section (2) deals with suits filed prior to the date of the commencement of the Act. It says that though the appeal would now lie in a different Court, yet in decided suits the previously prescribed period of limitation for an appeal would nonetheless be available. The necessary intendment appears to be that an appeal in suits pending on that date would lie in the new forum; because otherwise the phrase "notwithstanding the fact that the appeal would now lie in a different Court" would fulfil no purpose, carry no meaning. If this phrase had not been there, the position would have been that the appeal would have lain to the old Court, but if time had begun to run, the old period of limitation would be available. The legislature cannot be presumed to be indulging in surplusage. The conclusion seems inescapable that this phrase was designed to catch and canalise the right of appeal in pending suits.

14. In my opinion, sub-section (2) is an exception to sub-section (1) in respect of two matters relating to the potential right of appeal (which has not become perfected by the passing of the decree), namely, the forum and the period of limitation. This Act, therefore, changes the forum of appeal against decrees or orders passed after its commencement, in suits instituted prior to its commencement.

15. I venture to think that this view is in line with the decision of the Supreme Court in *Lakshmi Narain v. First Additional District Judge, Allahabad*, AIR 1964 SC 489. There, it was observed that the Statement of Objects and Reasons of the amending Act, inter alia, stated that:—

"In order to reduce the volume of work in the High Court and to ensure quicker disposal of appeals, the Bengal, Agra and Assam Civil Courts Act, 1887, is proposed to be amended so that appeals in cases from Rs. 5,000 to Rs. 10,000 in valuation may be heard by the District Judge." The Supreme Court held:—

"It is true, as pointed out by the High Court, that the object behind the amendment in question was to give relief to the High Court. But the High Court was in error in thinking that the legislature amended the law as the 'relief was required instantaneously'. The amending Act 'may have given relief to the High Court in respect of appeals to be instituted after the commencement of the Act,' but it did not grant the much required relief to that Court in respect of the pending first appeals." (emphasis (here in ') mine).

The Supreme Court thus seems to have been of the view that the change of forum introduced by the amending Act would apply to appeals that may be instituted after the commencement of the Act. If the amending Act is interpreted to apply only to suits filed after it came in force, the object of the legislature would not be achieved even after a generation. In the present case, the suit was filed in 1934. If an appeal filed even 33 years after, is to lie in the High Court, the legislature may as well have not made any amendment with a view to relieve the High Court. The Courts ought, as far as is reasonably possible, to so construe the provisions as would advance the aim, aspiration and purpose of the legislature, and not frustrate it altogether.

16. For the respondents, reliance was placed upon the decision of a Division Bench of this Court in *Cyril Austin Spencer v. M. H. Spencer*, 1955 All LJ 307. There, the matter was considered before the admission of the appeal. The respondents were not heard. The Bench expressed its opinion "as at present advised". The Bench held:—

"Section 3 of the amended Act says that any right, title, obligation or liability already acquired, accrued or incurred shall continue to be heard and decided by such Court. Accordingly, the right of appeal which had become vested in a party before the commencement of the Act is not affected by the provisions of the Act. All those appeals, therefore, which lay to this Court under the old law would still continue to lie to this Court provided that the suit or other proceeding was instituted prior to the commencement of the Act."

It is apparent from these observations that the Bench considered only sub-section (1) of Section 3. It did not take into

account sub-section (2) of Section 3. The decision is, with respect, per incurium.

17. In the present case, the original suit was filed in 1934. It was pending on 30th November, 1954, when the U. P. Civil Laws (Reforms and Amendment) Act, 1954, came into force. The execution application was filed in 1965. The decree sought to be appealed against was passed on 23rd December, 1967. It would be governed by the amended provision in CL (a) of Section 21 (1) of the Bengal, Agra and Assam Civil Courts Act. The valuation of the original suit was Rs. 7,162/8. Accordingly, the appeal lay to the District Judge. It was not competent in this Court.

18. My answer to the question referred to this Bench is that an appeal would lie to the District Judge, and not in this Court.

19. S. N. DWIVEDI J.:— I agree.

20. R. B. MISRA J.:— I agree.

21. BY THE COURT: Our answer to the question referred to this Bench is that an appeal would lie to the Court of the District Judge and not to the High Court.

Answer accordingly.

AIR 1970 ALLAHABAD 20 (V 57 C 3)

FULL BENCH

R. S. PATHAK, M. H. BEG AND

R. L. GULATI JJ.

Commissioner, Sales Tax U. P., Applicant v. M/s. Allied Chemicals, 77 Factory Area, Kanpur, Opposite Party,

Sales Tax Ref. No. 213 of 1964, D/- 25-11-1968.

Sales Tax—U. P. Sales Tax Act (15 of 1948), Ss. 3 (1) 1st proviso, 2 (h) explanation II, 2 (i) and 27 (before the amending Act 19 of 1958)—Exempted turnover — Computation — Turnover relating to sales outside State not includible — AIR 1957 SC 657, Followed; (1963) 14 STC 546 (All) Distinguished. (Para 27)

Cases Referred: Chronological Paras (1963) 1963-14 STC 546 (All).

Commr. of Sales Tax, U. P. v.

Balbir Singh & Co. 5, 16, 20 (1957) AIR 1957 SC 657 (V 44) =

1957-8 STC 561, A. V. Fernandez v. State of Kerala 5, 16, 25

V. P. Tewari and S. N. Agarwal, for Applicant; O. P. Agarwal, for Opposite Party.

PATHAK J.:— The assessee, M/s. Allied Chemicals, Kanpur, is a dealer in chemicals.

2. During assessment proceedings under the U. P. Sales Tax Act, 1948 for the assessment year 1956-57 it disclosed that the sales effected by it within Uttar

Pradesh during the year amounted to Rs. 7,642/12/3 and the sales made outside Uttar Pradesh during the same period amounted to Rs. 15,591/11. The assessee contended that the sales made outside Uttar Pradesh fell outside the purview of the U. P. Sales Tax Act and could not be taken into consideration for any purpose whatsoever under the Act. According to the assessee, if the turnover of the sales made outside Uttar Pradesh was excluded, the turnover of the remaining sales being Rs. 7,642/12/3 would fall below the prescribed minimum turnover liable to tax and, therefore, the assessee would not be liable to tax at all. The Sales Tax Officer did not accept the contention of the assessee. He held that by virtue of Explanation II to CL (h) of Section 2 of the Act the sales made outside Uttar Pradesh would be deemed to have taken place in Uttar Pradesh. The Sales Tax Officer, therefore, determined the gross turnover at Rs. 23,234/7/3 and rejected the contention of the assessee that he was not liable to tax. For the purpose of determining the tax liability he exempted the sales made outside Uttar Pradesh of Rs. 15,591/11 under Section 27 of the Act and computed the tax on the remaining turnover of Rs. 7,642/12/3.

3. The assessee preferred an appeal against the assessment, but the appeal was dismissed.

4. Thereafter, he applied in revision and the Judge (Revisions), Sales Tax, accepted the plea of the assessee that the turnover of sales made outside Uttar Pradesh could not be included in his gross turnover and held that the remaining turnover of the assessee being below the minimum taxable limit he was not liable to tax at all.

5. At the instance of the Commissioner of Sales Tax U. P., the Judge (Revisions) has referred the case and invited the opinion of this Court on the following question:—

"Whether ex-U. P. sales are to be excluded from computing the prescribed minimum of the gross turnover or not under the circumstances of the case?"

The reference came on for bearing before a Division Bench of this Court. In the view that there was a conflict between the decision of this Court in Commissioner of Sales Tax, U. P. v. Balbir Singh & Co. (1963-14 STC 546 (All) and some observations of the Supreme Court in A. V. Fernandez v. State of Kerala, 1957-8 STC 561 = (AIR 1957 SC 657) and considering the point to be one of importance it has referred the case to a larger Bench. The reference has now been laid before us.

6. The question referred relates to the assessment year 1956-57 and we must, therefore, examine the provisions of the

Act as it stood on April 1, 1956. Section 3 of the Act provides:—

"(1) Subject to the provisions of this Act, every dealer shall, for each assessment year, pay tax at the rate of three pies per rupee on his turnover of such year, which shall be determined in such manner as may be prescribed:

Provided that a dealer shall notbe liable to pay the tax if his turnover of the assessment year is less than Rs. 12,000....."

Section 2 (h) declared that a 'sale' means

"With its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration

Explanation I

Explanation II—Notwithstanding anything in the Indian Sale of Goods Act, 1930, or any other law for the time being in force, the sale of any goods—

(i) which are actually in Uttar Pradesh at the time when in respect thereof the contract of sale as defined in Section 4 of that Act is made, or

(ii) which are produced or manufactured in Uttar Pradesh by the producer or manufacturer thereof, shall, wherever the delivery or contract of sale is made, be deemed for the purposes of this Act to have taken place in Uttar Pradesh."

Section 2 (i) defined 'turnover' as

"the aggregate of the proceeds of sale by a dealer:—

Provided

Provided, secondly, that the proceeds of any sale made outside Uttar Pradesh by a dealer who carries on business both inside and outside Uttar Pradesh shall not be included in the turnover."

7. The only remaining provision which needs to be considered is Section 27 of the Act. That section provided:—

"27(1) Notwithstanding anything contained in this Act—

(a) a tax on the sale or purchase of goods shall not be imposed under this Act—

(i) where such sale or purchase takes place outside the State of Uttar Pradesh; or

(ii) where such sale or purchase takes place in the course of import of the goods into, or export of goods out of, the territories of India;

(b) a tax on the sale or purchase of any goods shall not after the 31st day of March, 1951, be imposed where such sale or purchase takes place in the course of inter-State trade or commerce except in so far as Parliament may by law otherwise provide.

(2) The Explanation to Cl. (1) of Article 286 of the Constitution shall apply for

the interpretation of sub-clause (i) of Cl. (a) of sub-section (1)."

8. This section was added by the Adaptation of Laws Order, 1950, as amended by the Adaptation of Laws (Third Amendment) Order, 1951. It was added for the purpose of bringing the U. P. Sales Tax Act into line with Art. 286 of the Constitution. At the relevant time, Article 286 read:—

"286(1). No law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of the territory of India.

Explanation:— For the purposes of sub-clause (a) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State Trade or commerce:

Provided that

9. These are all the provisions which, in my opinion govern the decision of this case.

10. The question before us is whether the sales made outside Uttar Pradesh should be included in the turnover for the purpose of determining whether the dealer is liable to tax under the Act.

11. According to Shri K. N. Singh, the learned Chief Standing Counsel appearing for the Commissioner of Sales Tax, the first proviso to S. 3 (1) does not specifically provide against(?) the exclusion of sales made outside Uttar Pradesh nor can such exclusion be spelt out from the definition of "turnover" in Section 2 (i). He contends that the first proviso to Section 3 (1) requires that the turnover of all the sales made by the dealer must be taken into consideration for determining whether the turnover is not less than the prescribed minimum which makes the dealer liable to tax. He urges that all the sales effected by the dealer must be taken into account when considering that proviso, and it is immaterial that some of the sales cannot be taxed.

12. It seems to me that no question arises here of applying the first proviso to Section 3 (1). That is so because regard must be had to what is declared by Section 27. It is important to note that

Section 27 is only a statutory expression of the corresponding provisions of Article 286 of the Constitution. It voices the prohibition which Art. 286 lays down. The constitutional prohibition is paramount and no legislation contravening or modifying that provision is competent. It is an important principle of statutory construction that the statute should be so construed, where that is possible, that it does not run counter to the provisions of the Constitution, because the presumption always is that the Legislature did not intend to disobey the Constitution. Where upon a fair reading of the statute that is not possible, the statute must fail as being outside the powers of the Legislature. We are relieved of the necessity of embarking upon this enquiry because the Legislature enacted Sec. 27. The non obstante provision in Section 27 lifts the transactions mentioned in that section outside the scope of the Act. Those transactions lie beyond the reach of the envelope of power created by the Act. According to the plain language of Section 27, no matter what any provisions of the Act may say, no liability to tax can be visited on sales made outside Uttar Pradesh. Because of the non obstante provision Section 27 overrides all other provisions of the Act. Section 3, the charging section, is subject to Section 27. And, therefore, neither the first proviso to Section 3 nor the definition of "sale" in Section 2 (h) nor of "turnover" in Section 2 (i) can be applied to include sales made outside Uttar Pradesh.

13. In this connection, it will be useful to refer to the observations of the Supreme Court in *A. V. Fernandez* (supra). In that case the Supreme Court was required to consider the impact of Section 26 of the Travancore-Cochin General Sales Tax Act on the other provisions of the Act and the rules made thereunder. Section 26 of that Act is substantially in the same terms as Section 27 of the U. P. Sales Tax Act. The Supreme Court said:—

"In our opinion, Section 26 of the Act, in cases falling within the categories specified under Art. 286 of the Constitution has the effect of setting at naught and of obliterating in regard thereto the provisions contained in the Act relating to the imposition of tax on the sale or purchase of such goods and in particular the provisions contained in the charging section and the provisions contained in R. 20 (2) and other provisions which are incidental to the process of levying such tax. So far as sales falling within the categories specified in Art. 286 of the Constitution and the corresponding Section 26 of the Act are concerned, they are, as it were, taken out of the purview of the Act and no effect is to be given to

those provisions, which would otherwise have been applicable if Section 26 had not been added to the Act."

14. The Court rejected the contention that it was permissible to include the prohibited transactions for the purpose of determining the assessable turnover. It observed:—

"If there is no liability to tax there cannot be any assessment either. Sales or purchases in respect of which there is no liability to tax imposed by the statute cannot at all be included in the calculation of turnover for the purpose of assessment and the exact sum which the dealer is liable to pay must be ascertained without any reference whatsoever to the same the sales or purchases are exempted from taxation altogether. The Legislature cannot enact a law imposing or authorising the imposition of a tax thereupon and they are not liable to any such imposition of tax. If they are thus not liable to tax, no tax can be levied or imposed on them and they do not come within the purview of the Act at all. The very fact of their non-liability to tax is sufficient to exclude them from the calculation of the gross turnover as well as the net turnover on which sales tax can be levied or imposed."

If this distinction is borne in mind it is clear that Section 26 of the Act enacts a provision with regard to non-liability of these transactions to tax and these transactions were, therefore, taken out of the purview of the Act.

We are, therefore, of opinion that the non obstante provision contained in Section 26 of the Act has the effect of taking these transactions out of the purview of the Act with the result that the dealer is not required nor is he entitled to include them in the calculations of his turnover liable to tax thereunder." (Emphasis (here in ' ') mine).

15. These observations, to my mind, completely support the conclusion that the sales made outside Uttar Pradesh by the assessee cannot be taken into account at all in the assessment proceedings against it. Those sales cannot be taken into consideration when applying the first proviso to Section 3 (1) and that is so whether what is contemplated by that proviso is the gross turnover or net turnover.

16. At this stage, I may point out with respect, that having regard to the facts of this case the decision in *Balbir Singh & Co.*, 1963-14 STC 546 (All) (Supra) is not attracted at all. The controversy in *Balbir Singh & Co.*, 1963-14 STC 546 (All) (Supra) arose upon very different facts. There, the question was whether the sales made by a dealer as a commission agent could be included in its gross turnover in order to determine its liability to tax. It was not the

contention in that case that a tax on the sales made by a dealer as a Commission agent fell outside the competence of the State Legislature or that there was any provision in the Act itself which excluded such sales from the purview of the Act. Article 286 (1) of the Constitution does not exclude such sales nor does Section 27 of the Act nor, so far as we know, does any other provision of the Act. I confess that so far as the point raised before us is concerned I see no conflict between anything said in *A. V. Fernandez*, 1957-8 STC 561 = (AIR 1957 SC 657) (Supra) and what was said by this Court, in *Balbair Singh & Co.*, 1963-14 STC 546 (All) (Supra).

17. Shri K. N. Singh also contended that the sales in question are not sales made outside Uttar Pradesh and he refers to Clause (ii) of Explanation II of Section 2 (h) of the Act. When there is no dispute that the goods were actually sold outside Uttar Pradesh within the meaning of Section 27 of the Act, this contention cannot survive in the view that I am taking that Section 27 completely excludes the operation of the other provisions of the Act in relation to such sales. Upon the aforesaid considerations, I am of opinion that the turnover of sales made outside Uttar Pradesh by the assessee cannot be included in the turnover of the dealer for the purposes of the first proviso to Section 3 (1).

18. I answer the question accordingly.

19. The assessee is entitled to his costs which I assess at Rs. 200. Counsel's fee is assessed in the same figure.

20. M. H. BEG J.:— I agree entirely with the views expressed by my learned brother R. S. Pathak, J. who was a party to the decision of a Division Bench of this Court in 1963-14 STC 546 (All) where, having regard to the facts of that case, it was held on a reference under S. 11 (1) of the U. P. Sales Tax Act:—

"It would be clear from the above resume of the law that liability to pay tax, or in short, taxability is one matter and the quantum of tax to be assessed, or how it is to be assessed, or, if it is to be assessed by applying a certain rate to a certain amount, or how that amount is to be determined is quite a different matter. It is possible under the law to hold that a dealer is liable to tax, because a certain figure exceeds a certain amount and to assess the amount of tax by applying a certain rate to a smaller figure. Whether a dealer is taxable or not depends only upon the turnover of the previous year; if it exceeds Rs. 12,000 he becomes liable. But when he is found to be liable different figures may enter into the determination of the amount of the tax to be assessed. We are not concerned with matters of policy; if the legislature

made a distinction between the basis for determining whether a dealer is liable to pay tax or not and the basis on which the amount of the tax to be paid by him, if found liable, is to be determined, we are not only not to enquire whether the Legislature had the power to make this distinction but also not to enquire whether it acted wisely or even reasonably in doing so. The sole question before us is whether it has done so and I have no doubt that it must be answered in the affirmative. When it did not intend to include a certain matter in a turnover, even though according to the definition it would be included in it, it has made an express provision."

21. It was also pointed out there that "turnover" may be determined differently for different purposes. But, the last sentence, in the passage quoted above, shows that any observations made there were inapplicable where the legislature had made an express provision excluding certain sales from the purview of "turnover" even though, if express provision was not there, those sales could be covered by the definition of "turnover". The definition of "Sale" in Section 2 (h) read with Explanation II was unhappy. But, the legislature had made express provision by the second proviso to Section 2 (i) of the Act, which was there until deleted by the U. P. Act 19 of 1958, excluding sales made outside U. P. from the purview of "turnover" altogether. Section 27 was also introduced in 1951, to make it clear that the provisions of the Act did not contravene Art. 286 of the Constitution. The legislature, after that, clarified the position further by deleting Explanation II to Section 2 (h) itself, and, as a consequence, the second proviso to Section 2 (i) and Section 27 of the Act which became unnecessary, were also deleted. But, these provisions were there to be applied to the assessment year 1956-57 to which the case before us relates.

22. Even as the provisions stood at the relevant time the intention of the legislature clearly was to exempt turnovers below Rs. 12,000 from sales tax altogether. As sales tax could only be levied on "turnover" under Section 3 (1) of the Act, it is obvious that the exemption conferred by the proviso to Section 3 (1) could not be circumvented by taking into account sales expressly excluded from the definition of "turnover". The position, therefore, seems very clear from a bare perusal of the relevant provisions. The result is that sales made outside Uttar Pradesh had to be ignored altogether in assessment proceedings under the Act.

23. GULATI J.:— I agree with the answer proposed by my learned brother Pathak, J.

24. However, I wish to add that R. 8 of the U. P. Sales Tax Rules is another provision which is relevant for the decision of this case and upon which reliance had been placed by the learned Chief Standing Counsel at the time of arguments. Rule 8 runs as follows:

"Rule 8. Liability to pay tax.

A dealer's liability to pay tax under the Act shall be determined on the basis of his gross turnover;

Provided that the turnover in respect of the transactions of forward contracts, in which goods are not actually delivered, shall not be included in the gross turnover."

It was contended that R. 8 should be read along with the proviso to Section 3 which provides that a dealer shall not be liable to pay tax if his turnover of the assessment year would be less than Rs. 12,000 or such larger amount as may be notified by the State Government. The minimum turnover mentioned in the proviso meant the gross turnover and gross turnover of a dealer, according to the learned counsel, meant the aggregate amount of all sales effected by a dealer regardless of the fact that a part of such turnover comprised of Ex-U. P. Sales, Ex-U. P. Sales or Inter-State sales could not be subjected to tax because of the provisions of Article 286, but such sales could certainly be taken into account in order to determine a dealer's liability to pay tax in respect of his other sales which were liable to tax under the Act. The argument proceeded that so long as such sales were not subjected to tax, the mandate contained in Art. 286 could not be said to have been violated merely because such sales were included in the gross turnover of a dealer in order to determine as to whether or not he was liable to pay tax in respect of his other sales. The State was not bound to provide that a dealer shall not be liable to tax if his turnover did not exceed a particular limit, but if it did provide a minimum limit, it was open to the legislature to further provide that the minimum turnover so provided would include such sales as were not liable to tax.

25. The argument is attractive indeed, but cannot be accepted in view of the clear pronouncement of the Supreme Court in the case of 1957-8 STC 561 — (AIR 1957 SC 657). It was ruled in that case:—

"The very fact of their non-liability to tax is sufficient to exclude them from the calculation of the gross turnover as well as the net turnover on which sales tax can be levied or imposed."

26. If Section 27 of the Act operates upon the charging Section 3, it would operate on R. 8 as well. We must, therefore, interpret "gross" turnover for pur-

poses of R. 8 to mean the aggregate turnover of such sale as are taxable or would be taxable but for an exemption provided in the Act.

27. BY THE COURT: The turnover of sales outside Uttar Pradesh by the assessee cannot be included in the turnover of the dealer for the purposes of the first proviso to S. 3(1) of the U. P. Sales Tax Act. The question referred to this Court is answered accordingly. The assessee is entitled to his costs which we assess at Rs. 200. Counsel's fee is assessed at the same figure.

Answer accordingly.

AIR 1970 ALLAHABAD 24 (V 57 C 4)

R. S. PATHAK, J.

New Victoria Mills Co. Ltd. Kanpur,
Petitioner v. Raja Ram Gupta and others,
Opp. Parties.

Civil Misc. Writ No. 1126 of 1963 D/-
23-5-1968.

U. P. Industrial Disputes Act (28 of 1947), Ss. 6-E (ii) (b) & 6-F — "Workman concerned in such dispute" — "All workmen who are members of the Union sponsoring the dispute are not covered — (Industrial Disputes Act (1947), S. 33 (1) (a) and 33 (2)).

One G, a cotton godown clerk of the petitioner's mill was dismissed after enquiry into certain charges against him. An industrial dispute in respect of suspension and termination of service of one R, an operative in the weaving shed was pending at that time. G filed an application under Section 6-F of the U. P. Industrial Disputes Act contending that the dismissal was hit by Section 6E(ii) (b) of the Act, that the employer ought to have taken the approval of the Tribunal before dismissing him. The Labour Court allowed the application and ordered reinstatement with back wages. The fact that Gupta was also a member of the Labour Union which sponsored the dispute concerning R. weighed with the Court in coming to the finding. The petitioner challenged the above order in this Writ petition.

Held, that G was not a workman concerned in the dispute relating to R and therefore his application under Section 6F before the Labour Court was not maintainable. It had not been shown that having regard to the nature of the dispute relating to R, G could be said to be interested in that dispute. There was no common feature which could connect G with the pending dispute relating to R. Mere membership of Gupta in the Union which sponsored the dispute relating to Ram Sumer was not enough to make him

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(Gupta) a workman concerned in that pending dispute. (Paras 4 & 6)

What must be ascertained is the nature of the pending dispute and the relationship which particularly links the workman, against whom action is proposed, with the pending dispute. It is not correct to say that all the members of the trade union espousing a pending dispute are workmen concerned in that dispute. AIR 1960 SC 875 & (1964) 2 Lab LJ 143 (SC) & AIR 1966 SC 288 & AIR 1967 Pat 10 Foll. (Para 5)

Cases Referred: Chronological Paras
(1967) AIR 1967 Pat 10 (V 54)=

(1967) 2 Lab LJ 210, Cane
Manager, New India Sugar Mills
Ltd. Dharbhanga v. Krishna
Ballabh Jha 5

(1966) AIR 1966 SC 288 (V 53)=

(1965) 3 SCR 429, Tata Iron &
Steel Co. Ltd. v. D. R. Singh 4

(1964) 1964-2 Lab LJ 143 =(1962-63)

22 FJR 385 (SC), Digwadih
Colliery v. Ramji Singh 4, 5

(1960) AIR 1960 SC 875 (V 47)=

(1960) 3 SCR 350, New India
Motors (P) Ltd. New Delhi v.
K. T. Morris 4

T. N. Sapru, for Petitioners K. P.
Agarwal, for Opp. Parties.

ORDER:— The petitioner, the New Victoria Mills Company Limited, Kanpur employed the first respondent, Raja Ram Gupta, as a cotton godown clerk. On August 12, 1961 it framed charges against Gupta on account of misconduct under Standing Order 23(1) in respect of neglecting his work and causing loss to the company. An enquiry upon those charges was made by an officer of the petitioner, and upon the report submitted by the officer Gupta was dismissed on September 28, 1961.

2. On October, 4, 1961, Gupta presented an application before the Labour Court I, Kanpur under Section 6F of the U. P. Industrial Disputes Act. Inter alia, it was pointed out that the petitioner had contravened the provisions of Section 6E of the Act. The Labour Court found that an industrial dispute in respect of the suspension and termination of services of Ram Sumer, an operative in the Weaving Department of the concern, was pending adjudication, that the petitioner was bound to comply with Section 6E (ii) (b) of the Act and before dismissing Gupta apply to the Labour Court for approval of the action of the petitioner. The Labour Court found that inasmuch as Gupta was a member of the Sufi Mill Mazdoor Sabha, a trade union of workmen, and the Sufi Mill Mazdoor Sabha had sponsored the industrial dispute in respect of the suspension and termination of the services of Ram Sumer, Gupta was a workman concerned in that industrial

dispute and the provisions of Section 6E(ii) (b) were attracted. Holding that it had jurisdiction to entertain the application under Section 6F, it entered into the merits of the dispute raised by Gupta and on November 14, 1962 it made an award directing the petitioner to reinstate Gupta in service with effect from the date on which the award became enforceable and to pay him 50% of the back wages from September 28, 1961 to the date of reinstatement. The award was enforced by a notification dated December 4, 1962 of the State Government. Thereafter Gupta applied under Section 6H (I) of the Act for realisation of the dues which he claimed under the award. The proceedings were registered as R. D. Case No. 17 of 1963 and are pending. The petitioner prays for the quashing of the award dated November 14, 1962, the notification dated December 4, 1962 enforcing it and the proceedings in R. D. Case No. 17 of 1963.

3. A number of contentions has been raised before me by the learned counsel for the petitioner.

4. The first contention is that Gupta was not a workman concerned in the dispute relating to Ram Sumer and that, therefore, the application under Section 6F of the Act moved by Gupta before the Labour Court was not maintainable. In my opinion, the contention is well founded. Gupta was a cotton godown clerk while Ram Sumer was an operative in the Weaving Department. It has not been shown that having regard to the nature of the dispute relating to Ram Sumer, Gupta could be said to be interested in that dispute. No common feature which could serve as a connecting link between Gupta and the pending dispute relating to Ram Sumer has been found by the Labour Court. The Labour Court has confined itself to the circumstance that Gupta is a member of the Sufi Mill Mazdoor Sabha which sponsored the dispute relating to Ram Sumer. That consideration, in my opinion, is not sufficient to make Gupta a workman concerned in that pending dispute.

I have been referred to the decision of the Supreme Court in New India Motors (P) Ltd. New Delhi v. K. T. Morris, AIR 1960 SC 875 where the Supreme Court was called upon to decide what was the scope of the expression "workman concerned in such dispute" under Section 33(1) (a) of the Industrial Disputes Act. In that case, the Supreme Court expressed the opinion that all workmen on whose behalf the dispute had been raised as well as those who would be bound by the award which may be made in the pending dispute would be included within the expression "workmen concerned in such dispute." This was followed by the decision of the Supreme Court in Dig-

wadh Colliery v. Ramji Singh 1964-2 Lab LJ 143 (SC) where that Court considered it necessary to ascertain the nature of the dispute pending in the reference while deciding whether the workmen in question could be said to be concerned in the pending dispute. It was pointed out:

"unless it is known as to what was the nature of the dispute pending in the said reference, it would plainly be impossible to decide whether the respondent is a workman concerned within the meaning of Section 33(2)."

Thereafter in Tata Iron & Steel Co. Ltd. v. D. R. Singh, AIR 1966 SC 288 the Supreme Court declared that it was the duty of the Tribunal to decide the preliminary question raised before it as to the applicability of Section 33(2) and that the preliminary question fell to be decided in the light of the decisions of the Supreme Court in the New India Motors P. Ltd. AIR 1960 SC 875 (supra), and Digwadih Colliery, 1964-2 Lab LJ 143 (SC) (supra).

5. It appears to me that in order to ascertain the true scope of the expression "workmen concerned in such dispute" it is necessary to read the judgment of the Supreme Court in these two cases together. So read, it is clear that what must be ascertained is the nature of the pending dispute and the relationship which particularly links the workman, against whom action is proposed, with the pending dispute. It is not easy to accept the proposition that all the members of the trade union expounding a pending dispute are workmen concerned in that dispute. To accept that understanding of the scope of the section would be to give to it a far wider expression than was in fact intended by the Supreme Court and which runs counter to what the Supreme Court said in Digwadih Colliery, 1964-2 Lab LJ 143 (SC) (supra). In this view, I am fortified by the decision of the Patna High Court in Cane Manager, New India Sugar Mills Ltd. Dharbhanga v. Krishna Ballabh Jha, AIR 1967 Pat 10.

6. In my opinion, the consideration upon which the Labour Court has held that the application filed by Gupta under Section 6F of the Act was maintainable is manifestly erroneous in law. The Labour Court must now decide the matter afresh and in the light of the observations made above. It is open to it to permit the parties to lead fresh evidence in the matter.

7. In the circumstances it is not necessary to consider the other contentions raised on behalf of the petitioner.

8. The petition is allowed. The award dated November 14, 1962 of the Labour Court, 1, Kanpur and the notification dated December 4, 1962 of the State Govern-

ment enforcing the award are quashed. The proceedings under Section 6H(1) registered as R. D. Case No. 17 of 1963 are also quashed. The Labour Court will now dispose of the application made under Section 6F of the U. P. Industrial Disputes Act in accordance with law and in the light of the observations set out in this judgment. In the circumstances of the case there is no order as to costs.

Petition allowed.

AIR 1970 ALLAHABAD 26 (V 57 C 5)

FULL BENCH

JAGDISH SAHAJ, S. N. KATJU AND GANGESHWAR PRASAD JJ.

Raghunath and others, Appellants v. Ram Khelawan and others, Respondents.

Special Appeal No. 314 of 1987, D/-2-8-1968 against order and judgment of V. G. Oak, J. in C. M. W. No. 3075 of 1966, D/-6-1-1967.

(A) Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 183, Proviso — U. P. Agricultural Tenants (Acquisition of Privileges) (Amendment) and Miscellaneous Provisions Act (7 of 1950), S. 10 and Sch. Entry III — "Is liable to ejectment" in Proviso to S. 183 — Interpretation — Ejectment of sub-tenant barred by virtue of S. 10 read with Entry III of Schedule, of Act 7 of 1950 — His suit for possession is not barred by proviso to S. 183 of Tenancy Act, 1965 All LJ 290, Overruled; Civ. Misc. Writ No. 3075 of 1966, D/-6-1-1967 (All), Reversed.

The words "in accordance with the provisions of this Act" occurring in the Proviso to Section 183 are connected with the earlier words "is liable to ejectment". Thus if a plaintiff-sub-tenant for whatever reason, be it because of Section 10, U. P. Act 7 of 1950 or for any other reason, could not be ejected, the Proviso to Section 183 could not stand in his way in obtaining a decree for possession. 1965 All LJ 290, Overruled. Civ. Misc. Writ No. 3075 of 1966, D/-6-1-1967 (All), Reversed. (Para 18)

Inasmuch as ejectment from an agricultural holding can only be made in accordance with the provisions of the U. P. Tenancy Act, 1939, and because of the existence of Section 10 read with Entry III of the Schedule of U. P. Act VII of 1950, the provisions of the Tenancy Act cannot be invoked to eject the plaintiff-sub-tenant, the proviso to Sec. 183 does not stand in his way of getting a decree for possession. It is true that the immunity against ejectment is from another Act (U. P. Act 7 of 1950) but that is not material at all, because so long as the immunity exists, the sub-tenant cannot be

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ejected in accordance with the provisions of the Tenancy Act. (Paras 18 and 19)

(B) Constitution of India, Art. 226 — Limitation Act (1908), S. 14 — Error apparent on face of record — Lower Court giving benefit of S. 14 to plaintiff — Board of Revenue which was the final Court of appeal also deciding on the question in favour of plaintiff — Findings of due diligence and good faith required by S. 14, based on evidence — No illegality committed in arriving at the finding — Question of application of S. 14 held could not be subject-matter of writ petition — Held, however, on facts that the respondent had succeeded in making not a case for being given benefit of S. 14 of the Limitation Act. (Para 22)

(C) Civil P. C. (1908), S. 11 — Res judicata — Suit under S. 183. U. P. Tenancy Act before the Assistant Collector decreed—Additional Commissioner in appeal holding that the revenue Court had no jurisdiction in the matter and dismissing suit — Suit filed before Civil Court — Civil Court returning plaint holding that it had no jurisdiction and the same was presented again before the Assistant Collector — Held, that the previous order by the Addl. Commissioner that he had no jurisdiction in the matter could not bar the subsequent suit before the Assistant Collector — It was the latter decision of the Civil Court that operated as res judicata. (Para 23)

Cases Referred: Chronological Paras
(1965) 1965 All LJ 290, Phailu v.

Board of Revenue U. P. 7, 8, 9, 18, 20
(1953) AIR 1953 SC 65 (V 40) =
1953 SCR 377, Mohanlal v. Benoy
Krishna 23

R. M. Sahai, for Appellants.

JAGDISH SAHAI J.:— The dispute between the parties in this case relates to plots Nos. 5317/1 and 5317/2 area 28 acres each, situate in village Machhli Sahar, Pergana Ghesuwa, district Jaunpur. These two plots originally constituted plot No. 5317 measuring 56 acres. Syed Abdullah was the fixed rate tenant of this plot. On 24-8-1949 he sold his half share in the aforesaid plots to Ram Khilawan, Ram Dular and Daya Ram, respondents Nos. 1 to 3. Thereafter proceedings under Section 145, Criminal P. C. were started. Those proceedings terminated in favour of Ram Khilawan, Ram Dular and Daya Ram. Thereafter, on 12th May, 1951 Naresh, father of the appellants Raghunath, Kedar Nath, Jai Nath and Hari Lal filed a suit against Ram Khilawan, Ram Dular, Daya Ram and Kaleem who was the landlord of the plots in dispute (he succeeded Syed Abdullah on the latter's death) under Section 183 of the U. P. Tenancy Act, 1939 (hereinafter referred to as the Act) on the allegation, inter alia, that the plots in dispute were sub-let to

him (Naresh) by Syed Abdullah, but the respondents Ram Khilawan, Ram Dular and Daya Ram, who had purchased half share of the plot from Syed Abdullah, were interfering with his (Naresh's) possession.

2. Ram Khilawan, Ram Dular and Daya Ram contested the suit, inter alia, on the plea that Syed Abdullah, who was the original fixed rate tenant of the aforesaid plots, had sold his half share in the same to them on 24-8-1949 and had sub-let the remaining half to them. It was also pleaded that Naresh had never been in possession over the land in suit. The Assistant Collector decreed the suit on 23-4-1953. Ram Khilawan, Ram Dular and Daya Ram filed an appeal against the decree passed by the learned Assistant Collector. That appeal was heard by the learned Additional Commissioner, Varanasi, who allowed it on 22-2-1954 and dismissed the suit filed by Naresh on the ground that the revenue Court had no jurisdiction to try the suit.

3. Naresh did not appeal against the decree passed by the learned Additional Commissioner, Varanasi but filed a suit in the Civil Court against Ram Khilawan, Ram Dular and Daya Ram for recovery of possession over the plots in dispute. The Civil Court returned the plaint on the finding that it had no jurisdiction to entertain the suit. Naresh then presented the plaint before the Assistant Collector, I class, Jaunpur on 6-2-1958 making it a suit under Sections 59/180/183 of the Act and sought the relief of ejectment against Ram Khilawan, Ram Dular and Daya Ram. The Assistant Collector decreed the suit on 23-9-1959. Ram Khilawan, Ram Dular and Daya Ram filed an appeal against the decree dated 23-9-1959. This appeal was heard by the Additional Commissioner, Varanasi who allowed it, set aside the decree passed by the Assistant Collector and dismissed the suit on 7-6-1960. Naresh then preferred a second appeal before the Board of Revenue. The Board of Revenue allowed the appeal on 7-7-1965/11-4-1966 (7-7-1965 being the date of the judgment of the Member of the Board of Revenue who heard the appeal and 11-4-1966 being the date of the order of concurrence passed by the other Member).

4. Ram Khilawan, Ram Dular and Daya Ram then filed Writ Petition No. 3075 of 1966 in this Court and prayed for the quashing of the order passed by the Board of Revenue and the Assistant Collector, I class, Jaunpur.

5. The writ petition came up for hearing before Oak, J. (as he then was.) No one appeared before him on behalf of Naresh. On 6-1-1967 he allowed the writ petition and quashed the order of the Board of Revenue but directed the parties to bear their own costs. Against the judg-

ment of Oak, J. (as he then was) dated 6-1-1967, the instant special appeal has been filed in this Court. The special appeal has been referred to a Full Bench by a Division Bench of this Court of which one of us (Jagdish Sahai, J.) was a member.

6. The following three submissions were made before Oak, J. (as he then was):—

1. The decision dated 22-2-1954 operated as res judicata.
2. The trial Court committed an error of law apparent on the face of the record in giving Naresh the benefit of Section 14 of the Limitation Act.
3. The Board of Revenue could not pass a decree for possession.
7. Oak, J. repelled the first two submissions made on behalf of Ram Khilawan, Ram Dular and Daya Ram but upheld the last submission. He felt himself bound by the decision of this Court in Phailu v. Board of Revenue, U. P., 1965 All LJ 290, and rested his decision on that authority.

8. In the special appeal Mr. Ram Manohar Sahai has contended that the case of Phailu had been wrongly decided by this Court. He submitted that the correct view was taken in the unreported decision of Raghubar Dayal and H. P. Asthana, JJ., dated 24-12-1958 which was not brought to the notice of either of the learned Judges who decided Phailu's case, 1965 All LJ 290, or to that of Oak, J. The learned counsel contended that the judgment of Oak, J. (as he then was) should be set aside and this special appeal be allowed because he wrongly held that the proviso to Section 183 of the Act stood in the way of Naresh and the appellants.

9. The view taken in Phailu's case, 1965 All LJ 290 is that a sub-tenant plaintiff would not be able to obtain a decree under Section 183 of the Act in spite of the provisions of Section 10 of the U. P. Agricultural Tenants (Acquisition of Privileges) (Amendment) and Miscellaneous Provisions Act, 1950 (hereinafter referred to as U. P. Act 7 of 1950).

10. The proviso to Section 183 of the Act reads:

"Provided that no decree for possession shall be passed where the plaintiff at the time of the passing of the decree, is liable to ejectment in accordance with the provisions of this Act within the current agricultural year."

11. The question for consideration is whether Naresh, and after him, the appellants are liable to ejectment in accordance with the provisions of the Act. The proviso to Section 183 of the Act stands from 1939 when the U. P. Tenancy Act, 1939 was originally enforced. At that time, neither S. 295-A of the Act nor S. 10 of U. P. Act 7 of 1950 were on the

statute book.

12. Section 175 of the Act is headed as "Ejectment on Other Grounds" and reads:—

"175. Ejectment on application—Subject to the provisions of Section 19, a non-occupancy tenant shall also be liable to ejectment on the application of the landholder on any of the following grounds, namely:

(a) that he is a tenant holding from year to year;

(b) that he is a tenant holding under a lease or for a period which has expired or will expire before the end of the current agricultural year."

13. Section 176 (1) of the Act reads:

"176. Application and notice. (1) An application for the ejectment of a tenant under the provisions of Section 175 shall be made between the first day of July and the thirtieth day of September and not otherwise, and shall be accompanied by the notice specified in S. 161."

These two provisions show that a sub-tenant can be ejected at will but the application for that purpose must be made between July 1 and September 30 of a year. Inasmuch as the Legislature conferred on the sub-tenant no immunity from ejectment, in case the application for the same is made, between the period mentioned above, the proviso to S. 183 of the Act provided that if a plaintiff in the suit under Section 183 of the Act himself is liable to ejectment in the current agricultural year, no decree in his favour will be passed. Such proviso was necessary in respect of a person who himself was liable to ejectment because to award him a decree for possession against another when he himself was liable to ejectment would have been meaningless. It was with this intention that the proviso to Section 183 of the Act was enacted. The Legislature amended the Act and introduced in 1947 Section 295-A which reads:—

"295-A. Right of Sub-tenant to retain possession.—Notwithstanding any contract to the contrary or anything contained in this Act or any other law for the time being in force, every person who, on the date of the commencement of the United Provinces Tenancy (Amendment) Act, 1947, is a sub-tenant shall, subject to the provisions of the proviso to sub-section (3) of Section 27 of the United Provinces Tenancy (Amendment) Act, 1947 be entitled to retain possession of his holding for a period of five years from that date, and for this period nothing in sub-section (2) of Section 44 or Section 171 shall render the landholder of such sub-tenant liable to ejectment under the provisions of Section 171:

Provided that nothing in this section shall authorise a sub-tenant of a person who belongs to one of the classes men-

tioned in Section 41 to retain possession of his holding after the disability of such person has ceased."

14. The substance of Section 295-A of the Act is that a sub-tenant obtained immunity from ejectment for a period of five years from 14-6-1947 which is the date of the commencement of the U. P. Tenancy (Amendment) Act, 1947, i.e. upto 14-6-1952, notwithstanding what is contained in Section 44 or Section 171 of the Act, with the result that sub-tenant could obtain decrees for ejectment under Section 183 of the Act upto 14-6-1952 without the proviso of that section obstructing their way.

15. The Board of Revenue was of the opinion that the expression "current agricultural year" occurring in the proviso to Section 183 means "the agricultural year in which the suit was filed". Learned counsel for the appellant has submitted that the suit giving rise to this special appeal was filed on 6-2-1958. The agricultural year in which 6-2-1958 would fall, would end on 30th June, 1958 with the result that no application for ejectment of Naresh, or of the appellants, could have been made in the period 1st July, 1957 to 30th September, 1957. The learned counsel contends that the consequence was that Naresh or the appellants were not liable to ejectment in the current agricultural year and for that reason the proviso to Section 183 of the Act would not be attracted. Learned counsel contended that in any case by virtue of Section 10 of U. P. Act 7 of 1950, Naresh and the appellants had obtained immunity for an indefinite period from ejectment. Section 10 of U. P. Act 7 of 1950 reads:

"Notwithstanding anything contained in any law for the time being in force, all suits, applications or proceedings of the category specified in the Schedule pending on the date of the commencement of this Act shall remain stayed for so long as the Act remains in force."

Admittedly, the Act was in force when the Board of Revenue, decided the case. Again admittedly, the Act is still in force. Entry III of the Schedule to U. P. Act 7 of 1950 reads:—

"III.— Under the United Provinces Tenancy Act, 1939 (U. P. Act 17 of 1939)— Suits, applications or proceedings under Sections 175, 180 (other than suits in which the plaintiff is a tenant), 181 (about applications and proceedings relating to the last two classes.)"

16. Reading Section 10 along with Entry III of the Schedule, it becomes apparent that the appellants could not be ejected from the land in suit on the date when the suit was filed or on the date when the trial Court decreed the suit or on the date when the Board of Revenue

affirmed the decree of the trial Court and reversed that of the Additional Commissioner.

17. The words used in the proviso are: "is liable to ejectment." In view of what is contained in Section 10 read with Entry III of the Schedule to U. P. Act 7 of 1950, the appellants were not liable to ejectment,

18. In 1965 All LJ 290 (supra) Desai, C. J. observed:—

"It was on account of the provisions of another Act that a suit brought against him would have been stayed but it does not mean that he was not liable to ejectment at all under the U. P. Tenancy Act."

With great respect to the learned Judges who decided Phailu's case, 1965 All LJ 290, the question in that case clearly was whether, notwithstanding the provisions of S. 10 read with Entry III of the Schedule of the U. P. Act 7 of 1950, the appellant in that case was still liable to ejectment. The words "in accordance with the provisions of this Act" occurring in the proviso to Section 183 are connected with the earlier words "is liable to ejectment." The whole sentence reads: "is liable to ejectment in accordance with the provisions of this Act". So long as the bar created by Section 10 read with Entry III of the Schedule of the U. P. Act VII of 1950 stood, there was no provision in the Act under which the sub-tenant plaintiff could be ejected. The important point to notice is that the U. P. Act 7 of 1950 does not deal with ejectments at all. It only gives certain immunities to tenants, including the sub-tenants. Ejectment from an agricultural holding could only be made under the provisions of the Act (U. P. Tenancy Act, 1939). Therefore, for whatever reason, be it because of Section 10 of U. P. Act 7 of 1950 or for any other reason if a plaintiff-sub-tenant could not be ejected, the proviso to Section 183 of the Act could not stand in his way in obtaining a decree for possession. Again, Desai, C. J. has in Phailu's case, 1965 All LJ 290 observed as follows:—

"For all that was known when the question arose whether the Section 183 suit should be decreed or not was that the Act could be repealed before the end of the agricultural year and there would have been no ban on the passing of a decree in a suit under Section 175 before the end of the agricultural year and the Section 183 suit could be decreed."

On the date when the Assistant Collector decreed the suit or the Board of Revenue affirmed his decree and reversed that of the Additional Commissioner, Section 10 and Entry III of the Schedule of U. P. Act 7 of 1950 stood intact. Consequently, irrespective of the consideration that U. P. Act 7 of 1950 could be repealed at

any time, on all the relevant dates that Act being in force, gave immunity to the appellants from being ejected. It is not possible to read U. P. Act 7 of 1950 in isolation. It was one of the definite steps taken by the Legislature to accord immunity to the sub-tenants from ejectment because the Legislature thought that they being the actual tillers of the soil, were entitled to protection. This policy of the Legislature is apparent from the circumstances that in 1947, the Act (U. P. Tenancy Act, 1939) was amended and Section 295-A was added to it, which gave five years immunity to sub-tenants against ejectment. Thereafter the U. P. Legislature passed the U. P. Tenants (Acquisition of Privileges) Act, 1949, Section 3 of which gave the sub-tenants the right to become bhumidhars on payment of ten times of the rent. This was followed by the U. P. Act 7 of 1950 which created a bar to the ejectment of sub-tenants during the period in which that Act was in force. The U. P. Zamindari Abolition and Land Reforms Act also gave certain rights to sub-tenants who, under certain circumstances, became sirdars.

19. Inasmuch as ejectment from an agricultural holding could only be made in accordance with the provisions of the U. P. Tenancy Act, 1939, and in the instant case, because of the existence of section 10 read with Entry III of the Schedule of U. P. Act VII of 1950, the provisions of the Act could not be invoked to eject the appellants, the proviso to section 183 did not stand in their way. It is true that the immunity against ejectment which the appellants received was from another Act (U. P. Act 7 of 1950) but that was not material at all, because so long as the immunity existed, the appellants could not be ejected in accordance with the provisions of the Act.

20. For the reasons that I have given in this judgment, I respectfully disagree with the view taken by the learned Judges who decided Phailu's case, 1965 All LJ 290 (supra).

21. Mr. Sukha Ram Singh contended that the trial Court wrongly gave the benefit of Section 14 of the Limitation Act to Naresh or the appellants and the Board of Revenue committed an error of law apparent on the face of the record in affirming that view. Sub-section (1) of Section 14 of the Limitation Act reads:—

"14(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of like nature, is unable to entertain it."

22. Naresh filed a suit against Ram Khilawan and others in the revenue Court as far back as 12th May, 1951. That suit was decreed by the Assistant Collector on 23rd April, 1953. The respondents before us appealed to the Additional Commissioner and pleaded that the revenue Court had no jurisdiction to entertain and decide the suit. Their appeal was allowed and the suit was dismissed on the finding that not the revenue Court but the Civil Court had jurisdiction to entertain the suit. Naresh then filed a suit in a Civil Court. Ram Khilawan and others pleaded before the Civil Court that it (the Civil Court) had no jurisdiction to entertain the suit and the plaint was returned to Naresh for presentation in the revenue Court, whereupon Naresh filed the suit, giving rise to this special appeal, in the revenue Court. There cannot be any manner of doubt that throughout Naresh and the appellants acted in good faith in filing the suits first in the revenue Courts and then in the Civil Courts. It cannot also be doubted that they acted with diligence. In my opinion, therefore, Section 14 of the Limitation Act was fully applicable to the facts of the present case. In any case, it is not a matter over which a writ petition could lie under Art. 226 of the Constitution of India. It was for the Assistant Collector, before whom the suit giving rise to this special appeal was filed, to decide whether or not Naresh was prosecuting his earlier suits with due diligence and in good faith. He decided in favour of Naresh. The Board of Revenue, which is the final Court of appeal, also decided in favour of Naresh. There is clear evidence in support of the finding recorded by the Assistant Collector and the Board of Revenue. They had jurisdiction to decide the matter. They have committed no illegality in deciding the case. Consequently, in my opinion, the question of the applicability of S. 14 of the Limitation Act could not be the subject matter of the writ petition. In any case, I have held that on the facts and circumstances of the case, the appellants have fully succeeded in making out a case for being given the benefit of Section 14 of the Limitation Act.

23. Mr. Sakha Ram Singh then contended that in view of the findings recorded by the Additional Commissioner in the appeal directed against the decree passed by the Assistant Collector in the first suit on 23-4-1953 that the revenue Court had no jurisdiction to entertain the suit, the suit giving rise to this appeal was barred by res judicata. He has placed reliance upon Mohan Lal v. Benoy Krishna, AIR 1953 SC 65. In that case, Ghulam Hasan, J. had observed that even an erroneous decision on a question of law operates as res judicata between the parties to it.

An erroneous decision on a question of law by a Court competent to decide the matter is not the same thing as an order by a Court to the effect that it had no jurisdiction to entertain the matter. Besides, the judgment of the Civil Court returning the plaint for being filed in the revenue Court on the ground that it had no jurisdiction to entertain the plaint and the competent Court was the revenue Court is subsequent in time to the judgment of the learned Additional Commissioner. It is trite that in a case of res judicata it is the latter decision and not the former which creates the bar. I, therefore, find no substance in the plea of Sri Sakha Ram Singh with regard to res judicata.

24. For the reasons mentioned above, I would allow this special appeal, set aside the judgment of Oak, J. (as he then was) dated 6-1-1967 and dismiss Writ Petition No. 3075 of 1966 with costs.

25. S. N. KATJU J.:— I agree.

26. GANGESHWAR PRASAD J.:— I agree with brother Jagdish Sahai.

Appeal allowed.

AIR 1970 ALLAHABAD 31 (V 57 C 6)

RAJESHWARI PRASAD AND

A. K. KIRTY, JJ.

Fertilizer Corporation of India Limited, Appellant v. M/s. Domestic Engineering Installation, Respondent.

F. A. F. O. No. 341 of 1967 D/- 23-5-68 against judgment and decree of Civil J., Gorakhpur D/- 5-7-1967.

(A) Arbitration Act (1940), Ss. 39 (1) (iv), 20 — Application under S. 20 — Court directing filing of arbitration agreement and calling for name of agreed arbitrator — Order is appealable.

Where in an application under Section 20, the Court only directed the filing of the arbitration agreement in court and gave opportunity to the parties to submit the name of some agreed arbitrator within the period fixed by the court, the order cannot be read to be an order appointing an arbitrator or making reference to an arbitrator. As the appointment of the arbitrator and making of reference to him were proposed to be done by other orders to be passed in future, the order was appealable. (Para 9)

(B) Arbitration Act (1940), S. 2(a) — Arbitration agreement — Form of — Need not be signed by parties — Tender accepted and work-order containing terms of contract given to Contractor — Terms containing arbitration clause — Formal order executed later — Held, there was arbitration agreement between parties when work-order was given.

No particular form is necessary for an agreement to constitute an arbitration agreement. In order to constitute an arbitration agreement in writing, it is not necessary that it should be signed by the parties. It is sufficient that the terms are reduced to writing and the agreement of the parties thereto is established. AIR 1955 SC 812 & AIR 1963 SC 1685, Rel. on. (Para 10)

Thus where A accepts the tender for execution of certain work offered by B and gives his work-order to B which contains all the terms of the contract including the arbitration clause and, in spite of the fact that, the formal agreement was signed at a later date, the parties treated themselves bound by the agreement from the date of the work-order.

Held, that an arbitration agreement was in existence from the date of the work-order. (Para 10)

(C) Arbitration Act (1940), S. 20 — Arbitration agreement existing between parties before application under S. 20 — Formal contract drawn after filing of application — Disputes and differences relating to subject-matter of agreement disclosed to other party after the application but before making reference — Held, that the disputes could form subject-matter of the proceedings under S. 20. (Para 13)

(D) Arbitration Act (1940), S. 20(4) — Appointment of arbitrator under — Powers of Court.

Perusal of Clause (4) of Section 20 of the Act indicates that there are three courses open to the court under that provision of law. After the arbitration agreement has been ordered to be filed, the court shall proceed to make reference firstly to the arbitrator appointed by the parties in the agreement; secondly to the arbitrator not named in the agreement, but with regard to whom the parties agree otherwise; and thirdly, when the parties cannot agree upon an arbitrator, to an arbitrator appointed by itself. (Para 18)

(E) Arbitration Act (1940), Ss. 20, 14 — Specific Relief Act (1877), S. 22 — Proceedings under S. 20 — Agreed arbitrator biassed and likely to act unfairly — Court can relieve party from bargain and appoint another arbitrator — Principle of natural justice — (Constitution of India, Art. 226).

A party is entitled to be released from a bargain if he could show that the selected arbitrator was likely to show bias or that there were sufficient reasons to suspect that he would act unfairly or that he had been guilty of continued unreasonable conduct. This principle applies also to the proceedings under S. 20. AIR 1967 SC 249, Rel. on. Case law referred to. (Paras 28, 29)

After all, the question really is whether the term of the contract regarding the reference to a particular nominated arbitrator is one which should be specifically enforced under the circumstances of the case or not and there is no reason why the principle underlying Section 22 of the Specific Relief Act, be not pressed into service for doing justice in such a case.

(Para 28)

It would also amount to denial of natural justice if in a case of this nature, the party is forced to submit to the arbitration of a person who has not only gone biased and became prejudiced against that party, but who has also expressed his opinion on the merits of the case against that party.

(Para 29)

If the decision of the arbitrator even if has resulted in an award, can be avoided on the ground of misconduct of the arbitrator in relation to the proceedings as provided for under Section 14 of the Act, there is no reason why at the initial stage before reference is actually made under Section 20 of the Act, the question whether the proposed arbitrator has become prejudiced and biased and otherwise disqualified to act as such, should not be relevantly allowed to be raised. (Para 29)

In a proceeding under Section 20, therefore, if the plaintiff has succeeded in establishing reasonable apprehensions that the Officer of the defendant corporation or his nominee named as arbitrator in the agreement may not act fairly and justly as arbitrator, he is entitled to be released from the bargain.

(Paras 28, 44)

Cases Referred:	Chronological	Paras
(1967) AIR 1967 SC 249 (V 54)=		
(1966) Supp SCR 215, Uttar Pradesh Co-operative Federation Ltd. v. Sunder Brothers, Delhi	27	
(1966) 1966 All LJ 518, Union of India v. Gopal Dass & Co.	23	
(1965) AIR 1965 Cal 404 (V 52), Union of India v. Himco (India) Private Ltd.	24	
(1964) AIR 1964 All 477 (V 51)= ILR (1964) 1 All 564, Union of India v. Gorakhmohan Das	22	
(1963) AIR 1963 SC 1685 (V 50), Union of India v. A. L. Rallia Ram	10	
(1962) AIR 1962 Cal 360 (V 49)= Gannon Dunkerley & Co. v. Union Carbide (India) Ltd.	26	
(1958) AIR 1958 Punj 418 (V 45)= ILR (1958) Punj 1160, Karam Chand v. Sant Ram Tarachand	25	
(1955) AIR 1955 SC 812 (V 42)= 1955-2 SCR 857, Jugal Kishore Rameshwar Das v. Mrs. Goolbai Hormusji	10	
(1913) 1913 AC 241=82 LJKB 684, Bristol Corporation v. John Aird and Co.	27	
V. Swaroop, for Appellant; Kameshwar Pd. and S. Shafat Ali, for Respondent.		

R. PRASAD J.:— This is a first appeal from order filed under Section 39 of the Indian Arbitration Act, 1940. The appeal has been filed on behalf of the Domestic Engineering Installations Gorakhpur through its partner Sri Gorakh Mohan Das (hereinafter referred to as the plaintiff). The respondent to this appeal is Fertilizer Corporation of India Ltd. (hereinafter referred to as defendant).

2. The order appealed against is an order purported to have been passed under Section 20 of the Indian Arbitration Act, 1940 (hereinafter referred to as the Act).

3. The plaintiff filed an application under S. 20 of the Act alleging inter alia the facts given hereinunder. The defendant invited sealed tenders in August, 1964 for carrying out the work of laying Main Sewerage in the Fertilizer's Township. The plaintiff submitted its tender which was eventually accepted by the defendant on or about 20th October 1964. The work-order dated 19/20th October 1964 was issued to the plaintiff which contained in detail the various terms of the contract. It was also noted therein that the work had to be executed in accordance with the terms and conditions of the notice inviting tenders (hereinafter referred to as "NIT") and the general direction and conditions of contract (hereinafter referred to as "GDCC"). Clause 65 of the G. D. C. C. contained arbitration clause which provided for the settlement of disputes arising under the contract. When the plaintiff started executing the work, it found that it was required to do certain work which was wholly different from the work tendered for. The plaintiff further met with the difficulty that the Engineer Incharge of the work on behalf of the defendant neglected to give adequate instructions to the plaintiff as required by the terms of the contract. Certain major disputes arose during the course of the work. Accordingly, the plaintiff sent a notice dated 17th December 1964 to the General Manager of the defendant in accordance with Cl. 65 of G. D. C. C. calling upon him to himself act as arbitrator or nominate some one else to act as arbitrator and to refer the dispute to arbitration. The General Manager did not take any action on the notice sent by the plaintiff. The plaintiff, therefore, sent a reminder on 13th January 1965. Thereafter, Shri Gorakh Mohan Das partner of the plaintiff firm personally met Shri N. R. Sheshadari, the then General Manager of the defendant. The plaintiff requested Mr. Sheshadari to proceed in the matter of arbitration but he refused to act as arbitrator and showed his unwillingness to appoint any other arbitrator. It was under those circumstances that the plaintiff proceeded to file

his application under Section 20 of the Act on the 18th January 1965. The plaintiff prayed that the agreement be ordered to be filed and the dispute be referred for arbitration. The proceedings initiated by the plaintiff proceeded as a suit as required by the provisions of the Indian Arbitration Act and the application was treated to be the plaint in that suit. Some further facts were incorporated in the plaint as a result of the order of the Court below allowing the plaintiff to make amendments therein.

4. The additional facts introduced in the plaint are that in May 1965, Mr. N. R. Sheshadari was replaced by Mr. B. K. Khanna as General Manager. Shri Gorakh Mohan Dass approached Shri B. K. Khanna also and requested him to settle the dispute that had arisen under the contract. Mr. B. K. Khanna is said to have first assured the plaintiff that he would try to give necessary relief to the plaintiff, but later on, he went back upon his words and insisted that the plaintiff should withdraw his petition filed under Section 20 of the Act. He held out that he would be able to do something in the matter only after the petition had been withdrawn by the plaintiff from Court. Shri Gorakh Mohan Das, however, did not agree to the suggestion made by Sri B. K. Khanna. As a result thereof, Shri B. K. Khanna got a notice dated 12/16th June 1965 served on the plaintiff containing the threat that on the expiry of 48 hours, sewerage work of Type III quarter would stand withdrawn to the extent specified in the said notice and that further action would also be taken against the plaintiff under Cl. 63 of the G. D. C. C. It has then been alleged that Shri V. S. Pahwa, the Deputy Chief Engineer of the defendant was the main person responsible for all the troubles of the plaintiff. He had been prejudiced against the plaintiff from the very inception and had been threatening the plaintiff with dire consequences. Mr. B. K. Khanna, the General Manager was led away by the representations and influence of Mr. Pahwa and he became biased against the plaintiff. He, therefore, became incapable of acting as arbitrator and impartial adjudication of the dispute was not expected from him. Further Mr. B. K. Khanna accepted and acted upon the explanation given by Mr. Pahwa on the disputed items and in a report which he made to his Head office at New Delhi, he represented the representations made by Mr. Pahwa as his own conclusions in the matter. He also sought legal opinion on the question as to how best the plaintiff could be penalised and thereafter he directed his subordinates to act accordingly. Arbitration by Mr. B. K. Khanna or by a person appointed by him would wholly be unjust and inequitable and is bound to result in

miscarriage of justice. It has also been alleged by the plaintiff that in preparing the abstract of costs, serious mistake had been committed by the defendant. The employees of the defendant had been attempting to throw the entire responsibility of their mistakes on the shoulders of the plaintiff and had conspired to deprive the plaintiff of its legitimate dues. The General Manager and all other officers of the defendant, therefore, have become incapable of functioning as arbitrators in the matter. The plaintiff, therefore, prayed that reference of the dispute be made to any other arbitrator appointed in accordance with provisions of law.

5. The defendant put in contest and filed written statement and additional written statement. The pleas raised by the defendant are varied. It is said that the application was not maintainable under Section 20 of the Arbitration Act because no agreement had been reduced to writing or had been executed before the petition was filed. No dispute had arisen between the parties inasmuch as all the grievances were heard and finally disposed of by the defendant in accordance with the provisions of Cl. 64 of the G. D. C. C. The differences pointed out on behalf of the plaintiff were those which were covered by Cl. 64 of the G. D. C. C. Disputes which could be referred to arbitration under Cl. 65 of G. D. C. C. were referred to the defendant only after the institution of the present proceedings. There was, therefore, no occasion for the arbitrator to act as provided under Cl. 65 aforesaid. It was incorrect on the part of the plaintiff to say that the General Manager had failed to act as arbitrator within the provision of Cl. 65 of the G. D. C. C. It was also wrong to say that Sri B. K. Khanna, the General Manager of the defendant was ever approached to act as arbitrator or to appoint an arbitrator. He could, therefore, not be charged to neglect in acting as an arbitrator or in appointing an arbitrator. The allegations made by the plaintiff against Mr. B. K. Khanna, the General Manager and Sri V. S. Pahwa, the Deputy Chief Engineer were denied. The General Manager never directed his subordinates to take any steps against the plaintiff beyond the scope of G. D. C. C. and that he never became biased against the plaintiff. It has been denied that any mistake had been committed in preparing abstract of costs in the tender. The merits of the dispute have also been denied.

6. A large number of issues were framed by the Court below which arose on the pleadings of the parties. The more important findings returned by the Court below are that the application under Section 20 was maintainable inasmuch as an arbitration agreement did exist before

the proceedings had been started. It has been further held that the disputes relied upon by the plaintiff fell within the scope of the arbitration clause and that they could be referred to arbitration under Cl. 65 of the G. D. C. C.

7. Next it was held that the fact that notice of the disputes contained in Annexure 'A' of the petition was given to the defendant only after the institution of the present proceedings, was no ground for refusing to pass an order to file the agreement. The Court below further found that Sri N. R. Sheshadari who was the General Manager of the defendant showed his unwillingness to do anything in the matter of giving arbitration to the plaintiff, and, therefore, he failed to arbitrate or to appoint a nominee to arbitrate. There is the further finding of the Court below that Shri B. K. Khanna General Manager of the defendant who succeeded Mr. N. R. Sheshadari also showed his unwillingness to arbitrate in the matter. According to the Court below, mistakes had occurred in preparing the abstract of costs in the tender, and that it could not be said that the apprehension of the plaintiff that the General Manager and the other officers of the defendant were trying to make the plaintiff suffer the consequences of their mistakes, was unreasonable. Another important finding returned by the Court below is that as after the passing of an order for filing of the agreement under Section 20 of the Act, it is the further duty of the Court to make an order of reference, the Court must look into the question of negligence or misconduct or bias etc. raised by the plaintiff against the named arbitrator, on the ground of justice, equity and good conscience. Next the Court below held that the General Manager had rendered himself incapable of either acting himself as arbitrator or appointing a nominee for the purpose of arbitration. Shri B. K. Khanna, the General Manager had made up his mind against the plaintiff and had also directed the actions which were taken against the plaintiff, and therefore, there was well-founded apprehension in the mind of the plaintiff that the General Manager was biased against it. It was further found that the plaintiff's apprehension that no other officer or person of the Fertilizer Corporation of India Ltd. could be trusted to act fairly as an arbitrator is not unjustified. On the question of law, the Court took the view that the Court acting under Section 20, Cl. (4) of the Arbitration Act, had ample power to fill in vacancy caused by the failure of the nominated arbitrator and to pass an order of reference of disputes to an arbitrator otherwise appointed by the parties and in case there was no such agreement, to appoint an arbitrator itself. On such find-

ings, the Court below passed the order directing that the arbitration agreement be filed in Court. The Court further asked the parties to submit the name of some agreed arbitrator within ten days from the date of the order so that disputes contained in Annexure "A" of the petition with the exception of the disputes given under Items Nos. 4 and 11 be referred to him. It was also observed that in case the parties failed to submit the name of an agreed arbitrator within the time allowed, the Court itself would appoint an arbitrator and refer the said dispute to him.

8. By its order, it is obvious, that all that the Court below has done is to direct the filing of the arbitration agreement in Court. It has neither appointed an arbitrator nor has referred the dispute to any arbitrator.

9. An objection was raised on behalf of the respondent that the appeal is not maintainable against the order of the Court below in view of the provision of Section 39 of the Act. An order relating to filing or refusing to file an arbitration agreement is alone appealable under Section 39 (1) (iv) of the Act. As we have pointed out above by its order the Court below only directed the filing of the arbitration agreement in Court and the order cannot be read to be an order appointing an arbitrator or making reference to an arbitrator. The Court gave opportunity to the parties to submit the name of some agreed arbitrator within the period fixed by the Court. The observation that in case the parties failed to submit the name of an agreed arbitrator within the time allowed, the Court itself would appoint an arbitrator and refer the dispute to him, cannot be deemed to be an order actually appointing an arbitrator or making reference to any arbitrator. The appointment of the arbitrator and making of reference to him were proposed to be done by other orders to be passed in future. This being so, we are of the opinion that the appeal is not incompetent.

10. In support of the appeal, it has first been urged that the petition under Section 20 of the Act was not maintainable inasmuch as there was no arbitration agreement in existence before the institution of the suit. What had happened in this case was that the documents which formed the contract were signed on the 25th March 1965 i.e. after the petition under Section 20 of the Act had been filed. Learned counsel for the appellant has referred to Section 2 (a) of the Act for the purpose of showing that "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. Accord-

ing to the plaintiff-respondent, the contract had been completed between the parties on 20th October 1964. The defendant-appellant had accepted the tender of the plaintiff which was offered on 24th September 1964. In pursuance of that acceptance of the tender, the defendant issued work-order to the plaintiff dated 19/20-10-1964. That document contained all the terms of the contract and in spite of the fact that the formal agreement was signed at a later date, the parties treated themselves bound by the agreement from the date of the work-order. The document constituting the contract included G. D. C. C. (General Directions and Conditions of Contract). Clause 65 of the document is the arbitration agreement. Both the parties filed that document and relied upon it. The Supreme Court has more than once expressed the view that the agreement in order to be an arbitration agreement need not necessarily be signed by the parties. In the case of *Jugul Kishore Rameshwar Das v. Mrs. Goolbai Hormusji*, AIR 1955 SC 812 it was held that in order to constitute an arbitration agreement in writing, it is not necessary that it should be signed by the parties and it is sufficient that the terms are reduced to writing and the agreement of the parties thereto is established. Again in the case of *Union of India v. A. L. Rallia Ram*, AIR 1963 SC 1685 similar view was taken. In the last mentioned case, the Food Department of the Government of India invited tenders in the name of Chief Director of Purchases. The respondent submitted his tender which was duly accepted by the Government of India. The acceptance letter set out general conditions of contract. One of the conditions contained therein, was an arbitration clause. On such facts, it was held by the Supreme Court that it constituted an arbitration agreement within the meaning of Section 2 (a) of the Act. No particular form is necessary for an agreement to constitute an arbitration agreement. We have, therefore, no hesitation in coming to the conclusion that arbitration agreement was in existence before the institution of the suit in this case.

11. It was then urged that the disputes pointed out by the plaintiff were covered by Cl. 64 of the G. D. C. C. and were not covered by Cl. 65 of the G. D. C. C. which is the arbitration clause. The dispute, therefore, could not be referred to arbitration. Incidentally, it was urged that the disputes which were all covered by Cl. 64 of the G. D. C. C. had already been decided by the defendant's Engineer and for that reason also, there was nothing which needed being referred to arbitration. In order to appreciate the contention of the learned counsel for the appellant, it is necessary to quote Cl. 64 referred to above:—

"All disputes or differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the works or after the completion and whether determination of the contract shall be referred by the contractor to F. C. I. (Fertilizer Corporation of India Ltd.) and F. C. I. shall within a reasonable time after presentation make and notify decisions thereon in writing. The decisions, directions and certificates with respect to any matters, decision on what is specially provided for by these conditions given and made by F. C. I. or by the Engineer on behalf of F. C. I. which matters are referred to hereinafter as excepted matters, shall be final and binding upon the contractor and shall not be set aside or be attempted to be set aside on account of any informality, omission, delay or error in proceedings in or about the same or on any other reason and shall be without any appeal."

That clause is followed by Cl. 65, which also, it is necessary to quote, and is as follows:—

"Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship, or materials used in the work, or as to any other question, claim, right, matter or thing whatsoever in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders, or these conditions, or otherwise concerning the work of the execution, or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof or otherwise shall within one month of the arising of such question or dispute, be referred to the sole arbitration of the General Manager of F. C. I. and if the General Manager is unable or unwilling to act, to the sole arbitration of some other person appointed by the General Manager, willing to act as such arbitrator. There will be no objection if the arbitrator so appointed is an employee of F. C. I. (Fertilizer Corporation of India Ltd.) and that he had to deal with the matters to which this agreement relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute or differences. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to this contract."

Under Cl. 64, the decisions which are said to be final and binding on the contractor are those decisions, directions and certificates which relate to "excepted matters". Those "excepted matters" are said to be (sic) by the conditions given in the G. D. C. C. The "excepted matters" as appears from the G. D. C. C. are (i) exten-

sion of time provided in Cls. 21, 22 and 32; (ii) measurement on completion of work and before final certificate provided in Cl. 23; (iii) payment of lump sum in estimate given in Cl. 26; (iv) return of F. C. I's surplus materials to F. C. I. given in Cl. 29; (v) liability for damages for three months after final certificate given in clause 38; and (vi) costs incurred or excess amount paid to another contractor for the work left incomplete after determination of contract for default of contractor given in clause 63 (xii) (b) (c).

12. On an examination of the various items of disputes and the differences as given in Annexure "A" to the petition, the court below came to the conclusion that majority of them are items of disputes and differences that do not come within the category of "excepted matters" as provided in Cl. 64. We have ourselves examined the various items of disputes and differences given in Annexure "A" mentioned above, and we find ourselves in agreement with the view taken by the Court below. It must, therefore, be held that the contention of the defendant that no dispute had arisen between the parties within the meaning of Cl. 65 of the G. D. C. C., is not correct. It is obvious that it was necessary to have recourse to the contract to settle the disputes and differences given in Annexure "A" of the petition. That being so such disputes and differences must be held to be disputes and differences under the contract.

In the last item of Annexure "A", the claim of the plaintiff is that he was entitled to recover from the defendant the sum of Rs. 2,55,000 for the work done including the costs of planks and ballies, left in trenches and which amount had not been paid. The plaintiff also claimed the sum of Rs. 11,000 being refund of earnest money and Rs. 28,510 for wrongful termination of the contract. He claimed interest on the total claim. The real controversy between the parties, related to the designs, drawings, specifications, estimates, instructions and orders concerning the work or its execution or failure to execute. For the settlement of that controversy the contract had necessarily to be looked into. We are, therefore, unable to accept the contention of the learned counsel for the appellant on this point.

13. It was thereafter urged by the learned counsel for the appellant that the disputes and differences given in Annexure "A" to the application were brought to the notice of the defendant only after the execution of the present proceedings, and that, therefore, they could not form subject-matter of decision under Section 20 of the Arbitration Act. We, however, do not find much substance in such contention. A person has a right

to move the Court under Section 20 of the Act for filing of the arbitration agreement on the ground that he had entered into an arbitration agreement before the institution of the suit with respect to the subject-matter of his agreement or any part of it and that differences had arisen between the parties to which the agreement applied. In this case before the stage of making of reference was reached, the defendant did get notice of the disputes which were required to be referred as those disputes and differences were clearly mentioned in Annexure "A" of the petition itself.

14. On the whole, we are satisfied that the order of the Court below directing that arbitration agreement be filed in Court does not suffer from any legal infirmity and therefore, reversal of that order by this Court is not called for.

15. Extensive and elaborate arguments have been advanced by the learned counsel for the parties on the question whether on the facts of the instant case, Court below had or had not the power to appoint an arbitrator other than the General Manager of the defendant corporation or his nominee under S. 20, Cl. (4) of the Act. We have already quoted Cl. 65 of the agreement earlier. It may be recalled that certain classes of disputes arising between the parties under the contract were to be referred to the sole arbitration of the General Manager of the F. C. I. and if the General Manager was unable or unwilling to act, to the sole arbitration of some other person appointed by the General Manager, willing to act as such arbitrator. In that clause, the parties also expressed that there would be no objection if the arbitrator so appointed was an employee of the F. C. I. and that he had to deal with matters to which this agreement relates and that in course of his duties as such he had expressed views on all or any of the matters in dispute or differences. It was further provided that the award of the arbitrator so appointed shall be final, conclusive and binding on all parties to the contract. Clause (4) of S. 20 of the Act reads as follows:—

"Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court."

16. It is clear from the above clause that the reference will be made to the arbitrator who is appointed by the parties either in the agreement itself, or appointed by the parties otherwise, in case, the parties have not nominated an arbitrator in the agreement and they did not, otherwise, agree to the appointment of a particular arbitrator, the Court would have

the power to refer the disputes to an arbitrator appointed by itself.

17. In the instant case, it was pointed out that the nomination of the General Manager of the defendant had been made by the parties in the agreement itself and if for some reason, the General Manager could not arbitrate then the parties had agreed that the nominee of the General Manager would be the person who will act as an arbitrator. This being so, it was urged that the power of the Court to appoint another person as an arbitrator could not be exercised by the Court below in this particular case.

18. To us it appears that the question whether the lower Court could appoint an arbitrator under S. 20 (4) of the Act or not, does not arise in this case. We have already pointed out that the Court below did not actually appoint an arbitrator by the order under appeal, but all that it did was to ask the parties to give an agreed name so that the dispute could be referred to him for decision. Perusal of Cl. (4) of Section 20 of the Act indicates that there are three courses open to the Court under that provision of law. After the arbitration agreement has been ordered to be filed, the Court shall proceed to make reference firstly to the arbitrator appointed by the parties in the agreement; secondly to the arbitrator not named in the agreement, but with regard to whom the parties agree otherwise; and thirdly, when the parties cannot agree upon an arbitrator, to an arbitrator appointed by itself. The stage for exercising power of arbitration by Court, was not yet reached in this case. The Court below only directed the parties to give an agreed name so that the Court might make a reference to him for deciding the dispute that had arisen between the parties. The precise question, that really arises in the case, is whether, the plaintiff could be permitted to contend that the arbitrator named in the agreement had since then incapacitated himself from acting as an arbitrator between the parties and that, therefore, the plaintiff had the right to urge that reference be not made to the arbitrator named in the agreement. If the plaintiff could do so, then the order of the Court below directing the parties to give an agreed name for appointment of arbitrator must be held to be correct.

19. The grounds on the basis of which the plaintiff objected to the reference being made to the General Manager or to his nominee have already been indicated by us earlier. The contention of the plaintiff is that the General Manager had refused to arbitrate and also to nominate any person to act as arbitrator. It has been further alleged by the plaintiff that the General Manager has disabled him-

self from acting as an arbitrator for the reason of bias and prejudice against the plaintiff. It has also been contended on behalf of the plaintiff that the General Manager had already made up his mind regarding the merits of the disputes that have arisen between the parties and had also expressed his opinion in those matters unequivocally. It is on account of such reasons that the plaintiff urged that reference could not be made to the General Manager of the defendant corporation, nor could the General Manager be relied upon for the purpose of nominating an appropriate person to act as arbitrator over the disputes between the parties. Before we examine the correctness of the facts alleged by the plaintiffs against the General Manager, we propose to answer the question of law mentioned above.

20. On behalf of the appellant, it has been urged that the plaintiff having entered into the agreement that disputes arising under the contract would be referred to the arbitration of the General Manager of the defendant, the plaintiff could not resile from that position, and consequently, the plaintiff was bound to accept the General Manager or his nominee as arbitrator to decide the disputes which have thus arisen under the contract. It was further urged that the Court cannot relieve the plaintiff of the consequence of that agreement, and could not refuse to make reference to the General Manager or to the nominee of the General Manager. It was also urged that it was not open to the plaintiff in proceedings under Section 20 to ask the Court to consider the allegations of bias, prejudice and neglect against the arbitrator appointed under the terms of the agreement itself. The learned counsel for the appellant sought to substantiate his contention by urging further that the Court seized of proceedings under Section 20 of the Act could not exercise powers provided for under Section 8 of the Act. It was also urged that the term in the agreement giving power to the General Manager to nominate an arbitrator could not be deemed to be an arbitration clause and that there was no reason why that specific contract between the parties should not be enforced.

21. The learned counsel for the plaintiff has urged that the question raised by the plaintiff could very well be gone into in proceedings under Section 20, Cl. (4) of the Act. Relying upon Cl. (5) of Section 20, it has been contended that all the other provisions of the Act are applicable to a proceeding under Section 20, Cl. (4) of the Act. The Court can exercise the powers provided for under Section 8 of the Act in a proceeding under Section 20, Cl. (4) of the Act. It was also, urged that in view of the facts proved by

the plaintiff, the plaintiff is entitled to be relieved of that part of agreement by which the parties had nominated the General Manager to act as an arbitrator or by which power had been given to the General Manager to nominate an arbitrator. It was also urged that on account of the above disqualification of the General Manager, it must be held that there ceased to be an agreement between the parties that the General Manager or his nominee would act as an arbitrator. It was also urged that the point of time at which there should be an agreement between the parties to be bound by the decision of a particular arbitrator is the one when reference of the disputes is to be made and not prior to it. On that date, plaintiff could not be deemed to be in agreement regarding reference being made to the General Manager or to his nominee for arbitration.

22. Reference was made to the Division Bench decision of this Court in the case of Union of India v. Gorakh Mohan Das, AIR 1964 All 477. In that case, Sri Gorakh Mohan Das filed an application under Section 8 of the Act and prayed that an arbitrator be appointed to hear and decide certain matters in dispute between the parties. That application of Sri Gorakh Mohan Das was opposed by the Union of India on a variety of grounds. It was pleaded that the application was not maintainable.

23. The learned Civil Judge who was seized of the matter found that a dispute had arisen between the parties which required reference to arbitration; that the notice requesting appointment of an arbitrator was legal and valid; and that the request of the respondent for the appointment of an arbitrator not having been attended to, the petitioner was entitled to apply for the appointment of an arbitrator. The learned Civil Judge allowed the application and appointed one Sri Sri Narain Singh Vakil as arbitrator to go into the disputes between the parties as disclosed in the application. He also gave some other directions for the guidance of the arbitrator. The Union of India being aggrieved by the order of the learned Civil Judge filed a petition in revision in this Court, which came for disposal before a Division Bench on account of the case being referred to such Bench by a learned Single Judge of this Court. After quoting Sections 8 and 20 of the Act, the Court proceeded to point out that the province of the two provisions is quite distinct—one confers power upon the Court to appoint an arbitrator where the parties do not concur in the appointment of an arbitrator, the other entitled a party to apply for the filing of the arbitration agreement in Court and empowers the Court to make an order of reference to

the arbitrator appointed by the parties and in the absence of such appointment to the arbitrator appointed by it. It was observed that the power of the Court to make reference to arbitration is contained in Section 20 and further that there was nothing in Section 8 from which such power could be spelled out. In the result, it was held that it was clear from the terms of the order, made by the learned Civil Judge that he did not merely appoint Sri Sri Narain Singh as arbitrator but also referred the disputes to him. This according to the view expressed by the Bench could not be done without there being an application under Section 20 of the Act, and to that extent, the order was held to be without jurisdiction.

24. Reference was then made to the case of Union of India v. Gopal Dass & Co. which was decided by a learned Single Judge of this Court (and is reported in 1966 All LJ 518). The arbitration clause in that case was to the effect that in the event of any question or dispute arising under or in connection with the contract it was to be referred to the arbitration of a sole arbitrator nominated by the General Manager of the North Eastern Railway and the decision of the arbitrator was to be final and binding on the parties. When certain disputes arose between the parties, Messrs Gopal Dass & Co. served notice upon the General Manager of the North Eastern Railway calling upon him to appoint or nominate the sole arbitrator within fifteen days and when the General Manager did not so appoint or nominate an arbitrator, the petitioner moved two applications under Section 8 (2) of the Arbitration Act for the appointment of a sole arbitrator. The learned Civil Judge allowed both the applications and appointed one Sri K. C. Srivastava as the sole arbitrator. During the pendency of the proceedings, the General Manager proceeded to appoint or nominate sole arbitrator.

The question raised in that case was whether applications under S. 8, Cl. (2) of the Act were maintainable. The observation made in that case was that there were three important ingredients in Cl. (a) of sub-section (1) of S. 8 of the Act. The arbitration agreement must provide that the reference shall be to one or more arbitrators appointed by the consent of the parties; that after the differences had arisen, all the parties did not concur in the appointment or appointments; and that a written notice had been duly served calling upon the other party to concur in the appointment or appointments or in supplying the vacancy. Where any one of those ingredients was not fulfilled, application under Section 8 (2) of the Act could not be said to be maintainable though it may be open to the aggrieved

party to seek remedy in accordance with the provisions of the Act. The learned Single Judge then expressed doubt whether the person appointed or nominated by the General Manager as the sole arbitrator could in the eye of law be deemed to be an arbitrator appointed by the consent of the parties. In the view that the learned Single Judge took, he came to the conclusion that Section 8 of the Arbitration Act did not apply to a case where the General Manager had not appointed or nominated, or appoints or nominates at a later stage, the sole arbitrator, and the only remedy available to the aggrieved party is to move the Court under Section 20 of the Arbitration Act.

Reference was also made to the case of *Union of India v. M/s. Himco (India) P. Ltd.* AIR 1965 Cal 404. All that was laid down in that case is that the arbitration agreement in that case contained adequate and exhaustive machinery for appointment of arbitrators including provisional appointments in case the appointed arbitrator refused to act. It was also observed that the fact that the appointed arbitrator had not yet signified his willingness to act as arbitrator did not debar the Court from making an order of reference of the dispute to him. In case, he subsequently refused to act as arbitrator the procedure laid down in the arbitration agreement would prevail and would be followed. The facts of that case were different and not in (pari) materia with the facts of the instant case.

25. On behalf of respondent reliance has been placed on various decisions of different Courts. One of the cases relied upon by the learned counsel for the respondent is the case of *Karam Chand v. M/s. Sant Ram Tara Chand*, AIR 1958 Punj 418. The facts of that case put briefly are these. Karam Chand and Diwan Chand mortgaged certain property in favour of M/s. Sant Ram Tara Chand respondent by a registered mortgage deed. Clause (14) of that deed provided that any dispute arising between the parties out of that transaction would be referred to the arbitration of Hari Kishan Dass, who was known to the parties. Dispute arose in respect of this transaction between the parties, whereupon the mortgagee filed an application under Section 20 of the Act and prayed that the arbitration agreement be filed in Court. That application was contested by the mortgagor principally on the ground that Hari Kishan Dass was one of the partners of the petitioner's firm, consequently, was not a fit person to act as an arbitrator. The trial Court framed an issue to the effect whether Sri Hari Kishan Dass was not a fit person to arbitrate between the parties. The learned Subordinate Judge in that case upheld that objection of the mortgagor but he

ordered the filing of the arbitration agreement. The mortgagor then filed an appeal against that order in the Punjab High Court. In support of that appeal, it was urged that after accepting the objection of the appellant, the only course open to the Court was to dismiss the application for filing the agreement, and that the Court did not have jurisdiction to allow the filing of the agreement in absence of the intention of the parties to refer the dispute to the arbitration of any other person. The main question, therefore, that arose in that case was whether the arbitration agreement had become inoperative on account of the incapacity of the above named arbitrator to act, or could the Court keep the agreement alive under the Act. It was observed that on failure of the parties to agree to the appointment of the arbitrator, the Court could appoint one, and that, therefore, the Court was competent to keep the agreement alive in spite of incapacity of the named arbitrator to act. This being so, it was further held that the Court did have jurisdiction to order the filing of the agreement in that case. Thereafter, the implications of sub-section (5) of S. 20 as well as Section 47 of the Act were considered and the Court came to the conclusion that the provisions of Section 8 of the Act were attracted in proceeding under Section 20 of the Act.

26. In the case of *Gannon Dunkerley & Co. v. Union Carbide (India) Ltd.*, AIR 1962 Cal 360, an application under Section 20 of the Act for an order that the arbitration agreement be filed in Court and reference be made, was filed. Dispute having arisen, the plaintiff wrote a letter purporting to refer the dispute stated in the said letter to the arbitration of the Chief Engineer, Central Public Works Department in terms of the arbitration proceedings. The Chief Engineer in reply protested that he never agreed either to arbitrate or to nominate an arbitrator and wondered how his name came to be incorporated in the agreement without his consent. After an examination of the scheme of the Indian Arbitration Act and after referring to the three classes of arbitration provided for by that Act, it was observed that in a reference whether made privately without the intervention of the court or under an order of the Court either under Section 20 or S. 23, proceedings must be conducted in the same manner, arbitrator may be appointed or removed on the same ground and an award filed, confirmed or set aside on the same ground and according to the same procedure.

One of the contentions made in that case was that under the arbitration clause, the Executive Engineer, Central Public Works Department or his nominee alone could be appointed arbitrator and no

other, that being the express agreement between the parties. It was then urged that the Executive Engineer having refused to act or to appoint an arbitrator, no arbitrator could be appointed and no order of reference could be made in consequence. It was further urged that the parties had agreed upon an arbitrator i.e. the Chief Engineer, or his nominee and the Court, therefore, did not have power to appoint anybody else and for the same reason the Court was not empowered to make any order of reference as there was no arbitrator to whom the reference could be ordered. It was also urged that the parties could have filed an application under Section 8 of the Act, but if the parties chose to proceed under Chapter III and make an application under Section 20, reference could be made only to the arbitrator agreed to by the parties and only in those cases where the parties could not agree, the reference could be made to an arbitrator appointed by the Court. The Court was not empowered to appoint an arbitrator in case the parties had agreed to an arbitrator who was unwilling or unable to act. The further argument was that it was only after the order is made under Section 20 and not before that the other provisions of the Act in Chapter II in which Section 8 occurs became applicable to the arbitration proceedings with the intervention of the Court. In support of that argument, reliance was placed on the use of the words "thereafter" in sub-section (5) of Section 20. In meeting that argument, the Court observed that on the language of Section 20 (4) it was open to contend that only when the parties could not agree upon an arbitrator that the Court is empowered to appoint arbitrator. In cases where the parties agreed to an arbitrator either at the time of the arbitration agreement or subsequently, the Court has not been empowered to appoint any arbitrator other than the arbitrator agreed to by the parties. In cases where the parties had not agreed to an arbitrator, the Court was expressly authorised to appoint one in order to make an effective reference. It was noticed that sub-clause (4) of Section 20 does not provide for the third class of cases where the parties agreed to an arbitrator but the arbitrator was unable or unwilling to act. That class of cases has been expressly provided for in Section 8 of the Act and if the parties choose to proceed under Chapter II and make an application under Section 8, the Court would have power to appoint one. The Court then proceeded to make the following observations:—

"Under sub-clause (5) however provisions of Chapter II can be invoked to govern arbitration proceedings after the filing of the agreement under Section 20 of the Act. The provisions of Chapter II

cannot be taken recourse to, till after the order is made under Section 20. The language of sub-section (5) indicates that it cannot be invoked before. The orders to be passed in an application under Section 20 are: (a) filing the agreement in Court and (b) order of reference to an arbitrator. If the word "thereafter" in sub-section (5) is construed to have reference to the order of filing the agreement only and not to the order of reference as stated in the Punjab case noted before, then it can be said that in making the subsequent order of reference to an arbitrator, the provisions of Chapter II for filling up the vacancy as provided in Section 8 may be attracted. In my judgment, however, the order contemplated under Section 20 is not merely an order filing the agreement but a reference to an arbitrator as well. This order is one and the word "thereafter" in sub-section (5) of S. 20 refers not merely to an order of filing the agreement but an order of reference as well. Other provisions of the Act including the provisions of Section 8 are made applicable under sub-section (5) after an order is made not only of filing the agreement but also of making the reference. It is not, therefore, open to the Court to appoint an arbitrator in this application by attracting the provisions of Section 8 of the Act. It is to be noted that had the applicant proceeded under Chapter II and made an application under Section 8 for the appointment of an arbitrator, on the ground that the named arbitrator is unable or unwilling to act, this Court would have justification to make an effective reference by appointing an arbitrator in place of the arbitrator unable or unwilling to act. This he can do even now after the present application is dismissed on the acceptance of the construction of Section 20 (4) of the Act contended for by Mr. Niten De. This leads me to think that Section 20 (4) should be liberally interpreted as to cover all the three classes of cases indicated before and the Court is empowered to appoint an arbitrator in the cases where the agreed arbitrator is unwilling and/or unable to act. Mr. De's argument, as noted before is that the Court is empowered to appoint arbitrator in two cases (a) when the parties have agreed to an arbitrator, and (b) when the parties cannot agree and not in the third class of cases in which the arbitrator having been agreed to by the parties becomes unable or unwilling to act. This is the lacuna of the Act, according to the submission of Mr. Niren De. This lacuna, however, can be avoided if it is construed that the second class of cases contemplated by sub-s. (4) not only includes cases where at no previous point of time the parties agreed to an arbitrator but also to cases where the parties having agreed to

an arbitrator previously do not agree to a new appointment after the arbitrator previously agreed to is unable or unwilling to act If the clause "Where the parties cannot agree to an arbitrator" in Section 20 (4) is given a liberal interpretation it may very well include not only cases in which at no point of time parties agreed to an arbitrator but also cases where the parties are unable to agree to a new arbitrator after the arbitrator previously agreed to is found unable or unwilling to act. This inability to agree to a new arbitrator, in my judgment, has reference to the point of time when the application under Section 20 is made and no reference to the state of affairs previously."

After making those observations, the Court ultimately came to the conclusion that cases where parties did not agree to an arbitrator at any point of time and cases where the parties agreed previously to an arbitrator but he proved unable or unwilling to act and the parties could not agree to a new arbitrator must be treated on the same footing under Section 20, Cl. (4) of the Act.

27. The learned counsel for the respondent also relied on the case of *Uttar Pradesh Co-operative Federation Ltd. v. Sunder Brothers, Delhi*, AIR 1967 SC 249. It is true that that case was one under Section 34 and not under Section 20 of the Act. One of the reasons accepted by the Supreme Court for refusing to stay the hearing of the suit under Section 34 of the Act was that under Rr. 115 and 116 of the Co-operative Societies Rules, the reference of the dispute had to be made to the Registrar of the Co-operative Societies who could decide that dispute himself or refer the dispute to an arbitrator or to two joint arbitrators, appointed by him or to three arbitrators, of whom one shall be nominated by each of the parties to the dispute and the third by the Registrar who could also appoint one of the arbitrators to act as Chairman. In the case before the Supreme Court, it was alleged that the Registrar of the Co-operative Societies is ex-officio President of the Society and it was with his approval that the agreement in dispute was terminated. The Registrar was the Chief controlling and supervising officer of the Society under its bye-laws. Apprehension was, therefore, expressed by the respondent that the Registrar might not act fairly in the matter and therefore, it was improper that he should be an arbitrator in the dispute between the parties.

The Supreme Court held that the legal position was that an order of stay of suits under Sec. 34 of the Indian Arbitration Act could not be granted if it could be shown that there was good ground for apprehending that the arbitrator would

not act fairly in the matter or that it was for some reason improper that he should arbitrate in the dispute between the parties. The Supreme Court further pointed out that it was the normal duty of the Court to hold the parties to the contract and to make them present their disputes to the forum of their choice but that an order to stay the legal proceedings in a Court of law could not be granted if it was shown that there was good ground for apprehending that the arbitrator would not act fairly in the matter or that it was for some reason improper that he should arbitrate in the dispute.

Their Lordships also made reference to the decision of the House of Lords in *Bristol Corporation v. John Aird and Co.*, 1913 AC 241. That case before the House of Lords was a proceeding under Section 4 of the English Arbitration Act which is similar to Section 34 of the Indian Arbitration Act. The House of Lords in that case held that the fact that the Engineer, without any fault of his own must necessarily be placed in the position of a Judge and a witness, is a sufficient reason why the matter should not be referred in accordance with the contract. Their Lordships of the Supreme Court then proceeded to quote a passage from the report of Lord Atkinson made in that case. We cannot do better than to quote that passage in this judgment also. It is as follows:—

"Whether it be wise or unwise, prudent or the contrary, he has stipulated that a person who is a servant of the person with whom he contracts shall be the judge to decide upon matters upon which necessarily that arbitrator, has himself formed opinions. But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those preformed views of the engineer, that gentleman shall listen to argument and determine the matter submitted to him as fairly as he can as an honest man; and if it be shown in fact that there is any reasonable prospect that he will be so biased as to be likely not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain and to have the matter in dispute tried by one of the ordinary tribunals of the land. But I think he has more than that right. If, without any fault of his own the engineer has put himself in such a position that it is not fitting or decorous or proper that he should act as arbitrator in any one or more of those disputes, the contractor has the right to appeal to a Court of law and they are entitled to say, in answer to an application to the Court to exercise the discretion which the 4th Section of the Arbitration Act vests in them. We are not satisfied that there is not some reason for not submitting these questions to the

arbitrator. In the present case the question is, has that taken place?"

The Supreme Court then proceeded to observe that it was manifest that the strict principle of sanctity of contract is subject to the discretion of the Court under Section 34 of the Indian Arbitration Act, for there must be read in every such agreement an implied term or condition that it would be enforceable only if the Court, having due regard to the other surrounding circumstances, thinks fit in its discretion to enforce it. It was also observed that it was obvious that a party could be released from the bargain if he could show that the selected arbitrator was likely to show bias or by sufficient reason to suspect that he would act unfairly or that he had been guilty of continued unreasonable conduct.

28. It is clear from the above decision of the Supreme Court that a party is entitled to be released from a bargain of this nature if he could show that the selected arbitrator was likely to show bias or by sufficient reason to suspect that he would act unfairly or that he had been guilty of continued unreasonable conduct. It is equally clear that the Supreme Court took the view that under such circumstances, a Court should refuse to stay the hearing of a proceeding before it in exercise of its discretion under Section 34 of the Act. The question that then arises is whether a party cannot be released of the bargain, in such circumstances, in a proceeding under S. 20 of the Act on the ground that the power under Section 20 is not a matter of discretion as it is under Section 34 of the Act. In our opinion, the answer to that question must be in the negative. After all, the question really is whether the term of the contract regarding the reference to a particular nominated arbitrator is one which should be specifically enforced under the circumstances of the case or not. It cannot be contended that relief of specific performance of contract is not a matter of discretion. There is no reason why the principle underlying Section 22 of the Specific Relief Act, be not pressed into service for doing justice in such a case. Section 22, Cl. II provides that where the performance of the contract would involve more hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff, the Court is not bound to grant the relief of specific performance merely because it is lawful to do so and the Court had the discretion to refuse to enforce that contract between the parties. If it is possible to avoid a contract on that basis in its entirety, it should be possible to avoid a part of contract also on the same basis provided that part is not inseparable from the other part. The plaintiff in this case is not trying to avoid the arbitration

clause as a whole but is only trying to ensure that the arbitration should be fairly and justly done. We are, therefore, of the opinion that in case the plaintiff has succeeded in establishing reasonable apprehensions that the General Manager of the defendant corporation or his nominee may not act fairly and justly as arbitrator he was entitled to be released from the bargain even in the instant case.

29. It would amount to denial of natural justice if in a case of this nature, the party is forced to submit to the arbitration of a person who has not only gone biased and became prejudiced against that party, but who has also expressed his opinion on the merits of the case against that party. In fact it may be a farce to allow the dispute to be decided by an arbitrator against whom such charges have been made and substantiated. We are, therefore, of the opinion that a Court cannot be said to act without jurisdiction under such circumstances in a case where charges of the nature enumerated above have been substantiated, in refusing to refer the dispute to the arbitration of the person named in the agreement itself. If the decision of the arbitrator even if has resulted in an award, can be avoided on the ground of misconduct of the arbitrator in relation to the proceedings as provided for under Section 14 of the Act, there is no reason why at the initial stage before reference is actually made, the question whether the proposed arbitrator has become prejudiced and biased and otherwise disqualified to act as such, should not be relevantly allowed to be raised.

30. It now remains to be considered whether on the facts of the present case, the contention of the plaintiff of unfair conduct of the General Manager or his nominee is reasonably well founded or not.

31. It may be reiterated that the contention of the plaintiff in this case is that Shri B. K. Khanna, the present General Manager of the defendant has been completely won over and influenced by the other side; that he has already formed his opinion on the dispute and differences which have arisen between the parties, on the basis of reports submitted to him by Sri V. S. Pahwa, the Deputy Chief Engineer of the defendant. The Deputy Chief Engineer, Sri Pahwa was displeased with the plaintiff from the very beginning on account of his personal reasons and had been threatening the plaintiff with complete ruin, that Sri B. K. Khanna also threatened the plaintiff and took action against him finally leading up to the cancellation of the contract without notice and that Sri B. K. Khanna had also obtained legal opinion in the matter. Consequently, Sri B. K. Khanna had become

biased and that he attempted to prejudice the higher authorities against the plaintiff. It was on such grounds that the plaintiff expressed apprehension that an arbitration by Sri B. K. Khanna, the General Manager or by any person appointed by him would be highly inequitable and was bound to result into miscarriage of justice. The Court below in its order has observed that the only argument on behalf of the defendant on this part of the case, was, that the plaintiff was not entitled to agitate such question in proceedings under Section 20 of the Arbitration Act and that no arguments were addressed before the lower Court on the merits of the points which were raised on behalf of the plaintiff. According to the lower Court, all that was done on behalf of the defendant before that Court was to show that Sri B. K. Khanna and Sri V. S. Pahwa had denied the allegations of the plaintiff in their statement.

32-42. The plaintiff examined Sri Gorakh Mohan Das (P. W. 1), who is one of the partners of the plaintiff firm.

(Their Lordships then considered the oral as well as the documentary evidence and proceeded as under):

43. The lower Court has also referred to certain documents exhibited in the case and after considering the same had arrived at the conclusion that Sri Pahwa the Deputy Chief Engineer of the defendant was not on good terms with the plaintiff and that he did not render co-operation to the plaintiff in the execution of the work and perhaps he was responsible for inadequate payment to the applicant. We have looked into those documents and have also considered the reasonings advanced by the Court below on that point. Nothing has been pointed out to us to show that the view taken by the Court below regarding the attitude of Mr. Pahwa as against the plaintiff, is not correct.

44. For all the reasons given above, we have arrived at the conclusion that the Court below acted rightly in not making the reference of the disputes to the arbitration of Sri B. K. Khanna, the General Manager of the defendant or of his nominee under the circumstances of the case. We are further of the opinion that the Court acted well within its powers to ask the parties to give an agreed name to act as arbitrator and to whom the Court could refer the dispute.

45. In view of the part played by Shri B. K. Khanna in this matter, and in view of his performance in the witness box, we are definitely of the view that it is not desirable that the plaintiff be asked to submit to the arbitration of Shri B. K. Khanna or to submit to his judgment in the matter of choice of arbitrator. It would also not be decorous for Shri B. K.

Khanna to act as arbitrator in this case or to have his nominee act as such.

46. Before parting with the case, we must observe that the Court below should not have expressed opinion on the merits of the various items of dispute raised by the plaintiff in these proceedings. That was essentially the job of the arbitrator to whom the disputes are to be ultimately referred for decision. It is hoped that the arbitrator while deciding the dispute will not allow himself to be influenced by the expression of opinion by the Court below on the actual merits of the disputes between the parties.

47. For all the reasons, given by us, the appeal must be dismissed.

48. We, accordingly, dismiss the appeal with costs.

Appeal dismissed.

AIR 1970 ALLAHABAD 43 (V 57 C 7)

A. K. KIRTY J.

Firm Birohichand Badri Vishal and others, Judgment Debtors, Appellants v. Firm Gangadhar Baijnath, Decree-holder, Respondent.

Ex. First Appeal No. 382 of 1964. D/-11-4-1968 against judgment of First Civil Judge Kanpur, D/-17-10-1964.

(A) Civil P. C. (1908), O. 21, Rr. 10, 11 (2) and 89 (2) — Failure to claim interest accruing after filing of execution application — Decree-holder can file separate execution application for recovery of such interest — Original application need not be amended — Held on facts that decree-holder's right to claim further interest was not lost by waiver or relinquishment.

If a definite sum of money has accrued due to a decree-holder on the date of the execution application, but he omits or neglects to mention or claim the same, an inference by necessary implication may be drawn that there is a waiver or relinquishment on his part in regard to that sum. A decree-holder who makes an application for execution can only calculate the exact amount, which accrues due to him on the date of the execution application. He can never foresee when the execution proceedings will come to a close. Under the law it is always open to the judgment-debtor before the sale is held or even thereafter, as provided by law, to pay up the amount claimed by way of execution instead of allowing the execution to proceed. How is the decree-holder to know whether and if so when the judgment-debtor will pay or deposit the amount claimed in the execution application instead of allowing the sale to be held and confirmed? It is not, therefore, possible to mention any amount which may

LL/EM/G124/68/VGW/B

accrue due to a decree-holder on account of future interest after the filing of the execution application. The law does not require him to make any reservation of his claim for such future interest nor to specify in the execution application that such future interest should also be realised in execution. There can, therefore, be no conscious omission to claim such future interest nor any waiver or relinquishment in respect thereof: AIR 1933 Bom 364 & AIR 1949 Cal 228, Dist.; AIR 1951 Ajmer 48, Dissent. from: Case Law Ref. (Para 10)

The sub-rule (3) of R. 89 of O. 21 makes it abundantly clear that the liability for interest accruing due after the sale proclamation will subsist even though the entire amount mentioned in the sale proclamation has been deposited for payment to the decree-holder. This clearly shows that the decree still subsists and remains enforceable in so far as further interest is concerned, and the decree-holder is entitled to file a separate execution application for the recovery of such interest. Order 21, Rule 89 also clearly negatives the contention that the decree-holder having filed an application for execution of the decree could not file the second application for execution to realise interest accruing due after the making of the original execution application. It also repels the contention that the only remedy of the decree-holder would be to apply for the amendment of the original application to claim recovery of interest accruing due subsequently: AIR 1932 Cal 555, Rel. on. Case Law Ref.

The subsequent execution application is neither prohibited by law nor can it be said to be barred by any principle of waiver or relinquishment.

Held on facts that decree-holder's right to claim further interest after the filing of the first execution application was not lost by waiver or relinquishment and that the second application for execution was legally maintainable. (Para 18)

(B) Civil P. C. (1908), S. 11 and O. 21, Rr. 10 and 11 — Execution proceedings — Second application, for execution for recovery of amount accruing due after making of first application, is maintainable—Application filed earlier, not involving any dispute or any issue between decree-holder and judgment-debtor — Application summarily dismissed — Held subsequent application was not barred by res judicata: AIR 1933 SC 65, Disting.

(Paras 21, 22, 25)

Cases Referred: Chronological Paras
(1959) AIR 1959 SC 31 (V 46) =
ILR (1958) Ker 1340, Moran
Mar Basselios Catholicos v.
Thukalan Paulo 25
(1956) AIR 1956 SC 346 (V 43) =
1956 SCR 72, Sailendra Narayan
v. State of Orissa 24

(1956) AIR 1956 Nag 91 (V 43) =
ILR (1956) Nag 330, Govind
Prasad v. Ramraskal Kamta-
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Sideshwari Prasad, K. M. Dayal and
Rajendra Prasad, for Appellants; M. P.
Mehrotra, for Respondent.
JUDGMENT:— This appeal by the
judgment-debtors arises out of execution
proceedings. The relevant facts lie within
a narrow compass. Suit No. 71 of 1954
was filed by the respondent against the
appellants for the recovery of Rupees
23,408/5/3 with pendente lite and future
interest. It was decreed with costs by
the 2nd Civil Judge, Kanpur on 18-12-
1959; pendente lite and future interest at
the rate of 6% per annum was also
awarded. The first application for execu-
tion of the decree was made on 18-10-
1960, giving rise to execution case No. 49
of 1960 in the Court of the 1st Addl. Civil
Judge, Kanpur. It, however, appears
that an application was in the first in-
stance made on 17-9-1960 in the Court of
the 2nd Civil Judge, Kanpur, which had
passed the decree, and, as prayed by the
decree-holder, a certificate transferring
the decree for execution was sent to the
Court of the 1st Additional Civil Judge,

Kanpur. In that Court an application in the prescribed form was submitted by the decree-holder as required under O. 21, R. 11 of the Code of Civil Procedure (hereinafter called the Code). The transfer certificate was for Rs. 35,077.49 p. which consisted of Rs. 23,408.33 p. on account of principal amount decreed, Rupees 2,692.25 p. on account of costs, Rupees 8965.16 p. on account of interest upto 15th September, 1960 and Rs. 11.75 p. on account of present costs of execution. In the Court of the 1st Addl. Civil Judge, Kanpur the total amount mentioned in column No. 7 of the application in the prescribed form was Rs. 35,194.53 p. including Rs. 117.04 on account of interest from 17-9-1960 to 18-10-1960. A sum of Rs. 18.30 p. was also claimed on account of further costs of execution. Thus, the total sum for which execution was sought amounted to Rs. 35,212.83 p. Execution was sought by attachment and sale of some immovable properties. Ultimately, the properties against which execution had been sought were sold on 22-7-1963 for Rs. 42,000. The decree-holder was the auction purchaser. The sale price, after adjusting the amount claimed in the execution application and the incidental costs, left a surplus balance of Rupees 6855.82 p. After the sale, an application under O. 21, R. 90 of the Code was filed by the judgment-debtors, which having been dismissed an appeal was preferred in this Court. That appeal, I am informed, is still pending and in it an order has been passed staying the confirmation of the sale. In execution case No. 49 of 1960, no final orders striking off the execution in full or part satisfaction have so far been passed. The decree-holder filed another application seeking recovery of Rs. 3862.38 p. on account of interest from 18-10-1960 to 22-7-1963 on the decretal sum of Rs. 23,408.33 p. This application was registered as execution case No. 4 of 1964. A number of objections against this application were raised by the judgment-debtors and those objections having been dismissed the present appeal has been filed in this Court.

2. The learned counsel for the appellants submitted that the second application for execution giving rise to execution case No. 4 of 1964 was not legally maintainable. Firstly, because the claim for further interest must be taken to have been waived or relinquished and secondly, because the application itself was barred by the principles of *res judicata*.

3. The first submission that in the circumstances of the case the claim for further interest subsequent to 18-10-1960 must be deemed to have been waived or relinquished by the decree-holder, was also supported by the contention that the

decree being for money there could be no piecemeal execution. According to the learned counsel, from the facts and circumstances of the case, it was evident that there was a conscious omission on the part of the decree-holder to claim further interest. This submission was sought to be based on the fact that in column No. 7 of the execution application no claim or mention was made by the decree-holder about future interest after 18-10-1960. This omission, it was submitted by the learned counsel, must be deemed to be a conscious omission, because the decree-holder knew that it was entitled to future interest on the decretal sum upto the date of full recovery. The argument was also reinforced on the ground that the Code itself does not warrant the splitting up or piecemeal execution of a money decree.

4. In support of the aforesaid submission, strong reliance was placed by the learned counsel for the appellants on the decision of the Bombay High Court in *Panaji Girdhar Lal v. Ratan Chand Hazari Mal*, AIR 1933 Bom 364. In this case it was observed by Beaumont, C. J. that "a judgment for principal and interest is a single money decree and cannot be said to give effect to different forms of relief." Repelling the contention of the respondents in the case that there is nothing in the Code which prevents piecemeal execution, the learned Chief Justice, relying on *Forster v. Baker*, 1910-2 KB 636, held that "there is no authority for the proposition that a single money decree (for sums immediately payable at the date of execution) (bracketing is mine) can be executed at different times the correct rule, and certainly the rule of convenience, is that a party having a right to execute a decree for money (presently payable) (bracketing is mine) must enforce the whole decree at the same time." The learned counsel for the appellants particularly relied on the following passage in the judgment of Beaumont, C. J.:

"I think that if a person having a right to recover a certain sum under a decree asks the Court to enforce that decree for a less sum, he must be taken to waive his right to levy execution for the balance." On the facts of the case with which Chief Justice Beaumont and Murphy, J. were concerned the second application for execution to realise interest was held to be not maintainable. Admittedly in that case, however, on the date when the execution application was filed the amount which under the decree had already accrued due to the decree-holder on account of interest had not been claimed. The execution was only for the realisation of Rs. 1359 for which a decree had been passed plus the costs of the suit, although interest at the rate of Rs. 6% per annum had been awarded from the date of filing

of the suit. Under R. 11 of O. 21 of the Code a decree-holder applying for execution is required to give certain particulars, out of which the following is required under Cl. (g) of sub-rule (2) of R. 11 which reads as under:—

"Order 21, R. 11 (2) (g)—the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;"

Now in the instant case, the decree-holder had furnished all necessary particulars required by the law and which could be stated with precision and certainty. Originally when the application was made in the Court of the 2nd Civil Judge, Kanpur, for issuing a certificate of transfer to the Court of the 1st Additional Civil Judge, Kanpur, the decree holder had mentioned the sum due under the decree, the costs awarded in the suit, the amount of interest due on the decretal sum upto the date of application and the present costs of the execution. The decree-holder had, therefore, evidently furnished the particulars required by law and the amount which could be ascertained and claimed as a definite sum on the date of the application. When the transfer certificate was issued to the Court of the first Additional Civil Judge, the decree-holder was fully conscious of his own rights and also the requirements of the law. Therefore, in the application which he filed in the prescribed form, as required under O. 21, R. 11 of the Code a further sum of Rs. 117.04 p. was specifically mentioned in column No. 7 being the interest which had accrued subsequent to 17-9-1960 till the date of application viz., 18-10-1960. No question of piecemeal execution or waiver to my mind, arises in the instant case. Waiver must be attributable to some act or omission on the part of the person concerned. In the instant case, there is no specific or covert act on the part of the decree-holder on the basis of which it could be held that the claim for interest subsequent to 18-10-1960 had been abandoned, nor was it so contended by the learned counsel for the appellants. The contention was that by necessary implication the decree-holder must be deemed to have made a conscious omission to claim future interest subsequent to 18-10-1960. I am unable to accept the contention of the learned counsel. Facts already mentioned above, clearly show that the decree-holder was very jealous and astute about his rights under the decree. This is clearly indicated by the fact that a further sum of Rs. 117.04 p. on account of interest had been specifically mentioned in column No. 7 of the execution application, besides Rs. 18.30 p. on account of further costs. It is inconceivable that ordinarily any decree-holder, who

has obtained a decree after being driven to the Court, will voluntarily or consciously waive or abandon any sum which he is entitled to realise under the decree.

5. In support of his contention of waiver and piecemeal execution, the learned counsel also relied on a number of other reported decisions. Of these mention may here be made of A. R. S. Subramanian Chettyar v. K. Moses, AIR 1929 Rang 182; Shyama Cbaran v. Protap Chandra, AIR 1930 Cal 349; Ramdas Mukhopadhyay v. Uday Chand, AIR 1949 Cal 228; Anandi Pershad v. Jhaman Lal, AIR 1951 Aimer 48 and Govind Prasad v. Ramraskal Kamtaprasad, AIR 1956 Nag 91.

6. In AIR 1929 Rang 182 (supra) the decree-holder in the first execution application had mentioned a particular amount due on account of interest, but had scored it out himself. This was treated as a waiver on the part of the decree-holder. The judgment debtor, in fact, paid to the decree-holder the entire amount which was sought to be recovered against him. In the circumstances, it was held that it would be inequitable to allow the decree-holder to make another application asking for further sum. The decision therefore, rested purely on the peculiar facts of that case.

7. In AIR 1930 Cal 349 (supra) also the decree-holder in the execution application did not claim a portion of interest which had already accrued due. Under those circumstances, it was held that a second application for the recovery of the amount of interest which the decree-holder had failed to claim cannot be allowed. Although the decree-holder was held not to be entitled to the interest which had already accrued due and which he had failed to claim in his execution application, yet the learned Judges observed that there was no reason why he could not get interest for a subsequent period. This case, therefore, did not as a matter of law or universal rule lay down that a second application for recovery of a sum of money accrued due after the first execution application cannot be entertained. On the contrary, the observations made in the case show that under certain circumstances such an application would be competent.

8. In AIR 1949 Cal 228 (supra) it was held that a decree-holder cannot split up his claim into different portions and ask for separate execution proceedings to be started in regard to each particular portion of the claim, but there is nothing in law to prevent him from giving up part of his claim and executing his decree only for the remaining portion. There cannot be any quarrel with the aforesaid proposition, because if the decree-holder is permitted to split up

the decree into separate and distinct portions each being capable of separate execution, the result would be disastrous. The decree-holder then would be within his legal rights to split up a decree, say for Rs. 500 into, so to say, five hundred separate executable decrees for Re. 1 each. This the law never contemplated nor does the Code warrant it. What is required by the Code is that on the date of the filing of the execution application the amount which is realisable under the decree upto that date, must be claimed and stated as provided in Cl. (g), sub-rule (2) of Rule 11 of Order 21 and column No. 7 of the prescribed form. Since the law itself requires the decree-holder to do so, on the failure on his part to claim any sum which had already accrued due and was presently claimable on the date of the filing of the execution application, it may be held, as indeed it has been held that he must be deemed to have waived, abandoned or relinquished the claim to that amount. That, however, is not the same thing as saying that since the decree-holder has not mentioned in the execution application that further sum would accrue to him on account of interest after the presentation of the execution application, he must also be deemed to have waived or relinquished his right to seek recovery of such future interest.

9. In AIR 1951 Ajmer 48 (supra) which was decided by Oak, J. C. (now the Chief Justice of this Court) the facts were almost identical with those of the instant case. The decree-holder in that case applied for execution on 25-11-1942 for recovery of Rs. 1032. This amount was admitted to be due to him on the date of the execution application. Some property was sold in the course of the execution for Rs. 2000 out of which a sum of Rs. 1049, which included Rs. 17 as costs of execution, was paid to the decree-holder. On 21-2-1946 the decree-holder filed another application for execution claiming an additional sum of Rs. 165 towards future interest for the period 25-11-1942 to 2-1-1946. The previous execution application had been allowed by the decree-holder himself to be struck off in full satisfaction. It was held that the order striking off execution in full satisfaction implied full satisfaction of the whole money claimed under the decree and that no second application would be maintainable merely towards future interest. This conclusion was arrived at by placing reliance on the case of AIR 1933 Bom 364. If I may say so with utmost respect, the learned Judicial Commissioner failed to note that in the Bombay case itself the learned Chief Justice had specifically, and in my opinion purposely, used the expression "immediately payable at the date of execution" and "presently payable" which to my mind, furnish the key to the

problem. Besides unlike the present case, the decree-holder had allowed the execution to be struck off in full satisfaction of the decree.

10. I have already mentioned above that if a definite sum of money has accrued due to a decree-holder on the date of the execution application, but he omits or neglects to mention or claim the same, an inference by necessary implication may be drawn that there is a waiver or relinquishment on his part in regard to that sum. A decree-holder who makes an application for execution can only calculate the exact amount, which accrues due to him on the date of the execution application. He can never foresee when the execution proceedings will come to a close. Under the law it is always open to the judgment-debtor before the sale is held or even thereafter, as provided by law, to pay up the amount claimed by way of execution instead of allowing the execution to proceed. How is the decree-holder to know whether and if so when the judgment-debtor will pay or deposit the amount claimed in the execution application instead of allowing the sale to be held and confirmed. It is not, therefore, possible to mention any amount which may accrue due to a decree holder on account of future interest after the filing of the execution application. The law does not require him to make any reservation of his claim for such future interest nor to specify in the execution application that such future interest should also be realised in execution. There can, therefore, be no conscious omission to claim such future interest nor any waiver or relinquishment in respect thereof.

11. There are yet other difficulties in holding that, because the decree-holder has not mentioned that he is entitled to future interest subsequent to the date of the execution application, he has lost his right to such interest by waiver or relinquishment. Firstly, that right is reserved to the decree-holder under the decree itself if it has been provided therein that he will be entitled to future interest on the decretal sum till payment of the sum on which the future interest is payable. Secondly, the duty of issuing sale proclamation is that of executing Court. Under O. 21, R. 66 (2) of the Code a sale proclamation must contain certain particulars, one of them being, vide Cl. (d), the amount for the recovery of which the sale is ordered. It is not unknown indeed it is almost the usual practice of judgment-debtors that objections are raised against execution at every stage. Often, it takes a considerably long time even to reach the stage of issuing the sale proclamation under O. 21, R. 66 of the Code. Even after the issue of the sale proclamation, the actual sale is not

very often allowed to be held on the date originally fixed. Therefore, in so far as the decree-holder is concerned, he really is not even in a position to ascertain and state the amount which will be due to him either on the date of the sale proclamation or on the date of sale itself. It cannot, therefore, be said that the decree-holder has failed or omitted to do something which is required of him by law either expressly or impliedly when he does not mention in the execution application that he would also be entitled to future interest after the date of execution application till full recovery of the whole sum realisable under the decree. Thirdly, satisfaction of a decree in full or in part, has to be according to the procedure and mode laid down in O. 21 of the Code. In a case where some amount recoverable under the decree remains unpaid, the judgment-debtor cannot disown his liability therefor unless he has taken necessary proceedings under O. 21, R. 2, of the Code and has obtained an appropriate order thereunder. If, according to the judgment-debtor, the decree in respect of future interest subsequent to the date of execution application has been satisfied or adjusted on account of waiver or relinquishment on the part of the decree-holder, the satisfaction or adjustment must be got certified under O. 21 R. 2 of the Code. Besides, on the facts of the present case, I have no doubt in my mind that there is nothing on the part of the decree-holder from which even a remote inference can be drawn that it waived or relinquished the claim for interest which was to accrue subsequent to the date of the execution application viz. 18-10-1960. The submission of the learned counsel, therefore, must be rejected.

12. Before passing on to the second submission of the learned counsel for the appellants reference may be made to some authorities cited by the learned counsel for the decree-holder respondent. It was submitted by him that apart from authorities on principle also the decree-holder's right to future interest cannot be said to be lost or destroyed or legally barred due to waiver or relinquishment. It was pointed out that the provisions of O. 2, R. 2 of the Code have been held to be not applicable to execution proceedings and that this would clearly indicate that it was never the intention of the law to bar the realisation of interest accruing due to the decree-holder after the filing of the first application by means of a second execution application. The law is settled that the provisions of O. 2, R. 2 do not apply to execution proceedings. It will be enough to mention in this connection the decision of the Privy Council in *Thakur Persad v. Fakir Ullah*, (1895) 22 Ind App 44 (PC).

13. Out of the many cases cited by the learned counsel for the respondents, notice need only be taken of a few. They are: *Basant Kumar v. Baikunthanath*, AIR 1932 Cal 555; *Ibrahim v. Firm of Ghulam Husain*, AIR 1921 Sind 13; *Balasubramania Chetty v. Swarnammal*, AIR 1915 Mad 811; *Upendra Nath Bose v. K. P. Dutta*, AIR 1926 Cal 1019 and *Lakshinarasimham v. Suryanarayana*, AIR 1948 Mad 248. Reliance was also placed on certain observations made in the case of AIR 1930 Cal 349, which I have already discussed earlier in my judgment.

14. In AIR 1932 Cal 555 (supra) it was held that a decree-holder, holding a decree with interest is entitled to interest calculated upto the date of sale although he only mentions in his application for execution the amount of interest upto the date of the application and does not specifically claim future interest upto the date of sale. Although, not directly in point, the decision supports the decree-holder's right to receive future interest after 18-10-1960 in the instant case.

15. In AIR 1915 Mad 811 it was observed by two learned Judges that there was nothing in the Code to prevent a decree-holder from presenting successive applications for realising portions of what he is entitled to under his decree. I am not prepared to accept the proposition so broadly put, because, as already mentioned, if the decree-holder is held to be entitled to split up the decree the result may be preposterous. That, however, does not mean that the decree holder would not be entitled to file a second or even, under certain circumstances, successive execution application to realise the amount or amounts accruing due to him after the previous application or applications.

16. In AIR 1921 Sind 13 (supra) the contention raised on behalf of the judgment-debtor against the maintainability of the second and separate application for execution for interest which had accrued due after the first execution application was repelled and it was held that neither the provisions of O. 2, R. 2 were applicable nor could the decree-holder properly claim such interest in his first application under O. 21, R. 11 of the Code.

17. In AIR 1926 Cal 1019 (supra) it was observed that the provisions of O. 2, R. 2 of the Code are not applicable to execution proceedings and, therefore, there was nothing to prevent successive applications for execution of a portion of the decree from being made although the Court might refuse to execute a portion of the decree when such an application was made on a previous occasion. For the reasons already noted above, I am unable to subscribe to this view in toto. Besides, the point also did not directly

arise. The question for decision in that case was in regard to the applicability of Art. 182 (5) of the Limitation Act, 1908.

18. Apart from the propositions propounded by the learned counsel for the parties and the cases cited by them, there is, to my mind, another strong reason why the contention of the learned counsel for the appellants cannot be accepted. This reason is furnished by the provisions of O. 21 of the Code itself. It has already been mentioned that a decree-holder seeking execution is required under R. 11 of O. 21 to furnish certain particulars. A duty, however, is cast upon the Court, itself to draw up the sale proclamation under R. 66 of O. 21 of the Code and under Cl. (d) of sub-rule (2) thereof to specify therein "the amount for the recovery of which the sale is ordered." The amount aforesaid ought to be, as held in AIR 1932 Cal 555 (supra) the amount as calculated upto the date of sale. Even after the sale has been held by or under the orders of the Court the judgment-debtor, if he so desires, can exercise the rights conferred on him under O. 21, R. 89 of the Code. He can within the time allowed by law deposit in the Court a sum equal to 5% of the purchase money for payment to the purchaser and the amount specified in the proclamation of sale for the recovery of which the sale was ordered for payment to the decree-holder; sub-rule (3) of R. 89 of O. 21 of the Code, however, specifically provides that the deposit on the making of which the sale is set aside shall not relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale. The aforesaid sub-rule (3) of R. 89 of O. 21 makes it abundantly clear that the liability for interest accruing due after the sale proclamation will subsist even though the entire amount mentioned in the sale proclamation has been deposited for payment to the decree-holder. This, to my mind, clearly shows that the decree still subsists and remains enforceable in so far as further interest is concerned, and the decree-holder is entitled to file a separate execution application for the recovery of such interest. Order 21, R. 89, in my opinion, also clearly negatives the contention that the decree-holder having filed an application for execution of the decree could not file the second application for execution to realise interest accruing due after the making of the original execution application. It also repeals the contention that the only remedy of the decree-holder would be to apply for the amendment of the original application to claim recovery of interest accruing due subsequently. Let us consider a case where the sale price of the property sold is just sufficient to cover the amount mentioned in the sale proclama-

tion for the recovery of which the sale was ordered. In such a case there will be nothing left by way of surplus from which the decree-holder can recover further amount subsequently accruing due to him on account of interest and the right to recover such subsequent interest, therefore, can be enforced only by one of the modes prescribed in the Code itself for the execution of the decree. If this be so, it must necessarily be held that the subsequent execution application is neither prohibited by law nor can it be said to be barred by any principle of waiver or relinquishment. I am, therefore, clearly of opinion that the decree-holder's right to claim further interest after the filing of the first execution application was not lost by waiver or relinquishment and that the second application for execution was legally maintainable.

19. The next point for consideration is as to whether the second application for execution was barred by principles of res judicata. Section 11 of the Code is not in terms applicable. This was also conceded by the learned counsel for the appellants. It was, however, contended by him that the principles of res judicata would be applicable and that it is now well settled that even in execution proceedings the principles of res judicata are applicable. The learned counsel for the decree-holder respondent also did not challenge the proposition that the principles of res judicata would in appropriate cases be applicable to execution proceedings as well. The question, however, is whether in the instant case, the second application can be said to be barred by the principles of res judicata.

20. In support of his submission that the second application for execution was barred by principles of res judicata, the learned counsel for the appellant referred to two applications made by the decree-holder in the proceedings arising out of first execution application and the orders passed on those applications. The first application (Paper No. 79-C) was filed on 31-7-1963 praying that Rs. 3873.87 p. be adjusted against the sale money and the decree-holder be permitted to deposit the balance of Rs. 1192.95p. This application was made by the decree-holder who happened to be the auction purchaser also. The sale price was Rs. 42,000/- whereas the amount for the recovery of which, as mentioned in the sale proclamation, the sale was held amounted to Rs. 35,244.18 p. Under the law an auction purchaser is required to deposit 25 per cent. of the purchase money immediately on being declared to be the purchaser and to deposit the balance within 15 days from the date of sale. An exception, however, has been provided when the decree-

holder himself has purchased the property and the law has given him a right to set off under Order XXI, Rule 72 (as amended in U.P.) and the proviso to Rule 83 of the Code. In the instant case, the decree-holder wanted to set off the amount which had become due to it till the date of sale. It was mentioned in the application that on account of further interest from 19-10-1960 to 22-7-1963 a sum of Rs 3873. 87 p had become due to it. This application was dismissed by the executing court by the following Order:—

"Ex-Appln. shows that interest is claimed only upto date of application. No prayer for execution for interest is made and so no adjustment to that effect is allowed. Let the full amount of balance due be deposited within the statutory period."

The decree-holder as required by the aforesaid order deposited the full amount after adjusting the sum of Rs. 35,244.18 p. Thereafter, the decree-holder filed another application (paper No. 81-C) on 29-8-1963 for amending the original execution application so as to include all future interest accruing after the date of the execution application. This application was also dismissed by the executing Court on 29-8-1963 by the following order:—

"This is a very old execution. Amendment is refused".

21. The contention of the learned counsel is that in view of the orders of the executing Court on the two aforesaid applications, the second application for execution subsequently filed by the decree-holder must be held to be barred by the principles of res judicata. I am unable to accept the contention of the learned counsel. Both these applications were summarily rejected. The two applications, in question, did not give rise to any issue between the decree-holder and the judgment-debtor, nor was any issue finally decided. The executing Court by accepting or disallowing the claim of the decree-holder to set off cannot destroy any rights accruing to the decree-holder under the decree. I am of opinion that such an order cannot operate as res judicata when a regular application for execution is subsequently filed if the making of such an application is not otherwise legally prohibited. It has already been mentioned that in so far as the express provisions of O. 21 of the Code are concerned, there is no bar to the making of further application or applications for execution for the recovery of the amount or amounts accruing due after the making of the first application. The rejection of the application (paper No. 79-C) in my opinion, did not involve the decision on any question of the executability of the decree for further interest

either directly or constructively. Therefore, the argument that the order passed on the application (paper No. 79-C) operates as res judicata cannot be accepted.

22. In regard to the order passed on the application (paper No. 81-C) dated 29-8-1963 also I am of opinion that if legally the second execution application was not prohibited then the order dated 29-8-1963 cannot be treated as res judicata. This application also did not give rise to any issue between the decree-holder and the judgment-debtors. Whether the execution application originally filed should or should not have been permitted to be amended might be a matter of judicial discretion of the executing Court but the rejection of the application, to my mind, cannot be accepted as destroying or barring the right which the decree-holder had under the decree itself. It has already been mentioned that under O. 21, R. 11 of the Code the decree-holder is required to furnish only those particulars as are mentioned therein. It has also been mentioned that it is settled law now that Order II, Rule 2 of the Code does not apply to execution proceedings. That being so, the subsequent application for execution cannot be held to be barred by res judicata because of the rejection of the application (paper No. 81-C).

23. In support of his contention that the subsequent application is barred by res judicata the learned counsel for the appellants referred to a number of decisions of the Supreme Court. In *Mohan Lal v. Benoy Krishna*, AIR 1953 SC 65 it was held that the principle of constructive res judicata is applicable to execution proceedings and that the question was no longer debatable. In that case the judgment-debtor himself did not raise certain objections which he could have legally raised in the course of execution proceedings before the sale was held. After the sale, the judgment-debtor in his objections under O. 21, R. 90 of the Code raised those objections. It was held that the objections were barred by the principles of res judicata. This decision, to my mind, is not applicable to the instant case at all. There the judgment-debtor himself did not raise certain objections which he was legally entitled to raise and could have raised before the sale. It was, therefore, held that since the judgment-debtor himself had permitted the sale to be held without raising certain objections it must be deemed that those objections were barred by principles of constructive res judicata.

24. In *Sailendra Narayan v. State of Orissa*, AIR 1956 SC 346, it was held that a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case. This

decision has no bearing on question raised in the instant case.

25. In *Moran Mar Basselios Catholicos v. Thukalan Paulo*, AIR 1959 SC 31 the point for decision was as to whether in a representative suit filed under O. 1. R. 8 of the Code by the trustees of a Church, the matter involved was barred by *res judicata* because of a previous decision in an inter-pleader suit in which the same question was directly and substantially in issue. This question was decided in the affirmative. In my opinion, this case also does not support the contention of the learned counsel. I have already mentioned that the application which had been filed and which was summarily dismissed did not directly or even constructively involve any dispute or any issue as such between the decree-holder and the judgment-debtor. The orders passed on the application cannot, therefore, be said to be even constructively a decision on any dispute or issue between the parties. I am therefore, clearly of opinion that the second contention of the learned counsel must also be rejected.

26. The learned counsel for the respondent also referred to a number of Supreme Court decisions, but in none of those cases the question involved in the present case was considered either directly or even by necessary implication. Further, since I have already come to the conclusion that the second submission of the learned counsel for the appellant founded on *res judicata* is without force, I do not think it will serve any useful purpose to refer to and discuss these cases.

27. The appeal, therefore, is dismissed. In the circumstances of the case, however, I direct the parties to bear their own costs of the appeal in this Court.

Appeal dismissed.

AIR 1970 ALLAHABAD 51 (V 57 C 8)

FULL BENCH

V. G. OAK C. J., W. BROOME,
MATHUR, B. D. GUPTA, GYANENDRA
KUMAR, M. H. BEG,
YASHODA NANDAN,
T. P. MUKERJEE AND
C. D. PAREKH JJ.

Rishi Kesh Singh and others, Appellants v. The State, Respondent.

Criminal Appeal No. 2567 of 1964, D/- 18-10-1968.

(A) Evidence Act (1872), Ss. 105, 3, 101-104 and 114 — Presumption under — Nature of — It only operates initially — Section 105 makes possible both kinds of acquittal one by proving plea fully and another by raising genuine doubt in the case — Line of reasoning in *Parbhoo's*

case, (AIR 1941 All 402 (FB)) Explained— Evidence as a whole (including evidence in support of general exception) creating reasonable doubt in the mind of Court as to guilt of accused — He is entitled to acquittal — Decision in *Parbhoo's* case, (AIR 1941 All 402 (FB)) is still good law — (Civil P. C. (1908), Pre. — Interpretation of Statutes) — (Evidence Act (1872), Preamble, Ss. 101-104 and 114) — (Evidence Act (1872), S. 3 'Proved', "Disproved" "Not proved") — (Words and Phrases — "Reasonable doubt" — "Preponderance of probability") — (Penal Code (1860), Ss. 6, 96, 76, Chapter IV (General) and S. 299).

Per Majority:—

(Broome, Mathur, Gupta, Parekh, Beg, Gyanendra Kumar and Yashoda Nandan, JJ.).

The Majority decision in *Parbhoo v. Emperor*, AIR 1941 All 402 (FB) is still good law. The accused person who pleads an exception is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception) a reasonable doubt is created in the mind of the Court about the guilt of the accused: AIR 1956 Nag 187 & AIR 1947 Bom 38 (SB) & AIR 1952 Sau 3 & AIR 1956 Sau 77 & AIR 1941 Mad 280 & AIR 1949 Nag 66 & AIR 1959 Madh Pra 203 & (1962) 2 Cri LJ 135 (Ker) held not good law in view of AIR 1964 SC 1563 & AIR 1955 Pat 209; AIR 1961 Pat 355, Commented upon. (Paras 93, 26, 162, 176)

Per Beg J.:—

It is true that, where provisions of the Act are clear and unambiguous, no recourse to extrinsic matter, even if it consists of the sources of the codification, would be permissible. But, the position is that it is not possible to fully bring out the meaning of Section 105 of the Evidence Act itself without reference to the principles found in the sources of the Act contained in English Law. At least, the aspect of Section 105 which was raised and considered in *Parbhoo's* case, AIR 1941 All 402 (FB) makes it necessary to go to those sources: AIR 1961 SC 493, Rel. on. (Para 119)

The concepts of 'proved', 'disproved', and 'not proved', compress a great deal of judicial wisdom with history and processes of evolution and development behind them which have not yet ended. The term 'Burden of proof' is not defined in the Act and cannot be fully understood without an exposition of its place and meaning in our procedural law as a whole. For an adequate understanding of the import of these basic concepts, Courts have to necessarily examine their sources, the context in which they were given statutory form, the purposes they were designed to serve, and the functions they actually fulfil. AIR 1965 SC 951 & AIR

1965 SC 871 & AIR 1964 SC 1230 & AIR 1958 SC 414, Foll. (Para 100)

The purpose of the Evidence Act was "to consolidate, define, and amend the law of Evidence" so that inadequacies and uncertainties in this branch of our law may be removed. It is no secret that this was sought to be accomplished by basing the Act on principles and rules evolved by the judge-made Anglo Saxon law of evidence with slight modifications but without departing from its basic norms. Therefore, to these principles and rules we have to turn to find out the meanings of ambiguous expressions. (Para 101)

Whenever the law places a burden of proof upon a party a presumption operates against it. Hence, burdens of proof and presumptions have to be considered together. When there is ample evidence from both sides, the fate of the case is no longer determined by presumptions or burdens of proof, but by a careful selection of the correct version, based, no doubt, on preponderance of probabilities which has to be so compulsive or overwhelming in the case of a choice in favour of a conviction as to remove all reasonable doubt. Burden of proof and presumption may become decisive again in cases where evidence is equally balanced. Thus, their function is decisive only in cases where there is paucity of evidence on either side or the evidence given by the two sides is equilibrated. Neither a burden of proof nor a rebuttable presumption can be used for excluding any evidence. That is not their function at all but of other provisions of law.

(Para 103)

In fact, it is not possible to appreciate the true meaning of a number of provisions of the Act, including Section 105, without exploring the law contained in the sources of the codification. If, however, the above mentioned expositions are kept in view, it becomes clear that the obligation of the Court to presume absence of circumstances supporting a plea is meant to operate only initially.

(Para 105)

If, for example, an accused "proves" inflection of injuries on him by the complainant in the course of the occurrence which is the subject-matter of the charge, he certainly proves some of the circumstances to support a plea of self-defence. The obligatory initial presumption against him is removed. Nevertheless, he may be convicted if the prosecution evidence proves that these injuries were indubitably caused in the exercise of a right of private defence by the complainant. But, his conviction would not be the result of any presumption under the last part of Section 105. It would follow from the superior proof given by the prosecution either direct or circumstantial or both. On the other hand, added to injuries on the

person of the accused, proved to have been caused by the complainant during the occurrence, the accused may succeed in proving, even from such circumstances as an attempt of the prosecution to conceal these injuries, that there is a doubt about the veracity of the prosecution version itself and that his plea of self-defence, although not positively established, may reasonably be true. In such a case, the prosecution could not use the presumption contained in the last part of Section 105 to secure a conviction. No doubt, the prosecution will fail, in such a case, because it has failed to prove its own case beyond reasonable doubt. But, the doubt it has failed to eliminate would have been induced by proved facts relied upon by the accused to establish the plea of an exception. The facts relied upon for proving an exception could not be automatically equated with facts disproved or disentitle the accused from getting the benefit of an exception simply because he could not fully prove, by a "preponderance of evidence", the exception pleaded. A plea taken but left in the region of "not proved" by the evidence on record may be enough, on a criminal charge, for a bare acquittal provided the doubt introduced by some proved facts and circumstances, displacing the initial obligatory presumption, is strong enough to reasonably shake the moral conviction of guilt of the accused on the charge levelled against him. This seems to be the line of reasoning underlying the majority view in Parbhoo's case, AIR 1941 All 402 (FB). It seems to be both practical and just. It accords with very firmly established principles of proof and burden of proof applicable to criminal trials in this country as well as with the provisions of the Act read as a whole. (Para 105)

Section 105 does not prevent the Court from giving the benefit of doubt altogether to an accused pleading an exception, or in other words, Section 105 makes possible both kinds of acquittal one by proving his plea fully and another by raising genuine doubt in the case. Section 105 of the Act was introduced not in order to depart from but to make our law conform to the norms of English Law of evidence on the subject. (Paras 109, 122)

Parbhoo's case was not meant to accord any guidance on what reasonable doubt itself means. The doubt which the law contemplates is certainly not that of a weak or unduly vacillating, capricious, indolent, drowsy, or confused mind. It must be the doubt of the prudent man who is assumed to possess the capacity to "separate the chaff from the grain". It is the doubt of a reasonable, astute, and alert mind arrived at after due application of mind to every relevant circumstance of the case appearing from the evidence. AIR 1937 Rangoon 83 (FB) & AIR 1941

Rangoon 175 & AIR 1965 All 417 & AIR 1967 All 204, Ref. (Para 112)

Section 105 serves the purpose sometimes served by a proviso. Of course, it could be looked upon as analogous to a proviso only if we view Section 6, I. P. C. and Section 105 of the Act together. It is certainly difficult to see the purpose of Section 105 of the Act unless it is viewed in the context of Section 6, I. P. C.

(Para 116)

Although, the exceptions contained in the Indian Penal Code, to which Section 105 of the Act refers, are contained in separate sections, yet, the result of Section 6 of the Indian Penal Code could well be said to be that the exceptions were engrafted in every definition of an offence as though they formed parts of each section defining an offence.

(Para 122)

While the process of balancing probabilities is common for all cases, the burdens of the parties to establish their respective cases in a criminal trial are really only two in kind; the higher one of the prosecution to establish its case beyond reasonable doubt and the lower one of the accused to prove his plea by a mere preponderance of probability. Neither should "preponderance of probability" be confounded with and reduced to the level of a reasonable doubt only, nor can the principle of reasonable doubt be eliminated altogether in a criminal trial. Each of the two kinds of conclusion—proof of an exception by a preponderance of probability and reasonable doubt about guilt—reflects a different situation. As soon as a Court finds one of these two types of conclusions to be the correct one to reach in a case the other is necessarily excluded.

(Para 127)

"Preponderance", literally interpreted, means nothing more than an outweighing in the process of balancing however slight may be the tilt of the balance or the preponderance. There are no sufficient grounds for holding that the word has been used in any other sense whenever it has been used. In fact, the dividing line between a case of mere "preponderance of probability" by a slight tilt only of the balance of probability and a case of reasonable doubt is very thin indeed although it is there. A case of reasonable doubt must necessarily be one in which, on a balancing of probabilities, two views are possible. Such a case and only such a case would, be one of reasonable doubt. A mere preponderance of probability in favour of the exception pleaded by an accused would, however, constitute a "complete" proof of the exception for the accused but a state of reasonable doubt would not. "Complete" proof for the prosecution cannot fall short of elimination of reasonable doubt about the ingredients of an offence. If one is clear about the

meaning of the terms used no misapprehensions need arise.

(Para 130)

Even a literal interpretation of the first part of Section 105 could indicate that "the burden of proving the existence of circumstances bringing the case within" an exception is meant to cover complete proof of the exception pleaded, by a preponderance of probability, as well as proof of circumstances showing that the exception may exist which will entitle the accused to the benefit of doubt on the ingredients of an offence. The last part of Section 105, even if strictly and literally interpreted, does not justify reading into it the meaning that the obligatory presumption must last until the accused's plea is fully established and not just till circumstances (i.e. not necessarily all) to support the plea are proved. Moreover, a restrictive interpretation of Section 105, excluding an accused from the benefit of bringing his case within an exception until he fully proves it, is ruled out by the declaration of law by the Supreme Court that there is no conflict between Section 105 and the prosecution's duty to prove its case beyond reasonable doubt. Hence, the obligatory presumption, at the end of Section 105, cannot be held to last until the accused proves his exception fully by a preponderance of probability. It is necessarily removed earlier or operates only initially as held clearly by judges taking the majority view in Parbhoo's case, AIR 1941 All 402 (FB).

(Para 153)

There is no reason why principles of public policy or consideration of consequences of taking a particular view should not affect the interpretation to be given to statutory provisions dealing with basic norms when two interpretations of a statutory provision are open. Acting in this manner would not be legislation. There is no reason why the principle of benefit of doubt deserves, either on grounds of public policy, or as a part of the concept of fair trial in a criminal case, to be given less recognition or force in this country. The meaning of our procedural or adjectival laws must, be determined in conformity with firmly established notions of a fair trial unless some statutory provision clearly sanctions a departure from these: (1936) 2 All ER 1138 & AIR 1966 SC 97 (102), Rel. on.

(Para 157)

In Parbhoo's case, AIR 1941 All 402 (FB) the majority of their Lordships did not lay down anything beyond three important propositions which, if not either directly or indirectly supported by decisions of their Lordships of the Supreme Court, have not been affected in the slightest degree by these decisions. These propositions are: firstly, that no evidence appearing in the case to support the ex-

ception pleaded by the accused can be excluded altogether from consideration on the ground that the accused has not proved his plea fully, secondly, that the obligatory presumption at the end of Section 105 is necessarily lifted at least when there is enough evidence on record to justify giving the benefit of doubt to the accused on the question whether he is guilty of the offence with which he is charged, and, thirdly, if the doubt, though raised due to evidence in support of the exception pleaded, is reasonable and affects an ingredient of the offence with which the accused is charged, the accused would be entitled to an acquittal.

(Para 160)

The practical result of the three propositions stated above is that an accused's plea of an exception may reach one of three not sharply demarcated stages, one succeeding the other, depending upon the effect of the whole evidence in the case judged by the standard of a prudent man weighing or balancing probabilities carefully. These stages are: firstly, a lifting of the initial obligatory presumption given at the end of Section 105; secondly, the creation of a reasonable doubt about the existence of an ingredient of the offence; and, thirdly, a complete proof of the exception by "a preponderance of probability", which covers even a slight tilt of the balance of probability in favour of the accused's plea. The accused is not entitled to an acquittal if his plea does not get beyond the first stage. At the second stage, he becomes entitled to acquittal by obtaining a bare benefit of doubt. At the third stage, he is undoubtedly entitled to an acquittal. This is the effect of the majority view in Parbhoo's case, AIR 1941 All 402 (FB) which directly relates to first two stages only. The Supreme Court decisions have considered the last two stages so far, but the first stage has not yet been dealt with directly or separately.

(Para 161)

The answer of the majority of Judges who decided Parbhoo v. Emperor, AIR 1941 All 402 (FB) is still good law. It means that in a case in which, in answer to a prima facie prosecution case, any general exception in the Penal Code is pleaded by an accused and evidence is adduced to support such a plea, but such evidence fails to satisfy the Court affirmatively that the accused has fully established his plea, he will still be entitled to an acquittal, provided that, after weighing the evidence as a whole prudently (including the evidence given in support of the plea of the said general exception), the Court reaches the conclusion that, as a consequence of the doubt arising about the existence of the exception, the prosecution has failed to discharge its onus of proving the guilt of the accused beyond reasonable doubt.

(Para 162)

Per Broome, Gupta, Parekh, JJ.:—

If the material put forward by accused to prove the exception is sufficient to show that the plea of private defence is more probable than the prosecution case, the plea will be taken as proved and the accused will be entitled to acquittal on the ground that he has discharged the onus laid on him by Section 105 of the Evidence Act. Alternatively, if this material (read in conjunction with the other evidence on record) is found to create a reasonable doubt in the mind of the Court regarding something (e.g. mens rea in majority of cases) that is required to be proved by the prosecution in order to establish the accused's guilt, the accused will be entitled to acquittal on the ground that the prosecution has failed to discharge the primary burden that lies on it in all criminal cases. A person who inflicts harm in a lawful manner in order to protect his person or property is clearly devoid of mens rea; and if the material relied upon by the accused creates a doubt as to whether he acted in exercise of the right of private defence, a doubt will simultaneously arise as to whether he had the mens rea that must be proved in order to make his act a punishable offence. In such circumstances he will have to be given the benefit of the doubt regarding this essential pre-requisite of the prosecution case and will be entitled to acquittal.

(Para 23)

Although the dictum in Parbhoo's case, AIR 1941 All 402 (FB) may be said to be somewhat unhappily worded, it is fundamentally correct and calls for no amendment.

(Para 26)

Per Gyanendra Kumar and Yashoda Nandan, JJ.:—

The dictum of the majority of learned Judges of this Court in Parbhoo v. Emperor, AIR 1941 All 402 (FB) is still good law. But, it may be elucidated that in a case in which any general Exception in the Penal Code is pleaded by an accused and evidence is adduced to support such a plea, but such evidence fails to satisfy the Court affirmatively that the accused has fully established his plea of the claimed Exception, he will still be entitled to an acquittal if, upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the said general Exception), a reasonable consequential doubt is created in the mind of the Court as to whether the accused is really guilty of the offence with which he is charged.

(Para 176)

Per Mathur, J.:—

The doctrine of the burden of proof and the nature of evidence necessary to discharge this burden, in cases where the accused claims the benefit of the general exceptions in the Penal Code or of any special exception or proviso contained in

any other part of the same Code, or in any other law, can be stated as below:—

1. The case shall fall in one of the three categories depending upon the wording of the enactment:—

- (i) The statute places the burden of proof of all or some of the ingredients of the offence on the accused himself;
- (ii) the special burden placed on the accused does not touch the ingredients of the offence but only the protection given on the assumption of the proof of the said ingredients; and
- (iii) the special burden relates to an exception, some of the many circumstances required to attract the exception, if proved, affecting the proof of all or some of the ingredients of the offence.

2. In the first two categories the onus lies upon the accused to discharge the special burden, and on failure he can be convicted of the offence provided that the prosecution has succeeded to discharge its general burden of proof, that is, to establish the case beyond any reasonable doubt.

3. In cases falling under the third category inability to discharge the burden of proof shall not, in each and every case, automatically result in the conviction of the accused. The Court shall still have to see how the facts proved affect the proof of the ingredients of the offence. In other words, if on consideration of the total evidence on record a reasonable doubt exists in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused, he shall be entitled to its benefit and hence to acquittal of the main offence even though he had not been in a position to prove the circumstances to bring his case within the exception. This shall be on the ground that the general burden of proof resting on the prosecution was not discharged.

4. The burden of proof on the prosecution to establish its case rests from the beginning to the end of the trial and it must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea.

5. The burden placed on the accused is not so onerous as on the prosecution. The prosecution has to prove its case beyond reasonable doubt, but in determining whether the accused has been successful in discharging the onus, the Court shall look into the preponderance of probabilities in the same manner as in a civil proceeding. In other words, the Court shall have to see whether a prudent man would, in the circumstances of the case, act on the supposition that the case falls within the exception or proviso as pleaded by the accused. (Para 92)

The dictum laid down in Parbhoo v. Emperor, AIR 1941 All 402 (FB) is partly erroneous and requires modification, though the decision, read as a whole is in conformity with the law. The dictum can be modified as below:—

In a case in which any General Exception in the Penal Code, or any special exception contained in another part of the same Code, or in any law defining the offence, is pleaded or raised by an accused person and the evidence led in support of such plea, judged by the test of the preponderance of probability, as in a civil proceeding, fails to displace the presumption arising from Section 105 of the Evidence Act, in other words, to disprove the absence of circumstances bringing the case within the said exception; but upon a consideration of the evidence as whole, including the evidence given in support of the plea based on the said exception or proviso, a reasonable doubt is created in the mind of the Court, as regards one or more of the ingredients of the offence, the accused person shall be entitled to the benefit of the reasonable doubt as to his guilt and hence to acquittal of the said offence: Case law discussed.

(Para 93)

Per Minority (Oak C. J. and Mukerjee, J.):—

The statement of law in Parbhoo's case, (AIR 1941 All 402 (FB)) is not accurate and needs modification: Case Law Ref.

Per Oak C. J.:—

The proposition of law laid down in Parbhoo v. Emperor, AIR 1941 All 402 (FB) has been too broadly stated, and needs qualification. The true legal position is this. Whenever an accused person raises a plea based on some general exception, the burden of proof lies upon him under Section 105. That burden has to be discharged by preponderance of probabilities. So far as the accused is concerned, the standard of proof is the same as the standard of proof for a plaintiff or a defendant in Civil proceedings. The accused cannot always secure an acquittal by merely creating a reasonable doubt in the mind of the Court as to whether the accused person is entitled to the benefit of the exception or not. If the nature of the case is such that a reasonable doubt arises as regards some ingredient of the offences, the accused is entitled to an acquittal. In other cases, a reasonable doubt as regards certain exception will not entitle the accused to an acquittal.

(Para 21)

It is settled law that when the burden of proof lies upon an accused person under Section 105, that burden can be discharged by showing preponderance of probabilities: AIR 1957 SC 469 (474) and AIR 1958 SC 61 and AIR 1960 SC 7 and AIR 1962 SC 605 and AIR 1966 SC 1 and AIR 1966 SC 97 and AIR 1968 SC 702

(703). Rel. on; AIR 1943 PC 211 and AIR 1964 SC 575, Ref. This position is inconsistent with the stand taken by the majority of the Full Bench in Parbhoo's case, AIR 1941 All 402 (FB) that it is sufficient for purposes of defence that the accused should create a reasonable doubt in the mind of the Court whether the accused person is entitled to the benefit of the exception or not. Preponderance of probabilities implies balance of evidence. In order to succeed, the accused must make out balance of evidence in his favour. The Court may entertain a reasonable doubt even if the balance of evidence is in favour of the prosecution. So, creating reasonable doubt cannot be equated with proof by preponderance of probabilities.

(Para 13)

Although a reasonable doubt arising under an exception may not secure an acquittal as a matter of course, in some cases the accused can secure an acquittal indirectly. There may be cases where, although the exception has not been proved, the evidence on record creates a doubt as regards some element which is an ingredient of the offence. Suppose, the accused is charged with an offence involving a certain intention or a certain object as an ingredient. It may happen that, as a result of the attempt of the accused to establish a particular exception, he succeeds in shaking the prosecution case as regards the necessary intention or object which is an ingredient of the offence. In such a case the accused will have to be acquitted. The reason of acquittal will be, not proof of the exception but failure of the prosecution to prove a necessary ingredient of the offence: AIR 1964 SC 1563 (1567) and AIR 1966 SC 1 (3), Rel. on.

(Para 15)

The majority in Parbhoo's case, AIR 1941 All 402 (FB) was not right in assuming that the accused has to be acquitted whenever the Court entertains a reasonable doubt as to whether the accused is entitled to the benefit of a certain exception or not. It all depends on the circumstances of each case. If the prosecution case is damaged as regards some ingredient of the offence, the accused will be acquitted. But if all the ingredients of the offence are established, the accused has to be convicted.

(Para 19)

Per Mukerjee, J.:-

Clearly the incidence of the burden of proving an exception under Section 105 is on the accused person. The crucial question for determination is how the burden may be rebutted by the accused. Section 105 says that the Court shall presume the non-existence of circumstances bringing the case within the exception proved until "disproved". In view of the categorical terms of the definition of the word "disproved" as given in Section 3 of

the Evidence Act, it is manifest that the accused person cannot succeed by merely creating a reasonable doubt in the mind of the Court as to whether he is or is not entitled to the benefit of the said exception. A presumption of law cannot be successfully rebutted by merely raising a doubt, however reasonable. Something more than raising a reasonable doubt is required for rebutting a presumption of law and it is necessary for the accused to show that his explanation is so probable that a prudent man ought, in the circumstances, to accept it: AIR 1962 SC 605, Ref. (Para 165)

The burden on an accused person being the same as the burden on a party in a civil proceeding, it follows that if the balance of probabilities supports the plea of exception the burden on the accused person is discharged, but if the Court is left in a state of reasonable doubt as to whether the accused person is or is not entitled to the benefit of the said exception, it would be a case where the probabilities are equal and the plea would fail.

(Para 167)

If, however, the nature of the case is such that, on the totality of evidence, a reasonable doubt arises as regards some ingredient of the offence, the accused person is entitled to an acquittal, in other cases, a reasonable doubt as regards the exception claimed will not entitle him to an acquittal: AIR 1968 SC 97 and (1947) 2 All E. R. 372, Ref.

(Para 168)

(B) Constitution of India, Article 141 — In face of Supreme Court decision, it is not necessary to make comments on English decisions — (Civil P. C. (1908), Preamble — Precedents).

Per Mathur J.:-

Where there exist clear decisions of the Supreme Court, it is not necessary to make comments on the English decisions or the decisions of the High Courts in India, for the simple reason that the law laid down by the Supreme Court is binding on all within the territory of India. (Para 31)

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P. C. Chaturvedi, U. S. M. Tripathi, for	
Appellants; A. G. A., S. P. Srivastava, for	
Respondent.	
OAK, C. J.: The question before the	
Full Bench is :	
"Whether the dictum of this Court in	
the case of Parbhoo v. Emperor, 1941 All	
LJ 619 = (AIR 1941 All 402) (FB) to the	
effect that the accused who puts forward	

a plea based on a general exception in the Indian Penal Code is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea based on such a general exception) a reasonable doubt is created in the mind of the Court whether the accused person is entitled to the benefit of the said exception is still good law".

2. I have read the judgment prepared by my learned brother Mathur, J. In my opinion, the statement of law in Parbhoo's case, 1941 All LJ 619 = (AIR 1941 All 402) (FB) is not accurate, and needs qualification.

Section 105, Indian Evidence Act, states :

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances"

Mr P. C. Chaturvedi, appearing for the appellants conceded that when an accused pleads an exception in the Indian Penal Code, the burden of proof lies upon him. Parties are not agreed as to the manner in which the burden may be discharged. One can conceive three different modes: (1) by proving the exception beyond all reasonable doubt; (2) by proof through preponderance of probabilities; and (3) by creating a reasonable doubt in the mind of the Court. According to the learned Advocate-General, the second mode is the correct solution. According to Mr. Chaturvedi, the third mode is the correct method. It is well settled that when burden of proof lies upon an accused person, he need not prove his case beyond all reasonable doubt. We may therefore, confine our attention to the second and the third alternatives.

3. According to Section 3 of the Evidence Act, a fact is said to be proved when, after considering the matters before it, the Court believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. It will be seen that a fact may be said to be proved under one of the two possible situations. Either the Court believes that the fact exists, or the Court considers existence of the fact probable. There is no indication in Section 3 of the Evidence Act that a fact can be said to be proved, even when the Court entertains a reasonable doubt as to whether the fact exists or not.

4 Mr. P. C. Chaturvedi contended that unless an accused person is given the benefit of reasonable doubt on an exception, there will be miscarriage of justice in many cases. Suppose two persons, A and B quarrel at a lonely place, and cause injuries to each other. They are both prosecuted in two cross-cases. In neither case will the accused be able to produce an independent witness to prove that he was the victim of an assault by his opponent. The plea of private defence will fail in each case. The result will be that each case will end in conviction. In most of such cases the accused in one case ought to be acquitted. The same difficulty will arise, when an accused pleads the right of private defence of property, but is unable to collect reliable evidence in support of his plea.

5. I think, such cases would be rare. In most cases the accused person is in a position to substantiate the plea of private defence. If the question is whether the complainant or the accused was in possession over a field in dispute, the accused is generally in a position to establish his plea by producing local residents and village papers in his support.

6. In *Jumman v. State of Punjab*, AIR 1957 SC 469, it was observed on p. 474: "In such a case where a mutual conflict develops and there is no reliable and acceptable evidence as to how it started and as to who was the aggressor, would it be correct to assume private defence for both sides? We are of the view that such a situation does not permit of the plea of private defence on either side and would be a case of sudden fight and conflict and has to be dealt with under Section 300, I. P. C., Exception 4."

Chapter IV of the Indian Penal Code deals with general exceptions. The right of private defence has been mentioned in Sec. 96 under Chapter IV of the Indian Penal Code. Insanity has been mentioned in Section 84, I. P. C. Under the Indian Law, a plea of insanity and a plea of private defence stand on the same footing. Under the English law, a plea of insanity is treated on the same footing as a statutory exception. It appears that under the English law, a plea of private defence is not treated on the same footing as a plea of insanity or a statutory exception. That makes the task of an accused pleading private defence comparatively easy. If it is considered that the law in India should be brought in line with the English law, Section 96 can be deleted from the Indian Penal Code.

7. In *State of Madras v. Vaidyanatha Iyer*, AIR 1958 SC 61, the Court was dealing with a case under the Prevention of Corruption Act. The High Court of Madras observed in its judgment thus:

"In any case, the evidence is not enough to show that the explanation of-

fered by the accused cannot reasonably be true, and so the benefit of doubt must go to him".

This observation of the High Court was not approved by the Supreme Court. The Supreme Court remarked that the approach of the High Court indicates a disregard of the presumption which the law requires to be raised under Section 4 of the Act.

8. *C. S. D. Swami v. The State*, AIR 1960 SC 7, was also a case under the Prevention of Corruption Act. It was held that after the conditions laid down in the earlier part of sub-section (3) of Sec. 5 of the Act have been fulfilled by evidence to the satisfaction of the Court, the Court has got to raise the presumption that the accused is guilty of criminal misconduct in the discharge of his official duties, and this presumption continues to hold the field unless the contrary is proved, that is to say, unless the Court is satisfied that the statutory presumption has been rebutted by cogent evidence.

9. In *K. M. Nanavati v. State of Maharashtra*, AIR 1962 SC 605, Subba Rao J. observed on page 617:

"The alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under Sec. 105 of the Evidence Act is more imaginary than real. Indeed, there is no conflict at all. There may arise three different situations: (1) A statute may throw the burden of proof of all or some of the ingredients of an offence on the accused.....(2) The special burden may not touch the ingredients of the offence, but only the protection given on the assumption of the proof of the said ingredients... ..(3) It may relate to an exception, some of the many circumstances required to attract the exception if proved affecting the proof of all or some of the ingredients of the offence..... In the second case, the burden of bringing the case under the exception lies on the accused.....the general burden to prove the ingredients of the offence, unless there is a specific statute to the contrary, is always on the prosecution, but the burden to prove the circumstances coming under the exceptions lies upon the accused. The failure on the part of the accused to establish all the circumstances bringing his case under the exception does not absolve the prosecution to prove the ingredients of the offence; indeed, the evidence, though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence."

10. In *Bhikari v. State of U. P.*, AIR 1966 SC 1, the Court quoted with approval the following passage from *Dahya-*

bhai v. State of Gujarat, AIR 1964 SC 1563:

"The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions.

(1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.

(2) There is a rebuttable presumption that the accused was not insane, when he committed the crime.....the accused may rebut it by placing before the Court all the relevant evidence oral, documentary or circumstantial but the burden of proof upon him is no higher than that rests upon a party to civil proceedings....."

11. In Harbhajan Singh v. State of Punjab, AIR 1966 SC 97, it was observed on page 101:

"Where the burden of an issue lies upon the accused he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That, no doubt, is the test prescribed while deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but that is not a test which can be applied to an accused person who seeks to prove substantially his claim that his case falls under an Exception. Where an accused person is called upon to prove that his case falls under an Exception, law treats the onus as discharged if the accused person succeeds 'in proving a preponderance of probability'."

Similarly, in V. D. Jhingan v. State of U. P., AIR 1966 SC 1762 it was observed on page 1764:

"It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability."

12. Likewise, in Munshi Ram v. Delhi Administration, AIR 1968 SC 702, it was observed on page 703:

"It is well settled that even if an accused does not plead self-defence it is open to the Court to consider such a plea if the same arises from the material on record..... The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record."

It is to be noted that in Munish Ram's case, AIR 1968 SC 702 the accused raised the plea of private defence. So, the decision of the Supreme Court in Munshi

Ram's case, AIR 1968 SC 702 is directly applicable to the present case.

13. It will be seen that it is settled law that when the burden of proof lies upon an accused person under Section 105, Indian Evidence Act, that burden can be discharged by showing preponderance of probabilities. This position is inconsistent with the stand taken by the majority of the Full Bench in Parbhoo's case, 1941 All LJ 619 = (AIR 1941 All 402) (FB) that it is sufficient for purposes of defence that the accused should create a reasonable doubt in the mind of the Court whether the accused person is entitled to the benefit of the exception or not, preponderance of probabilities implies balance of evidence. In order to succeed, the accused must make out balance of evidence in his favour. The Court may entertain a reasonable doubt even if the balance of evidence is in favour of the prosecution. So, creating reasonable doubt cannot be equated with proof by preponderance of probabilities.

14. Mr. P. C. Chaturvedi contended that under Section 105, Indian Evidence Act, the position of the accused is the same as that of an accused in a prosecution under Section 411, I. P. C. read with Section 114, Indian Evidence Act. Reliance was placed on Otto George Gfeller v. The King, AIR 1943 PC 211. In Dhanvantari v. State of Maharashtra, AIR 1964 SC 575 it was explained that the position of the accused under Section 105, Indian Evidence Act is not the same as that of an accused in a prosecution under Sec. 411, I. P. C. It was explained on pages 579 and 580:—

"That, however, was a case where the question before the jury was whether a presumption of the kind which in India may be raised under Section 114 of the Evidence Act could be raised from the fact of possession of goods recently stolen, that the possessor of the goods was either a thief or receiver of stolen property. In the case before us, however, the presumption arises not under Section 114 of the Evidence Act but under Section 4 (1) of the Prevention of Corruption Act. the Court has no choice in the matter, once it is established that the accused person has received a sum of money which was not due to him as a legal remuneration. The burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under Section 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one."

This passage shows that for purposes of Section 105, Indian Evidence Act, it is not sufficient for the defence to make out that

the explanation offered by the accused is plausible. The accused has to make out his case affirmatively.

15. Although a reasonable doubt arising under an exception may not secure an acquittal as a matter of course, in some cases the accused can secure an acquittal indirectly. There may be cases where, although the exception has not been proved, the evidence on record creates a doubt as regards some element which is an ingredient of the offence. Suppose, the accused is charged with an offence involving a certain intention or a certain object as an ingredient. It may happen that, as a result of the attempt of the accused to establish a particular exception, he succeeds in shaking the prosecution case as regards the necessary intention or object which is an ingredient of the offence. In such a case the accused will have to be acquitted. The reason of acquittal will be, not proof of the exception but failure of the prosecution to prove a necessary ingredient of the offence.

16. In AIR 1964 SC 1563, it was observed on page 1567:—

"The evidence so placed may not be sufficient to discharge the burden under Section 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the judge whether the accused had the requisite intention laid down in Section 229 of the Indian Penal Code."

It was further observed on page 1568:—

"Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged."

17. In AIR 1966 SC 1 it was observed on page 3:—

"If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused he would be entitled to be acquitted."

Mr. P. C. Chaturvedi contended that exceptions are ingredients of every offence. For this contention, he relied upon Section 6 of the Penal Code. Section 6. I. P. C. states:—

"Throughout this Code every definition of an offence, every penal provision and

every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the chapter entitled 'General Exceptions,' though those exceptions are not repeated in such definition, penal provision or illustration."

Section 6, I. P. C. is merely a device to avoid quoting lengthy exceptions in description of offences. Strictly speaking, an exception cannot be treated as an ingredient of an offence. Further, Section 105 of the Evidence Act expressly lays down that the Court shall presume absence of circumstances bringing a case within any of the general exceptions in the Indian Penal Code. So, assuming that exceptions constitute ingredients of offences, the Court is bound to start with a presumption that circumstances bringing the case under any general exception do not exist. Consequently, the question whether exceptions constitute ingredients of offences or not is merely of academic interest.

18. Creating a reasonable doubt under an exception may not always enable the accused to secure an acquittal. Suppose the accused is charged under Section 325, I. P. C. It is proved that the accused voluntarily caused grievous hurt to the complainant. The incident took place in a certain field. The accused pleads that he was in possession of the field, and acted in the right of private defence of property. Although the accused produces some evidence, the plea of private defence is not made out. The evidence is of such a character that the Court entertains a reasonable doubt as to whether the complainant or the accused was in possession. In such a case the position would be this. On the one hand, it is proved that the accused voluntarily caused grievous hurt to the complainant. On the other hand, the accused failed to establish his plea of private defence. In such a case the accused has to be convicted under Sec. 325, I. P. C. Reasonable doubt on one part of the case is of no avail.

19. It will be seen that the majority in Prabhoo's case 1941 All LJ 619 = (AIR 1941 All 402) (FB) was not right in assuming that the accused has to be acquitted whenever the Court entertains a reasonable doubt as to whether the accused is entitled to the benefit of a certain exception or not. It all depends on the circumstances of each case. If the prosecution case is damaged as regards some ingredient of the offence the accused will be acquitted. But if all the ingredients of the offence are established, the accused has to be convicted.

20. It may be that law as explained above causes miscarriage of justice in some cases. But Courts have no power to alter statute law. The position indicated above is the combined effect of

Chapter IV of the Indian Penal Code, Section 3 of the Evidence Act and Section 105 of the Evidence Act. If it is considered that the present legal position is unsatisfactory, it is open to Parliament and State Legislatures to make the necessary amendments in the Indian Penal Code and the Indian Evidence Act.

21. In my opinion, the proposition of law laid down in 1941 All LJ 619 = AIR 1941 All 402 (FB) has been too broadly stated and needs qualification. The true legal position is this. Whenever an accused person raises a plea based on some general exception, the burden of proof lies upon him under Section 105, Indian Evidence Act. That burden has to be discharged by preponderance of probabilities. So far as the accused is concerned, the standard of proof is the same as the standard of proof for a plaintiff or a defendant in civil proceedings. The accused cannot always secure an acquittal by merely creating a reasonable doubt in the mind of the Court as to whether the accused person is entitled to the benefit of the exception or not. If the nature of the case is such that a reasonable doubt arises as regards some ingredient of the offence, the accused is entitled to an acquittal. In other cases, a reasonable doubt as regards a certain exception will not entitle the accused to an acquittal.

BROOME, GUPTA & PAREKH, JJ.

22. We are in general agreement with the conclusions arrived at by Mathur, J. In this case (except that we would prefer to say that the Full Bench pronouncement in Parbhoo's case calls for elucidation rather than amendment). He has discussed the problem at considerable length and we do not consider it necessary to repeat the reasoning followed by him or his discussion of the case law. We would like, however, to add a few words of our own so as to leave no room for doubt as to our views regarding cases where the right of private defence is pleaded under Section 96, I. P. C.

23. An accused person who puts forward the plea of private defence will seek to prove it from the material on record, consisting of defence evidence, oral or documentary, and admissions elicited from the prosecution; and he can derive advantage from such material in two ways. In the first place, if this material is sufficient to show that the plea of private defence is more probable than the prosecution case, the plea will be taken as proved and the accused will be entitled to acquittal on the ground that he has discharged the onus laid on him by Section 105 of the Evidence Act. Alternatively, if this material (read in conjunction with the other evidence on record) is found to create a reasonable doubt in the mind of the court regard-

ing something that is required to be proved by the prosecution in order to establish the accused's guilt, the accused will be entitled to acquittal on the ground that the prosecution has failed to discharge the primary burden that lies on it in all criminal cases. In the vast majority of offences, mens rea is one of the essentials that the prosecution has to establish before the crime can be said to be proved; and a reasonable doubt as to whether mens rea is present or not must inevitably lead to acquittal. A person who inflicts harm in a lawful manner in order to protect his person or property is clearly devoid of mens rea; and if the material relied upon by the accused creates a doubt as to whether he acted in exercise of the right of private defence, a doubt will simultaneously arise as to whether he had the mens rea that must be proved in order to make his act a punishable offence. In such circumstances he will have to be given the benefit of the doubt regarding this essential prerequisite of the prosecution case and will be entitled to acquittal.

24. Oak C. J. in his separate judgment, has considered a case in which an accused who has caused grievous hurt to the complainant in a dispute over a field pleads that he was in possession of the field and that he acted in private defence of his property, and the evidence produced, though insufficient to prove the plea, is enough to create a reasonable doubt as to which of the parties was actually in possession. In such a case, according to Oak C. J., the accused must be convicted. With this view, however, we most respectfully but emphatically disagree. If the Court were to find, in a case of that nature, that the evidence gave rise to a reasonable doubt as to whether the disputed field was in the possession of the complainant or of the accused at the time of the incident, a simultaneous doubt would arise as to whether the accused had the necessary mens rea to make him guilty of the offence of grievous hurt; and in such circumstances the accused would in our opinion have to be acquitted on the ground that the prosecution had failed to prove beyond reasonable doubt an essential part of its case.

25. This, in our opinion, is precisely what the decision in 1941 All LJ 619 = AIR 1941 All 402 (FB) was meant to convey. The judgments of all the four Judges supporting the majority view in that case lay stress on the overriding need for the prosecution to discharge the burden of proving the accused guilty of the crime. Iqbal Ahmad C. J. remarked.—

"In cases falling within the purview of Section 105, the law placed on the accused the minor burden of bringing his case within the exception or proviso relied upon by him. There is however, nothing

in the Evidence Act to indicate that the failure of the accused to discharge the burden lightens the burden placed on the prosecution by Section 102."

And Bajpai J. observed:—

"It is open to the Court to consider whether the entire evidence proves to the satisfaction of the Court that the accused is entitled to the benefit of the exception and the charge levelled against him has not been established or that there is a reasonable doubt as to the guilt of the accused, and in both cases the accused would be entitled to an acquittal."

And further:—

"If there is such doubt (i.e. as to the plea of the right of private defence), has not a doubt been cast in connexion with the entire case and if that is so, is not the accused entitled to an acquittal? I think he is, and that is so because of the constant immutable primal burden resting on the prosecution."

Ismail J. also observed:—

"The decision on the question of self defence will be only a decision upon one of the issues in the case. The Court at the end of the trial has still to see whether having regard to the entire evidence and the circumstances of the case, the charge is proved beyond reasonable doubt."

And finally Mulla, J. held:—

"There is nothing in the language of Section 105 to warrant the conclusion that the law intended such a result and for that purpose enacted Section 105, Evidence Act, in order to curtail the fundamental right of the accused to claim an acquittal if there is any reasonable doubt about his guilt."

26. We are fully satisfied, therefore, that although the dictum in Parbhoo's case may be said to be somewhat unhappily worded, it is fundamentally correct and calls for no amendment. When the learned Judges who decided that case stated that "the accused person is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the said general exception), a reasonable doubt is created in the mind of the Court whether the accused person is or is not entitled to the benefit of the said exception", they had in mind the doubt that may arise, on a consideration of the entire evidence (both prosecution and defence), with regard to the discharge of the primary burden resting on the prosecution to prove the guilt of the accused. That guilt can only be established if the prosecution is able to prove beyond reasonable doubt all the essentials that go to make up the offence, including the fundamental requirement of mens rea. As already pointed out, a doubt regarding the existence of mens rea must necessarily

arise whenever there is a doubt in the mind of the Court as to whether the accused is entitled to the benefit of a general exception such as the right of private defence. Viewed in this light, the dictum of the Full Bench in Parbhoo's case is perfectly sound and requires no modification.

27. Our reply to the question that has been referred to the present Full Bench for decision, therefore, is in the affirmative.

MATHUR J.:—

28. The question referred to this Full Bench is as below:—

"Whether the dictum of this Court in the case of 1941 All LJ 619 = AIR 1941 All 402 (FB) to the effect that the accused who puts forward a plea based on a general exception in the Indian Penal Code is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea based on such a general exception) a reasonable doubt is created in the mind of the Court whether the accused person is entitled to the benefit of the said exception is still good law."

29. The material facts of the case are that Rishi Kesh Singh and eight others were tried for offences punishable under Sections 147 or 148 and 323, 324, 325 and 307, I. P. C., read with Section 149, I. P. C. for forming an unlawful assembly with the common object to cause injuries to Sudarshan Singh, Jai Govind Singh and Hirdanand Singh and for causing injuries to them. Some of the accused persons took the plea that they had caused the injuries in the right of private defence of their property and person. The Sessions Judge did not accept this plea and convicted the accused persons of the various offences detailed above. They preferred an appeal which came up for hearing before Asthana, J. The appellants relied upon the Full Bench decision of this Court in the case of AIR 1941 All 402 = 1941 All LJ 619 (FB), and contended that they were entitled to the benefit of the Exception pleaded even though the Exception was not proved, and only a reasonable doubt was created in the mind of the Court. The Government Advocate, however, urged that dictum laid down in the majority judgment was, in view of the Supreme Court decisions, no longer a good law, and that the existence of a reasonable doubt could be no ground to give the accused persons the benefit of the Exception. The question being of importance, Asthana, J., after framing the question referred the matter to a larger Bench. This reference came up for hearing before Uniyal and Capoor, JJ., who were of opinion that the decisions of the Supreme Court "appear to have cast a cloud of doubt on the rule of law laid down in the majority decision" in the above case and

the aforesaid decision required reconsideration. They slightly modified the question and referred it to a larger Bench for consideration. The question as modified by Uniyal and Kapoor, JJ. has already been reproduced above.

30. At the very outset it may be observed that all the questions involved or which can be said to be in issue pertaining to the scope and effect of Section 105 of the Evidence Act in criminal trials are concluded by the decisions of the Supreme Court, though in different circumstances. General Exceptions pleaded in those cases were under Ss 80 and 84, I. P. C., that is, accident and insanity. One case refers to the Exception to Section 499, I. P. C. (Defamation). The other two cases relate to the statutory presumption under the Prevention of Corruption Act, 1947. The main point for consideration is whether the rule laid down in those Supreme Court decisions applies with equal force to all the General Exceptions and the special Exception or proviso contained in the Indian Penal Code. The case of Parbhoo and others AIR 1941 All 402 = 1941 All LJ 619 (FB) related to the right of private defence (Section 96, I. P. C.) and a similar plea was raised in defence in the instant case. We shall, therefore, confine ourselves chiefly to this General Exception though reference shall be made to other Exceptions, if necessary. An attempt shall be made to lay down the law which can be applied to all the cases in which the benefit of the General Exception or special Exception or proviso is claimed.

31. Where there exist clear decisions of the Supreme Court, it is not necessary to make comments on the English decisions, or the decisions of the High Courts in India, for the simple reason that the law laid down by the Supreme Court is binding on all within the territory of India. However, we shall make reference to the various reported cases brought to our notice making comments wherever necessary.

32. AIR 1962 SC 605 is the leading case on the scope and effect of Section 105 of the Evidence Act. It will save time by reproducing in extenso the observations made therein, which are as below:

"The legal impact of the said provisions on the question of burden of proof may be stated thus: In India, as it is in England, there is a presumption of innocence in favour of the accused as a general rule, and it is the duty of the prosecution to prove the guilt of the accused; to put it in other words, the accused is presumed to be innocent until his guilt is established by the prosecution. But when an accused relies upon the General Exceptions in the Indian Penal Code or on any special exception or proviso contained in any other part of the Penal

Code, or in any law defining an offence, Section 105 of the Evidence Act raises a presumption against the accused and also throws a burden on him to rebut the said presumption. Under that section the Court shall presume the absence of circumstances bringing the case within any of the exceptions, that is, the Court shall regard the non-existence of such circumstances as proved till they are disproved. An illustration based on the facts of the present case may bring out the meaning of the said provision. The prosecution alleges that the accused intentionally shot the deceased; but the accused pleads that, though the shots emanated from his revolver and hit the deceased, it was by accident, that is, the shots went off the revolver in the course of a struggle in the circumstances mentioned in Section 80 of the Indian Penal Code and hit the deceased resulting in his death. The Court then shall presume the absence of circumstances bringing the case within the provisions of Section 80 of the Indian Penal Code, that is, it shall presume that the shooting was not by accident, and that the other circumstances bringing the case within the exception did not exist; but this presumption may be rebutted by the accused by adducing evidence to support his plea of accident in the circumstances mentioned therein. This presumption may also be rebutted by admissions made or circumstances elicited by the evidence led by the prosecution or by the combined effect of such circumstances and the evidence adduced by the accused. But the section does not in any way affect the burden that lies on the prosecution to prove all the ingredients of the offence with which the accused is charged: that burden never shifts. The alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under Section 105 of the Evidence Act is more imaginary than real. Indeed, there is no conflict at all. There may arise three different situations: (1) A statute may throw the burden of proof of all or some of the ingredients of an offence on the accused: (See Sections 4 and 5 of the Prevention of Corruption Act). (2) The special burden may not touch the ingredients of the offence, but only the protection given on the assumption of the proof of the said ingredients: (see Sections 77, 78, 79, 81 and 88 of the Indian Penal Code). (3) It may relate to an exception, some of the many circumstances required to attract the exception if proved affecting the proof of all or some of the ingredients of the offence: (see Section 80 of the Indian Penal Code). In the first case the burden of (the) proving the ingredients or some of the ingredients of the offence, as the case may be, lies on the accused. In the second case, the burden of bringing the case under the ex-

ception lies on the accused. In the third case, though the burden lies on the accused to bring his case within the exception, the facts proved may not discharge the said burden, but may affect the proof of the ingredients of the offence. An illustration may bring out the meaning. The prosecution has to prove that the accused shot dead the deceased intentionally and thereby committed the offence of murder within the meaning of Section 300 of the Indian Penal Code; the prosecution has to prove the ingredients of murder, and one of the ingredients of that offence is that the accused intentionally shot the deceased; the accused pleads that he shot at the deceased by accident without any intention or knowledge in the doing of a lawful act in a lawful manner by lawful means with proper care and caution; the accused against whom a presumption is drawn under Section 105 of the Evidence Act that the shooting was not by accident in the circumstances mentioned in Section 80 of the Indian Penal Code, may adduce evidence to rebut that presumption. That evidence may not be sufficient to prove all the ingredients of Section 80 of the Indian Penal Code, but may prove that the shooting was by accident or inadvertence, i.e., it was done without any intention or requisite state of mind, which is the essence of the offence, within the meaning of Section 300, Indian Penal Code on the essential ingredients of the offence of murder. In that event, though the accused failed to establish to bring his case within the terms of Section 80 of the Indian Penal Code, the Court may hold that the ingredients of the offence have not been established or that the prosecution has not made out the case against the accused. In this view it might be said that the general burden to prove the ingredients of the offence, unless there is a specific statute to the contrary, is always on the prosecution, but the burden to prove the circumstances coming under the exceptions lies upon the accused. The failure on the part of the accused to establish all the circumstances bringing his case under the exception does not absolve the prosecution to prove the ingredients of the offence; indeed, the evidence, though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence."

"As in England so in India, the prosecution must prove the guilt of the accused, i.e., it must establish all the ingredients of the offence with which he is charged. As in England so also in India, the general burden of proof is upon the prosecution; and if, on the basis of the evidence adduced by the prosecution or by the accused, there is a reasonable doubt whether the accused committed the offence he is entitled to the benefit of doubt. In India if an accused pleads an

exception within the meaning of Section 80 of the Indian Penal Code, there is a presumption against him and the burden to rebut that presumption lies on him. In England there is no provision similar to S. 80 of the Indian Penal Code, but Viscount Sankey, L. C., makes it clear that such a burden lies upon the accused if his defence is one of insanity and in a case where there is a statutory exception to the general rules of burden of proof. Such an exception we find in Section 105 of the Indian Evidence Act."

"Further citations are unnecessary as, in our view, the terms of Section 105 of the Evidence Act are clear and unambiguous."

33. The defence plea raised in the above case was that the deceased was killed accidentally and the death was not the result of any intentional act on the part of the accused. Benefit was thus claimed of Section 80, I. P. C.

34. AIR 1964 SC 1563 and AIR 1966 SC 1 are cases where the benefit of the General Exception detailed in Section 84, I. P. C. was claimed: plea of insanity was invoked by the accused to show that he was incapable of understanding the nature of the act done by him and hence was entitled to acquittal. In AIR 1964 SC 1563 (supra) the law was laid down as below:

"It is fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in Section 299 of the Indian Penal Code. This general burden never shifts and it always rests on the prosecution. But, Section 84 of the Indian Penal Code provides that nothing is an offence if the accused at the time of doing that act, by reason of unsoundness of mind was incapable of knowing the nature of his act or what he was doing was either wrong or contrary to law. This being an exception, under Section 105 of the Evidence Act, the burden of proving the existence of circumstances bringing the case within the said exception lies on the accused, and the Court shall presume the absence of such circumstances. Under Section 105 of the Evidence Act, read with the definition of "shall presume" in Section 4 thereof, the Court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist." To put it in other words, the accused will

have to rebut the presumption that such circumstances did not exist, by placing material before the Court sufficient to make it consider the existence of the said circumstances so probable that a prudent man would act upon them. The accused has to satisfy the standard of a "prudent man." If the material placed before the Court, such as, oral and documentary evidence, presumptions, admissions or even the prosecution evidence satisfies the test of "prudent man" the accused will have discharged his burden. The evidence so placed may not be sufficient to discharge the burden under Section 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the judge whether the accused had the requisite intention laid down in Section 299 of the Indian Penal Code. If the Judge has such reasonable doubt, he has to acquit the accused, for in that event the prosecution will have failed to prove conclusively the guilt of the accused. There is no conflict between the general burden, which is always on the prosecution and which never shifts, and the special burden that rests on the accused to make out his defence of insanity."

"The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions: (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea, and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code: the accused may rebut it by placing before the Court all the relevant evidence—oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged."

35. At another place after summarizing the law laid down in AIR 1962 SC 605 (supra), it was observed:—

"A Division Bench of the Nagpur High Court in Ramhitram v. State of Madhya

Pradesh, AIR 1956 Nag 187 has struck a different note inasmuch as it held that the benefit of doubt which the law gives on the presumption of innocence is available only where the prosecution had not been able to connect the accused with the occurrence and that it had nothing to do, with the mental state of the accused. With great respect, we cannot agree with this view. If this view were correct, the Court would be helpless and would be legally bound to convict an accused even though there was genuine and reasonable doubt in its mind that the accused had not the requisite intention when he did the act for which he was charged. This view is also inconsistent with that expressed in Nanavati's case."

36. In AIR 1966 SC 1 (supra), after quoting the passage from AIR 1964 SC 1563, their Lordships of the Supreme Court observed as below:—

"This passage does not say anything different from what we have said earlier. Undoubtedly it is for the prosecution to prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea. Once that is done a presumption that the accused was sane when he committed the offence would arise. This presumption is rebuttable and he can rebut it either by leading evidence or by relying upon the prosecution evidence itself. If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused he would be entitled to acquittal. This is very different from saying that the prosecution must also establish the sanity of the accused at the time of commission of the offence despite what has been expressly provided for in Section 105 of the Evidence Act."

37. In AIR 1966 SC 97 only one point was considered in detail namely, the nature and the extent of evidence which would discharge the onus of proof placed on an accused person claiming the benefit of an Exception. Observations on the other point are in consonance with the earlier decision. The relevant observations made on the point are as below:—

"There is consensus of judicial opinion in favour of the view that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That, no doubt, is the test prescribed while deciding whether the prosecution has discharged its onus to prove the guilt of the accused: but that is not a test which can be applied to an accused person who seeks to prove substantially his claim that his case falls under an Exception. Where an accused person is called upon to prove

that his case falls under an Exception, law treats the onus as discharged if the accused person succeeds in proving a preponderance of probability. As seen the preponderance of probability is proved, the burden shifts to the prosecution which has still to discharge its original onus. It must be remembered that basically, the original onus never shifts and the prosecution has, at all stages of the case, to prove the guilt of the accused beyond a reasonable doubt. As Phipson has observed, when the burden of an issue is upon the accused, he is not, in general, called on to prove it beyond a reasonable doubt or in default to incur verdict of guilty; it is sufficient if he succeeds in proving a preponderance of probability, for then the burden is shifted to the prosecution which has still to discharge its original onus that never shifts, i.e., that of establishing, on the whole case, guilt beyond a reasonable doubt."

"It will be recalled that it was with a view to emphasising the fundamental doctrine of criminal law that the onus to prove its case lies on the prosecution, that Viscount Sankey in *Woolmington v. Director of Public Prosecutions*, 1935 AC 462, observed that "no matter which the charge or where the trial, the principle that the prosecution must prove the guilt of the Prisoner is part of the common law of England and no attempt to whittle it down can be entertained." This principle of common law is a part of the criminal law in this country. That is not to say that if an Exception is pleaded by an accused person, he is not required to justify his plea: but the degree and character of proof which the accused is expected to furnish in support of his plea, cannot be equated with the degree and character of proof expected from the prosecution which is required to prove its case."

38. Thereafter, after quoting with approval the observations made by Duff, J., in *R. v. Clark*, (1921) 61 SCR 608, which had been approved by Lord Hailsham in *Sodeman v. R.*, 1936-2 All ER 1138, and making a reference to the law laid down in *R. v. Carr-Braint*, 1943-2 All ER 156, it was observed as below:—

"What the Court of Criminal Appeal held about the appellant in the said case before it, is substantially true about the appellant before us. If it can be shown that the appellant has led evidence to show that he acted in good faith, and by the test of probabilities that evidence proves his case, he will be entitled to claim the benefit of Exception Nine. In other words, the onus on an accused person may well be compared to the onus on a party in civil proceedings, and just as in civil proceedings the Court trying an issue makes its decision by adopting the

test of probabilities, so must a criminal Court hold that the plea made by the accused is proved if a preponderance of probability is established by the evidence led by him."

39. Similar observations, though in brief, were made in AIR 1968 SC 702, which are as below:—

"The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record."

This is a case where the accused had pleaded alibi; but a suggestion of self-defence was made in the cross-examination of the prosecution witnesses. Defence evidence on this plea was also adduced. It was observed that it was open to the Court to consider such a plea if the same arose from the material on record.

40. The other two cases brought to our notice relate to the statutory presumption under the Prevention of Corruption Act. Such a presumption is also covered by Section 105 of Evidence Act. However, for purposes of this case reference need be made to only one case, AIR 1966 SC 1762, wherein the nature of the burden of proof placed upon the accused person has been discussed. It was held:—

"The next question arising in this case is as to what is the burden of proof placed upon the accused person against whom the presumption is drawn under Section 4 (1) of the Prevention of Corruption Act. It is well established that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That is, of course, the test prescribed in deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but the same test cannot be applied to an accused person who seeks to discharge the burden placed upon him under Section 4 (1) of the Prevention of Corruption Act. It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. As soon as he succeeds in doing so, the burden is shifted to the prosecution which still has to discharge its original onus that never shifts, i.e. that of establishing on the whole case the guilt of the accused beyond a reasonable doubt."

"We are accordingly of the opinion that the burden of proof lying upon the accused under Section 4 (1) of the Prevention of Corruption Act will be satisfied if the accused person establishes his case by a preponderance of probability and it is

not necessary that he should establish his case by the test of proof beyond a reasonable doubt. In other words, the onus on an accused person may well be compared to the onus on a party in civil proceedings, and just as in civil proceedings, the Court trying an issue makes its decision by adopting the test of probabilities, so must a criminal Court hold that the plea made by the accused is proved if a preponderance of probability is established by the evidence led by him."

41. In criminal trials where the accused puts forward a plea based on a General Exception, or a special Exception or proviso in the Indian Penal Code, three questions often arise: firstly on whom the burden of proof to establish the existence of the Exception or the proviso lies; secondly, the nature of evidence that shall justify the Court to hold that the Exception or proviso has been established; and thirdly, if the accused has not succeeded to rebut the presumption, how does his inability affect the result of the case, that is how is the conflict between the general presumption and the special presumption to be resolved? The rule on the first and third points has been laid down in detail in AIR 1962 SC 605 (supra), and this rule was applied to a case of alleged insanity in AIR 1964 SC 1563 (supra). A similar rule was also laid in AIR 1966 SC 1 (supra) and AIR 1966 SC 97 (supra).

42. For purposes of this reference, we can omit at least not make comments on that category of cases where the burden of proof of all or some of the ingredients of an offence is placed on the accused. We are at present more concerned with the General Exception, or special Exception or proviso, contained in the Indian Penal Code. Consequently, there can arise two different situations (1) where the special burden of proof does not touch the ingredients of the offence, but only the protection given on the assumption of the proof of the said ingredients; and (2) it relates to an Exception, some of the many circumstances required to attract the Exception if proved, affecting the proof of all or some of the ingredients of the offence. In AIR 1962 SC 605 (supra) it was mentioned that General Exceptions under five sections of the Indian Penal Code, fall within the first category. As it was contended before us that such observations were mere obiter dicta, it shall be proper not to indicate in this order the provisions which would fall in that category. That shall avoid unnecessary controversy in the future and it shall before the judge hearing a particular case to decide whether the case falls in the first or the second category. If this course be not adopted, it may at occasions become necessary to refer the matter to a larger Bench which would result in unnecessary

waste of time of this Court.

43. Where the plea raised in defence falls in the first category, the burden of proving the case under the Exception shall lie on the accused and he shall naturally be liable to conviction forthwith in case the prosecution has succeeded to establish the charge beyond reasonable doubt, considering that the Courts of law invariably, first of all, consider the prosecution case whether the ingredients of the offence of which the accused is charged have or have not been established beyond reasonable doubt. It is when the Court is of opinion that the charge has been established beyond reasonable doubt that the defence plea is looked into. However, where the case falls in the second category, the Court can acquit the accused if on consideration of the total material on record and the defence plea, there exists a reasonable doubt in its mind as to all or any of the ingredients of the offence charged.

44. In the first two reported cases it was also observed that the difference between the general presumption and the special presumption was more imaginary than real. In view of this observation it was contended by the learned Advocate for the appellants that when the result was the same, this Court should refuse to modify the dictum as such step may lead to utter confusion. It was also contended that a case under Section 80, I. P. C. alone was before the Supreme Court and hence the observations whereby Sections 77, 78, 79, 81 and 88 of the Indian Penal Code were placed in the first category were 'obiter dicta' and not binding on this Court. Reliance was also placed upon Section 6, I. P. C. and Section 221 (5) Criminal Procedure Code in support of the contention that all the cases under the Indian Penal Code shall fall in one group, namely, the second group detailed above. In this connection it was mentioned that when each and every case of the General Exception or the special Exception or proviso contained in the Indian Penal Code shall fall in the same group, this Court should, in the circumstances detailed above, not disturb the law as had been in existence for more than 25 years.

45. Theoretically one can lay down how the matters in issue shall be decided: the prosecution must, first of all, establish its case beyond reasonable doubt and thereafter consider whether the accused has succeeded in discharging the burden of proof. With regard to cases falling in the second category, the Court shall have to consider again whether all or some of the ingredients of the offence charged had been established beyond reasonable doubt. Where the offence has not been established beyond reasonable doubt, the accused would be entitled to acquittal. While recording a finding on

any of these points, the Courts of law have to consider the total evidence on record, oral, documentary or circumstantial, whether adduced by the prosecution or by the accused. When the total evidence has to be judged at the initial stage, it can be said what occasion there is or should be for rejudging the same evidence for recording a finding on the other two points. It is also contended that when as a result of reasonable doubt created in the mind of the Court as to the ingredients of the offence, the accused would be acquitted, in substance, the acquittal is based upon the doubt created in the mind of the Court as a result of the Exception pleaded by the accused; and in the circumstances, it would be better to retain the old dictum, that as consequence of reasonable doubt it be held that the accused is entitled to the benefit of the Exception.

46. In the administration of justice in India, Law prevails over equity and good conscience, and consequently the provisions of the statute must be given their full effect unless the enactment is held to be unconstitutional or invalid and it is only in the absence of an enactment that the matter can be decided on the principles of equity. In other words, it would be possible for the Courts of law to depart from the provisions contained in Section 105 of the Evidence Act only if it can be held that the Evidence Act is not a complete Code by itself. If it is a complete Code it shall not be possible to depart from its provisions on the ground of injustice or inequity. Its provisions must be given their full effect. It is now a settled law that the Evidence Act is a complete Code, not for assessment of evidence but for evidence which can be adduced in any suit or proceeding, the circumstances in which such evidence can be adduced and also on whom the burden of proof lies. This shall be evident from the preamble and also Section 5 thereof. Repeal of Section 2 of the Evidence Act shall make no difference as the repeal of a provision does not revive the provisions which had been repealed by the repealed provision. In other words, by the repeal of a provision there is no re-enactment of the provisions which had earlier stood repealed. (See *Maharaja Sris Chandra Nandy v. Rakhalananda*, AIR 1941 PC 16; *Collector of Gorakhpur v. Palakdhari Singh*, (1890) ILR 12 All 1 (FB) and *T. W. King v. Mrs. F. E. King*, AIR 1945 All 190.

47. To put it differently if the dictum under reference is contrary to the provisions of Section 105 of the Evidence Act, it must be suitably modified even though the practical effect thereof in all or most of the cases shall be the same. Further, the law laid down by High Courts must be expressed in such clear and unambi-

guous words that no one may feel any difficulty in enforcing it. The Courts of law do not merely read the Headnotes or the concluding or operating portion of the judgment. Consequently, if the dictum is suitably modified, the Courts shall know not only what changes have been made but why the changes were introduced. They shall thus know the correct law and how to enforce it and I see no reason why there would exist any confusion in the mind of anyone. I therefore, have no hesitation in suitably modifying the dictum even though the legality thereof has been challenged after a lapse of 25 years.

48. The prosecution is not, till the end of the trial, discharged of its burden to establish beyond doubt the guilt of the accused, and it can consequently be said that no case shall fall in the first category: they shall all be governed by the second group detailed above; and further when the total evidence has to be re-assessed before considering the defence plea and also thereafter, what importance does Section 105 of the Evidence Act have which places the burden of proof on the accused person for establishing the Exception pleaded by him.

49. Human mind does not like a machine move in only the prescribed manner. Ordinarily the judge hearing the case shall take an over-all view of the evidence irrespective of the mode that may be laid down for assessment of the evidence and independently of the question of the burden of proof, whether placed on the prosecution or on the accused; and he shall decide beforehand whether the evidence on record is sufficient for conviction or the accused is entitled to honorable acquittal or to the benefit of doubt. But to remove any misapprehension about the two categories, it would be desirable to lay down which matters must be decided before a formal opinion is expressed on the defence plea.

50. Offences defined in the Indian Penal Code or in other enactments invariably have more than one ingredient, some of which may not be connected with or co-related to the General Exceptions or special Exception or proviso pleaded by the accused. The various ingredients are established by oral, documentary or circumstantial evidence as may be adduced by the parties. Before entering into the defence plea, it shall be necessary to consider and to record a finding on the ingredients of the offence other than those connected with or co-related to the defence plea. If all such ingredients are established beyond doubt, the Court shall look into the defence plea to find out whether the presumption contemplated by Section 105 of the Evidence Act has been rebutted, that is, the absence of the circumstances benefit of which has been sought for has or has not been disproved. If the accused

succeeds in rebutting the presumption, it is an end to the matter and he shall straight off be acquitted of the offence or convicted of a lesser offence on the ground that some of the ingredients of the main offence had not been established; but if the accused does not succeed in rebutting the presumption, that is, in disproving the absence of the circumstances, the Court shall consider the question from the point of view of general presumption of the innocence of the accused, whether the ingredients connected with or co-related to the defence plea have been established beyond doubt. Even though the accused may not be able to establish his plea, that is, to rebut the presumption under Section 105 of the Evidence Act, he may succeed in creating a reasonable doubt in the mind of the Court, and what the Courts of law shall say is that because there exists a reasonable doubt on some of the ingredients of the offence, the benefit thereof shall go to the accused and he shall deserve acquittal or conviction of a lesser offence.

51. In cases falling in the first category, where no ingredient of the offence is connected with or co-related to the Exception pleaded in defence, the Court shall have to consider, on the basis of the total evidence on record, whether the prosecution has or has not succeeded to establish beyond doubt the guilt of the accused and then to consider whether there has been mitigation of the offence, or the accused deserves being exonerated thereof on account of the Exception pleaded by him. If it be found that the defence plea has not been proved, that is, the presumption of the absence of circumstances under Section 105 of the Evidence Act has not been disproved, the Courts of law would straight off record a finding of conviction. There would then be no question re-assessing the evidence as a whole to decide whether all the ingredients of the offence had been proved and the guilt established beyond doubt; but in cases falling in the second category, the Court shall have to record, in the first instance, a clear finding as to whether the ingredients other than the ingredient or ingredients covered by the defence plea have or have not been established beyond doubt. Once the finding is recorded in favour of the prosecution, the Exception pleaded by the accused shall be looked into whether the accused has succeeded in rebutting the presumption by disproving the absence of the circumstances pleaded by him. If he succeeds to disprove the absence of circumstances that is, to prove the defence plea, he shall deserve acquittal or conviction of a lesser offence as there would be absence of some of the ingredients of the main offence. In case the accused does not succeed to repel the presumption under Section 105 of the

Evidence Act, but does create a reasonable doubt, the Court shall say that there exists a reasonable doubt as to the ingredients connected with the defence plea and hence the offence as defined has not been established and on this ground would acquit the accused or convict him of the lesser offence.

52. Without expressing any final opinion the above can be clarified by giving an example. I shall naturally give an example which can be said to be beyond any controversy. Section 499, I. P. C. defines "Defamation", while 'defamation' is punishable under Section 500, I. P. C. Sec. 500, I. P. C. lays down that:—

"Whoever defames another shall be punished....." A person is said to defame another when "by words either spoken or intended to be read, or by signs or by visible representations makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person." This is subject to Exceptions detailed thereafter. The First Exception is that "it is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published."

53. The ingredients of Section 499, I. P. C. are the making or publishing of the imputation; intending to harm, or knowing or having reason to believe that such imputation shall harm, the reputation of such person. Where the accused pleads the benefit of the First Exception, what he suggests is that the allegation made is true and the imputation was made for the public good. The accused then does not challenge the two ingredients of Section 499, that is, the making and the publication of the imputation with the intention to harm the reputation of the other person. When the two facts raised in defence are in no way connected with the main ingredients of S. 499, I. P. C., the Court shall, first of all, have to record a finding whether the alleged defamation has or has not been established beyond doubt and thereafter to consider the defence plea. Protection is given to the accused person by the First Exception only if the imputation is true. No protection exists where the defamatory statements are not true, but may be true. When the benefit of the First Exception can be availed of only when the imputations are true, it cannot be open to the accused to say that he should be given the benefit of this Exception even when he is merely able to show that there is some possibility of the imputations being true; to put it differently, the imputations may be true or may not be true. When no question of reasonable doubt

as to the truth of imputations arises, the charge of defamation shall be fully established where the ingredients of Section 499, I. P. C. are established beyond doubt and the accused fails to establish the truth of the imputations. (See Lal-mohan Singh v. The King, AIR 1950 Cal 339). This case would clearly fall in the first category where none of the ingredients of the offence is connected with or co-related to the Exception pleaded by the accused.

54. The offence of murder is defined in Section 300, I. P. C. This section by itself says that:—

“Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

Every homicide is not murder. It is only culpable homicide which can amount to murder. The word ‘culpable’ means criminal or blame-worthy. Consequently, the intention or knowledge contemplated by Section 300, I. P. C. must be a criminal or guilty one. Where it appears that the intention or knowledge is not criminal or illegal, the causing of death cannot be said to be culpable and it shall not be ‘culpable homicide’, that is, murder. In the circumstances, it must be held that the intention or knowledge contemplated by Section 300, I. P. C. is a criminal or guilty intention or knowledge, and not mere intention or knowledge. To make this point more clear it must be mentioned that it is a well established rule that “unless the statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind.” Such observations made in *Brend v. Wood*, (1946) 110 JP 317 (318) were quoted with approval by their Lordships of the Privy Council in *Srinivas Mall v. Emperor*, 49 Bom LR 688 = (AIR 1947 PC 135). Consequently, the ingredients of the offence under S. 300, I. P. C. are the doing of an act by which the death is caused, and the doing of the act with the intention, that is, criminal intention to cause death. Where the accused seeks the benefit of the General Exceptions contained in Sections 80 and 84, I. P. C., what he implies to mean is that he did not have the guilty intention at the time he caused the death. Consequently, at the initial stage the Court shall have to consider whether the prosecution has established beyond doubt that the death of the person was caused by or is the result of the act done by the accused. If so satisfied, the defence plea shall be looked into whether the accused has succeeded to rebut the presumption, that, is to disprove the absence of the circumstances contemplated by the above sec-

tions. Once the accused succeeds in establishing his plea, he would deserve acquittal on account of there being no guilty intention; it is a different thing that he may be liable to conviction of the lesser offence; but if the accused is not successful in disproving the absence of circumstances, the Court of law shall still have to see whether the ingredient of criminal intention, that is, mens rea has been established by the prosecution beyond reasonable doubt. It is then that a reasonable doubt created in the mind of the Court as to the defence plea shall lead to the inference that the guilty intention has not been established beyond reasonable doubt and on this ground the guilt of the accused as to the main offence shall be deemed not to have been established beyond doubt and he shall be acquitted. From the practical point of view the accused is being given the benefit of the Exception pleaded by him; but, in the eye of law, the benefit of reasonable doubt is of the ingredients of the offence, and not of the Exception pleaded by him. The above case admittedly falls in the second category mentioned above.

55. The contention of the learned Advocate for the appellants that in view of Section 6 of the Indian Penal Code and Section 221 (5) of the Criminal Procedure Code all the Exceptions, whether “General” or special are parts of the offence, and hence ingredients thereof and they must be established beyond doubt by the prosecution, has, in my opinion, no force. Section 6 merely lays down that every definition of an offence shall be understood subject to General Exceptions even though not repeated in such definition. The effect of Section 6 is to incorporate the General Exceptions in every definition of an offence. For example, while reading Section 300, I. P. C. we shall have to include therein not only the Exceptions 1 to 5 detailed therein, but also the General Exceptions contained in Sections 76 to 106, I. P. C. The offence would still be as defined in the main part of Sec. 300, I. P. C. and the rest shall be Exceptions. If the burden of proving the Exception is placed on the accused, it shall be necessary for him to discharge this burden. Section 6 cannot thus affect application of Section 105 of the Evidence Act. In other words, Section 6 can be of no help in considering the scope of Section 105 of the Evidence Act.

56. Similarly, Section 221 (5) of the Criminal Procedure Code provides that—

“The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.”

Illustration thereof is as below:—

“(a) A is charged with the murder of B. This is equivalent to a statement that

A's act fell within the definition of murder given in Ss. 299 and 300 of the Indian Penal Code; that it did not fall within any of the general exceptions of the same Code; and that it did not fall within any of the five exceptions to Section 300, or that, if it did fall within Exception I, one or other of the three provisos to that exception apply to it."

Section 221 (5), Cr. P. C. is a procedural clause and cannot affect the rights and liabilities of the parties, nor can it affect the burden of proof, that is, which party must establish a particular fact or matter in issue. Apparently, this provision was incorporated to make it clear that it is for the accused to plead the benefit of the Exception, and if no such plea is raised, the Court shall assume that the Exception did not exist, and on the main ingredients being established the accused can be convicted of such offence.

57. The above contention was evidently repelled in the Full Bench case of 1941 All LJ 619 = AIR 1941 All 402 (supra). Iqbal Ahmad, C. J., expressed his opinion clearly by laying down that none of the above sections had the effect of reducing the scope of Section 105 of the Evidence Act and the burden of proof did lie on the accused.

58. My attention was also drawn to the fact that the Evidence Act was passed after the Indian Penal Code and before the commencement of the Code of Criminal Procedure. Each is a distinct law: Indian Penal Code laying down the criminal offences; the Code of Criminal Procedure, the procedure to be followed in criminal trials; while the Evidence Act, the evidence which can be adduced in any suit or proceeding and on whom the burden of proof lies. When each statute covers a particular branch of the law, it cannot override the provisions of the other laws.

59. The nature and extent of the evidence necessary to establish the Exception or proviso raised in defence has been considered in AIR 1964 SC 1563 (supra), AIR 1966 SC 97 (supra) and AIR 1966 SC 1762 (supra). It is thus a settled law that the burden of proof which lies on the accused by virtue of the provisions of Section 105 of the Evidence Act is not as heavy as on the prosecution to establish the guilt of the accused. The prosecution has to prove its case beyond reasonable doubt, while the accused has simply to disprove the absence or circumstances contemplated by the Exception, that is, to prove facts which would entitle him to the benefit of the Exception. The test of probabilities is to be applied in judging the defence plea. The accused has to establish his plea in the manner a plaintiff or defendant shall prove his case in a civil proceeding. It is thus the preponderance of probabilities which shall deter-

mine whether the defence plea has been established and the case falls or does not fall within one of the Exceptions contained in the Indian Penal Code. When the three expressions mentioned above are read together, there can be no difficulty in understanding the meaning of the term "preponderance of probability." However, in view of the fact that this question had been raised at the Bar, it is necessary to make a few observations.

60. Our attention was drawn to the definition of "preponderance of evidence" as in vogue in America. In American Jurisprudence, 2nd Edition, Volume 30, the expression has been defined in Article 1164. In America the term means "the weight, credit and value of the aggregate evidence on either side, and is usually considered to be synonymous with the term greater weight of the evidence", or "greater weight of the credible evidence". It is a phrase which, in the last analysis, means probability of the truth. To be satisfied, certain, or convinced is a much higher test than the test of "preponderance of evidence".

61. The phrase "preponderance of probability" appears to have been taken from Charles R. Cooper v. F. W. Slade, (1857-59) 6 HLC 745. The observations made therein make it clear that what "preponderance of probability" means is "more probable and rational view of the case", not necessarily as certain as the pleading should be.

62. On the basis of the definition of the words "proved", "disproved" and "not proved", as contained in Section 3 of the Evidence Act, a similar inference can be drawn. The term "proved" is defined as below:—

"A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

When the evidence is of a overwhelming nature and is conclusive, there shall exist no dispute, nor shall there be any doubt and the Court can say that the fact does exist, but in criminal trials, where the accused claims the benefit of the Exception, there cannot be any evidence of such a nature. Very often there is oral evidence which may be equally balanced. In the circumstances, the case of the prosecution or of the defence has to be accepted or rejected on the basis of probabilities. Section 3 of the Evidence Act by itself lays down that a fact is said to be proved when, after considering the matters before it, the Court considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This is what is meant

by the "test of probabilities" or the "preponderance of probabilities." The decision is taken as in a civil proceeding.

63. To avoid repetition it can here be mentioned that the law with regard to the discharge of burden of proof by the prosecution, or by the defence against whom a presumption can be drawn under Section 105 of the Evidence Act, is as detailed in AIR 1962 SC 605 (supra), and whether the accused has been able to discharge the burden of proof is to be judged on the basis of the "test of probabilities" or the "preponderance of probabilities" in the same manner as the Court records a finding in a civil proceeding. This rule applies to the accused. A more rigorous proof is called for from the prosecution which must establish its case beyond reasonable doubt.

64. The next point for consideration is to what extent the above rule laid down by the Supreme Court in case in which the benefit of Sections 80 and 84, I. P. C. is claimed, can be applied to cases in which the accused claims the benefit of other Exceptions, all the more, where a plea of private defence has been raised. The Evidence Act is a complete Code and its purpose is to consolidate, define and amend the law of Evidence. Consequently, the provisions of this Act shall govern all the judicial proceedings in or before any Court. The Evidence Act applies equally to civil and criminal cases. It may, however, be mentioned that in the Evidence Act there are certain provisions applicable exclusively to civil proceedings and a few others to criminal trial only; but speaking broadly, it can be laid down that the Evidence Act applies equally to both the civil and criminal proceedings. Further, there shall be no justification to depart from the express provisions contained in the Evidence Act. Such provisions shall govern the recording of evidence and also the question of the burden of proof. We cannot look into the English practice or the law prevalent in our country in the past on the ground of public policy or the interest of justice. To put it differently, the provisions of the Evidence Act must be strictly construed even though such a step may not conform with the ideas of the Court or may appear to be unjust or may cause hardship to the accused. (See *Governor and Company of the Bank of England v. Vagliano Brothers*, 1891 AC 107 and *Norendra Nath Sircar v. Kamalbasini Dasi*, (1895) 23 Ind App 18 (PC)).

65. Section 105 of the Evidence Act has been worded in clear and unambiguous terms and it shall apply to each and every case where the benefit of the General Exceptions, or the Special Exceptions or provisos contained in the Indian Penal Code, or in any other law is claimed. Section 105 reads as below:—

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

The term "shall presume" has been defined in Section 4 of the Evidence Act and means that the Court "shall regard the fact as proved unless and until it is disproved." Reading Section 105 of the Evidence Act with the definition of the terms "shall presume" as contained in Section 4, it must be held that where the existence of circumstances bringing the case within the Exception is pleaded or is raised, the Court shall presume the absence of such circumstances unless and until it is disproved. "Disproved" is different to "not proved." In Section 3 the meaning of the terms "proved" and "disproved" has been given and the term "not proved" is defined "neither proved nor disproved". Consequently, if the accused is unable to disprove the absence of circumstances, that is, prove the existence of the circumstances, the case would fall in the category of "not proved" and, in the eye of law, the burden imposed by Section 105 shall not stand discharged. In other words, the accused has to prove the existence of the circumstances bringing the case within the Exception and he shall be deemed to have discharged the burden of proof only when the Court considers the existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. In other words, no question of the benefit of doubt arises while the Court is considering the question of the existence of circumstances bringing the case within the Exception. On the basis of doubt the contention can be rejected or the case of the party not accepted; but to accept a case not free from doubts, that is, to accept a doubtful case, is not warranted by the Evidence Act. In this view of the matter the accused can be deemed to have discharged the burden of proof only when he is in a position to disprove the absence of circumstances, that is, is able to discharge the onus in the manner the plaintiff or the defendant must in a civil proceeding. It would be a wrong proposition of law to say that in criminal trials where there exists a reasonable doubt in the mind of the Court, the Exception pleaded be deemed to have been proved. Section 105 of the Evidence Act makes no difference between the Exceptions or provisos contained in one enactment or the other. In the circumstances, the rule applicable to the General Exceptions under Sections 80

and 84, I. P. C. shall apply with equal force to the other General Exceptions contained in the Indian Penal Code or the special exceptions or proviso contained in this Code or in other enactments.

66. Two other points raised on behalf of the appellants may now be considered. It was argued that the term "may presume" shall have the same meaning as "shall presume" in case the Court decides to presume the existence of a fact. The suggestion thus made is that it is discretionary with the Court to presume or not to presume and once the Court decides to presume the existence of a fact, the same rule shall apply as in a case where there is a statutory clause to presume the existence of the fact. Reliance was placed upon the case of AIR 1943 PC 211, where mere giving of a reasonable or plausible explanation was held to be sufficient to discharge the burden of proof. The definition of "may presume" and "shall presume", as contained in Section 4 of the Evidence Act, makes it clear that the discretionary presumption where the words "may presume" have been used is much weaker than in a case where the provision directs the Court to presume the existence of a fact. In case of a weaker presumption, mere explanation can be sufficient and such strong evidence is not needed as in a case where the Court must presume the existence of a fact. The above contention was raised in AIR 1964 SC 575 and AIR 1960 SC 7 but was repelled on the ground that the burden resting on the accused in a case under the Prevention of Corruption Act where the word "shall" had been used was not as light as it was where the presumption was raised under Section 114 of the Evidence Act, and could be held to be discharged merely by reason of the fact that the explanation offered by the accused was reasonable and probable. It was held that the presumption under the Prevention of Corruption Act must be rebutted by "proof" and not by a bare explanation which was merely plausible.

67. The second point raised is that in criminal trials more convincing evidence is expected from the prosecution before the accused can be held guilty of the charge, and this is a departure from the ordinary meaning of "proved" as contained in Section 3 of the Evidence Act. It was thus contended that in criminal trials while judging the defence plea similar leniency can be shown to the accused. The suggestion made is that where the evidence is equally balanced and the Court thinks that the defence plea may, or may not be true, a prudent person contemplated by Section 3 of the Evidence Act must act on the supposition that the fact exists. What is suggested is that the benefit of the reasonable possibility of truth

of the defence plea be utilized to hold that the absence of circumstances contemplated by Section 105 of the Evidence Act has been disproved. It is true that the maxim, applicable in India as in England, that an accused shall be presumed to be innocent and the prosecution must establish its case beyond reasonable doubt is a departure from the ordinary meaning of the term "proved" as contained in Section 3 of the Evidence Act. It is, however, a rule of caution and prudence laid down by the Courts of law how a prudent man must, in a criminal case, assess the evidence adduced by the prosecution. In the words used in Section 3 of the Evidence Act, the prosecution case is not deemed to have been 'proved', that is, is deemed to be 'not proved', even though in a civil proceeding the fact could, on the basis of such evidence, be deemed to have been 'proved'; and the effect of the above maxim is to regard a fact "not proved", though in civil proceeding it could be deemed to be "proved". The same cannot, however, be laid down for a provision where one has to consider whether the absence of circumstances had been disproved, or the existence of the circumstances had been proved. On the application of a rigorous rule, the Court can hold that the existence of circumstances had not been proved, or the absence of circumstances had not been disproved; but to say that the existence of circumstances shall be deemed to have been proved or the absence of circumstances disproved shall not be correct, for the simple reason that on the basis of doubt, the fact is to be disbelieved, and not believed. I am, therefore, not inclined to agree with the proposition that on a reasonable doubt being created, a prudent man should proceed with the assumption that the existence of circumstances had been proved.

68. Section 105 of the Evidence Act, therefore, applies to each and every Exception or proviso contained in any enactment and hence shall apply even when the accused pleads the benefit of the "General Exception" contained in Section 96, I. P. C., that is pleads to have acted in the exercise of the right of private defence of his person or property. In the circumstances, the rule laid down by the Supreme Court in cases where the benefit of Sections 80 and 84, I. P. C. had been claimed can be applied with equal force to a case where the accused pleads the benefit of Section 96, I. P. C. The application of this rule to a case where the accused person has pleaded the benefit of Section 96, I. P. C. shall not cause any hardship to him, as in such a case the burden shall lie on the prosecution till the end of the trial to prove all the ingredients of the offence beyond any reasonable doubt. When the accused raises the plea contained in Sections 80 and 84, I. P. C. what he

contends is that he did not have the criminal intention or knowledge contemplated by the definition of the "offence". The same can be said when the plea of private defence is raised. Section 80, I. P. C. provides:—

"Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution."

Criminal intention or knowledge is a material ingredient of Sec. 80—the other ingredients being that the act should be lawful and was done in a lawful manner by lawful means and with proper care and caution.

Similarly, S. 84, I. P. C. provides:—

"Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

A person incapable of knowing the nature of the act is a person who cannot be deemed to have guilty knowledge or intention.

69. The plea contemplated by Section 80 and Section 84, I. P. C. directly affects one of the ingredients of the offence, namely, the mens rea. The same can be said of the plea contemplated by Section 96, I. P. C.

70. Section 96, I. P. C. provides:—

"Nothing is an offence which is done in the exercise of the right of private defence".

The subsequent sections detail such right. Section 97 provides that every person has a right, subject to the restrictions contained in Section 99, to defend not only his person and property but also the person or property of others.

71. When an accused person acts in the exercise of the right of private defence, what is meant is that even though armed he had no prior intention to commit an offence and whatever he did was in the exercise of the rights given to him under the law. His act would thus not be illegal and, in the eye of law, the act cannot be deemed to have been done with a criminal or guilty intention or knowledge which is invariably the most important ingredient of a criminal offence.

72. At the very start of the argument the learned Advocate for the appellants had cited three illustrations where injustice shall be done to the accused if the benefit of the Exception, as contemplated by the dictum under reference, was not given to the accused. It was said that where there was a dispute as to possession of property between A and B, and such disputes were followed by a marpit in which both the parties were injured, it

shall be necessary to convict both the parties where the possession of either was doubtful, considering that none of the parties shall be able to discharge the burden of proof as contemplated by Section 105 of the Evidence Act. The suggestion thus made is that one party or the other must have been in possession and the conviction of the party in possession shall be against equity and conscience. Where the possession is in dispute there can be two kinds of cases: the property belonged to a third person and parties A & B start laying claim thereto, or that A is in possession and B raises a claim to the property at the same time asserting that he was in possession. In the first case both the parties can be deemed to have the guilty intention and they can be convicted for the acts done by them. It would be a case of free fight or in suitable circumstances a case sudden fight (See AIR 1957 SC 469). In the other case, one party alone shall be convicted and the other given the benefit of the General Exception contained in Section 96, I. P. C., that is, of private defence, provided that the evidence adduced by the party in possession is acceptable; but where the evidence is sufficient to hold that the possession had been proved, the Courts of law shall hold that the burden of proof contemplated by Section 105, the Evidence Act had not been discharged by both the parties. However, while deciding whether mens rea, one of the important ingredients of the offence, has or has not been established beyond doubt the Courts of law can grant the benefit of doubt to both the parties, or convict one party and give the benefit of doubt to the other. In such a case what, according to the learned Advocate, should be done by assuming the existence of circumstances shall be by holding that all the ingredients of the offence had not been established beyond doubt.

73. The other two illustrations pertain to those cases where there is a dispute as to where the marpit took place, or who started the marpit. The principles indicated above while making comments on the first illustration shall apply with equal force to these illustrations also. In other words, the accused person shall not be convicted simply because the dictum under reference shall not be followed and instead the law as laid down by the Supreme Court shall be made applicable.

74. Reference may now be made to the English decisions and the decisions of the High Courts in India to which our attention has been drawn. *Woolmington v. The Director of Public Prosecutions*, 1935 AC 462 has been the foundation of decisions not only by the Courts in England but also in India. This case and also 1943-2 All ER 156 were considered by the Supreme Court in some of the

decisions referred to above. The rule of law laid down in 1935 AC 462 (supra) has been reproduced in Halsbury's Laws of England. In the circumstances, it is not necessary to make further comments on these three cases.

75. The rule enunciated by Viscount Sankey L. C. in 1935 AC 462 (supra) was relied upon in Mancini v. Director of Public Prosecutions 1942 AC 1. The King v. Kakelo, 1923-2 KB 793 is a case where onus lay on the accused to prove that he was not an alien, and not upon the prosecution to prove that he was. This case cannot be of any help considering that therein the prosecution had itself adduced sufficient evidence to prove that the accused was an alien.

76. It was strongly argued on behalf of the State that the majority decision in 1941 All LJ 619 = AIR 1941 All 402 (supra) was contrary to the decisions of the Supreme Court and can no longer be regarded as a good law. I have carefully gone through the judgments of Iqbal Ahmad, C. J., and Collister, J., which can be regarded as the leading judgments of the majority and minority Judges and find that Iqbal Ahmad, C. J., had laid down the law correctly, though a mistake was committed while giving the answer to the question referred to the Full Bench. The answer was given in the form of a dictum which has been referred to us for consideration. If the dictum is not given unnecessary weight, it shall be found that the majority view is in consonance with the recent Supreme Court decisions. The minority view shall be contrary to the law laid down by the Supreme Court.

77. Iqbal Ahmad, C. J., has laid down not at one place but many that the reasonable doubt is as to the guilt of the accused, and not to the existence of the Exception. At page 407 he observed as below:—

"It would thus appear that there is formidable weight of authority in support of the view that in cases falling within the purview of Section 105, Evidence Act, the evidence produced by the accused person, even though falling short of proving affirmatively the existence of circumstances bringing the case within the exception pleaded by him, can be utilized as part of the entire evidence in the case for the purpose of showing that a reasonable doubt exists as to his guilt." Other observations made by Iqbal Ahmad, C. J., are as below:—

"It is on the basis of these principles that it is well settled in England that the evidence against the accused must be such as to exclude, to a moral certainty, every reasonable doubt about his guilt and if there be any reasonable doubt about his guilt he is entitled to be acquitted."

What holds good in England must hold good in India."

"The burden of proving the existence of circumstances bringing the case within the "exception" or "proviso" is no doubt cast on the accused by Section 105, but this does not in any way absolve the prosecution of the burden laid on it by Sec. 102. The burden of proof, so far as the entire "proceeding" is concerned, remains on the prosecution, even though the burden of the "fact in issue" pleaded by the accused is cast upon him by Section 105."

There is, however, nothing in the Evidence Act to indicate that the failure of the accused to discharge the burden lightens the burden placed on the prosecution by Section 102. ... and "the onus never changes". It is, therefore, manifest that even in cases to which Section 105 applies the prosecution has to prove the guilt of the accused."

"Should it in the consideration of the question whether A is guilty of murder, put aside the evidence produced by A, so to say, in a watertight compartment and exclude that evidence entirely from consideration? or should it take that evidence, for what it is worth into consideration along with the other evidence in the case and then make up its mind as to the guilt or innocence of A? I cannot but hold that it is only the latter alternative which is open to the Court and this is what follows from the definition of "proved" in the Act. It is one thing to hold that the "exception" or "proviso" pleaded has not been proved and it is quite another thing to say that it has been disproved. If a reasonable doubt as to the existence of the exception or proviso exists the Court cannot, while considering the evidence as a whole, deny to the accused the benefit of that doubt."

78. Collister, J. personally preferred the law as enunciated by Viscount Sankey in Woolmington's case, and saw no reason why the law in India as regards this branch of burden of proof should differ from the law in England, but he regarded it as his duty to interpret the law as it was. He summed up the legal position in the following words:—

"Upon a careful examination of the relevant sections of the Evidence Act I find myself forced to the conclusion that at the termination of the trial the accused person will not be entitled to the benefit of Section 96, Penal Code, unless upon a review of all the evidence the Court is either satisfied as to the existence of the circumstances pleaded or considers the fact of their existence to be probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that they existed."

Collister, J. repelled the contention that notwithstanding the specific provisions of the Evidence Act relating to exceptions, the Court must acquit an accused person if it entertained reasonable doubt as regards his guilt. At another place he expressed a similar opinion by laying down that the general onus on the prosecution was subject by statute to the special onus which Section 105 imposed on the accused person and that the Court would not be justified in falling back on the general principle that the Crown must prove the prisoners' guilt in view of the specific provisions contained in Section 105. In Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) reference to the Full Bench was made by Braund, J., and he expressed the question referred to the Full Bench in the following words:—

"The question before this Full Bench is whether, in such a situation, the Court is bound to reject the plea of the exception, or whether it still remains open to it, on looking at the evidence as a whole (including the evidence of self-defence) to give to the accused the benefit of any reasonable doubt that remains whether the act may not have been committed in self-defence."

The judgment of Collister, J. all the more, when read with that of Braund, J., makes it clear that the minority Judges were of opinion that once the defence story of self-defence was rejected, that is, plea of the exception was not accepted, the Court cannot, looking at the evidence as a whole, including the evidence of self-defence, give to the accused the benefit of any reasonable doubt as to the guilt on the ground that the accused had acted in self-defence.

79. The Supreme Court has clearly laid down that even after the rejection of the defence plea the general onus remains on the prosecution and if there exists any reasonable doubt as to the guilt, its benefit shall go to the accused and he shall be entitled to acquittal even though he had failed to discharge the burden of proof placed upon him under Section 105. It shall thus appear that the majority judgment in Parbhoo's case expresses the law correctly, though the reply to the question referred to the Full Bench was not expressed in correct legal words.

80. To avoid unnecessary repetition later it may be added that the minority judgment in Parbhoo's case stands overruled by the Supreme Court decision in AIR 1964 SC 1563 (supra). While discussing the case of AIR 1956 Nag 187 (Supra), their Lordships made it clear that they did not agree with the view expressed therein, namely, that the benefit of doubt which the law gives on the assumption of innocence is available only where the prosecution has not been able to connect

the accused with the occurrence and it has nothing to do with the mental state of the accused. In other words, even if the accused is unable to substantiate the defence plea, the Court has to see whether the guilty intention or knowledge which is a material ingredient of the offence has or has not been proved beyond reasonable doubt.

81. In *J. Danubha Vanubha v. State*, AIR 1952 Sau 3 and *State v. Bhima Devraj*, AIR 1956 Sau 77 the view expressed in the Full Bench case of *Government of Bombay v. Sakur*, AIR 1947 Bom 38 was adopted. Macklin, J. observed in this Bombay case that "the practical difference between English and Indian Law as to the proof of exceptions is not very great; in the result it is often no more than a matter of words". However, certain observations made suggest that in a case of murder the prosecution has merely to prove that the accused caused the death and thereafter the burden lies upon he accused to prove the existence of circumstances bringing his case within the exception relating to the right of private defence and if he fails to discharge this onus, the Court shall presume the absence of such circumstances and can convict the accused. At another place it was observed that in the eye of law, the standard of "proof" required from both the prosecution and the accused is the same, though in practice the standard of "proof" required to bring a case within one of the exceptions is lower than the standard of proof required from the prosecution to establish its own case. It was further observed that this was because a "prudent man might well consider it his duty to act upon circumstances in the one case which he might not consider to be a justification for action in the other case." It was held that the jury should not be told that the accused should prove his case beyond reasonable doubt or that the burden on him is necessarily less than the burden on the prosecution. These observations are clearly against the Supreme Court decisions and I may say with respect do not lay down the law correctly. It is true that in view of the definition of "proof" as contained in Section 3 of the Evidence Act, the proof expected from both the prosecution and the accused is the same which would be, what a prudent man considers sufficient in the circumstances of the case; but in view of the presumption of the innocence of the accused, it is necessary for the prosecution to establish its case beyond reasonable doubt, while the accused has to establish his case in the manner a plaintiff or defendant has to make out his case in a civil proceeding. Further, there are not always two question involved. "the proof of the case for the prosecution and the proof of the exception put forward by the

defence." They are also not "two separate questions to be decided separately", the second question arising after the first has been decided. This rule can be applied to only those cases which fall in the first category, and not those which fall in the second category detailed above. The Bombay case is more or less on the lines of the minority judgment in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) and cannot be said to correctly express the law.

82. The above Full Bench case was followed by the same High Court in Har Prasad Ghasi Ram Gupta v. State, AIR 1952 Bom 184. No further comments are therefore, necessary.

83. The observations of Mitter, J. in Yusuf Sk. v. The State, AIR 1954 Cal 258 that the "question of an onus under Section 105 only arises after the prosecution has established the commission of an offence" and that the "standard of proof under Section 105, Evidence Act, is the same as the standard which is required of the prosecution in a criminal trial," are clearly against the Supreme Court decisions. The first observation may however, apply to a case falling in the first category.

84. In Re, Gampla Subbigadu, 1940-2 Mad LJ 1018 = (AIR 1941 Mad 280) it was observed that in the absence of proof of the plea of self-defence it was not possible for the Court to presume the truth of the plea of self defence. It was further observed that it was not possible to reject the prosecution evidence merely because the prosecution witnesses did not explain how the accused himself came by his injuries. The Report suggests that the accused cannot be acquitted after giving the benefit of reasonable doubt created as to his guilt on the plea of private defence raised by him not being accepted. This is clearly against the law laid down by the Supreme Court.

85. In Baswantrao Bajirao v. Emperor, AIR 1949 Nag 66, it was observed that:—

"The accused is not entitled to any benefit of the doubt as to his insanity because the burden is on him to prove strictly that he committed the act in a moment of insanity."

This can no longer be treated as a correct law, the Supreme Court having decided to the contrary, namely, that if any reasonable doubt is created as to mens rea, the benefit of doubt shall go to the accused by holding that the charge had not been established beyond doubt.

86. In the State v. Chhotelal Gangadin Gadariaya, AIR 1959 Madh Pra 203 the earlier decision of that Court in AIR 1956 Nag 187 (Supra) was followed; but as already mentioned above, the case of Ramhit Ram has been overruled by the Supreme Court.

87. Though not so expressed Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) appears to have been followed in Bala Prasad Dhansukh v. State of Madhya Pradesh, AIR 1961 Madh Pra 241. I am drawing this inference from the following observations made in para 21 of the Report.

"In all such cases, as soon as such evidence is introduced, which, if believed, would establish the circumstances on which the defence may rely to bring his case under any of the exceptions, etc., the burden of the accused is discharged. It is equally discharged when on a consideration of the whole of the evidence the Court is left in doubt as to whether the killing may have been under the circumstances disclosed in the evidence on record."

88. Parbhoo's case was followed in Kamla Singh v. The State, AIR 1955 Pat 209 and it was observed that the onus under Section 105 was discharged or could be taken as discharged once "the Court is brought to a point where it becomes doubtful of the fact or when it cannot positively hold that the prisoner was then not of unsound mind and that he was capable of knowing the nature of the act alleged against him." For reasons already indicated above, this is not a correct approach, though the accused, can be given the benefit of reasonable doubt as to his guilt. In other words, the Court can hold that the prosecution has not succeeded to establish its case beyond reasonable doubt.

89. In Etwa Oraon v. The State, AIR 1961 Pat 355 the earlier case of AIR 1953 Pat 209 was not dissented from. It was observed that:—

"The burden is discharged if the defence establishes facts and circumstances which might lead to a reasonable inference that at the time of the commission of the offence the accused was of unsound mind, the unsoundness of his mind being of the nature or extent mentioned in Section 84, Indian Penal Code."

Reasonable inference is not the same thing as reasonable doubt. It cannot also amount to 'proof' as contemplated by Section 3 of the Evidence Act. The above observations are to some extent against the view expressed by the Supreme Court.

90. Brindaban Prasad v. The State, AIR 1964 Pat 138 is based upon the Supreme Court decision in the case of K. M. Nanawati v. State of Maharashtra (supra) and needs no further comments.

91. Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) was not followed in V. Ambhi v. State of Kerala, 1962 (2) Cri LJ 135 (Ker), and it was held that the accused would be entitled to acquittal on the ground of insanity only if there was a probability of the accused being legally insane at the time of the commission of

the crime. In case it was meant to lay down that the accused could not be given the benefit of reasonable doubt as to all or some of the ingredients of the offence, it would not be a correct exposition of law.

92. To sum up, the doctrine of the burden of proof and the nature of evidence necessary to discharge this burden. In cases where the accused claims the benefit of the general Exceptions in the Indian Penal Code or of any special exception or proviso contained in any other part of the same Code, or in any other law, can be stated as below:—

1. The case shall fall in one of the three categories depending upon the wording of the enactment:—

- (i) The statute places the burden of proof of all or some of the ingredients of the offence on the accused himself;
- (ii) the special burden placed on the accused does not touch the ingredients of the offence but only the protection given on the assumption of the proof of the said ingredients; and
- (iii) the special burden relates to an exception, some of the many circumstances required to attract the exception, if proved, affecting the proof of all or some of the ingredients of the offence.

2. In the first two categories the onus lies upon the accused to discharge the special burden, and on failure he can be convicted of the offence provided that the prosecution has succeeded to discharge its general burden of proof, that is, to establish the case beyond any reasonable doubt.

3. In cases falling under the third category inability to discharge the burden of proof shall not, in each and every case, automatically result in the conviction of the accused. The Court shall still have to see how the facts proved affect the proof of the ingredients of the offence. In other words, if on consideration of the total evidence on record a reasonable doubt exists in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused, he shall be entitled to its benefit and hence to acquittal of the main offence even though he had not been in a position to prove the circumstances to bring his case within the exception. This shall be on the ground that the general burden of proof resting on the prosecution was not discharged.

4. The burden of proof on the prosecution to establish its case rests from the beginning to the end of the trial and it must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea.

5. The burden placed on the accused is not so onerous as on the prosecution. The

prosecution has to prove its case beyond reasonable doubt, but in determining whether the accused has been successful in discharging the onus, the Court shall look into the preponderance of probabilities in the same manner as in a civil proceeding. In other words, the Court shall have to see whether a prudent man would, in the circumstances of the case, act on the supposition that the case falls within the exception or proviso as pleaded by the accused.

93. In this view of the matter the dictum laid down in 1941 All LJ 619 = AIR 1941 All 402 (FB) (Supra) is partly erroneous and requires modification, though the decision, read as a whole is in conformity with the law. The dictum can be modified as below:—

In a case in which any General Exception in the Indian Penal Code, or any special exception or proviso contained in another part of the same Code, or in any law defining the offence, is pleaded or raised by an accused person and the evidence led in support of such plea, judged by the test of the preponderance of probability, as in a civil proceeding, fails to displace the presumption arising from Section 105 of the Evidence Act, in other words, to disprove the absence of circumstances bringing the case within the said exception; but upon a consideration of the evidence as a whole, including the evidence given in support of the plea based on the said exception or proviso, a reasonable doubt is created in the mind of the Court, as regards one or more of the ingredients of the offence, the accused person, shall be entitled to the benefit of the reasonable doubt as to his guilt and hence to acquittal of the said offence.

94. M. H. BEG, J.:— The question we have to answer, the facts and circumstances leading to its reference to a Full Bench of nine Judges, and the authorities cited by both sides, have been very fully set out in the judgment of my learned brother D. S. Mathur, J. I concur with the views expressed there on a number of points but respectfully differ on others indicated below. I find myself in respectful disagreement also with Oak, C. J. on the questions whether there is some conflict either between the Indian law and English law on burden of proof when the plea of private defence is set up or between the majority view in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) and the Supreme Court's interpretation of Section 105 of the Indian Evidence Act (hereinafter referred to as the Act also). I have endeavoured to show, in the course of this opinion, that S. 105 of the Act does not depart from the principles of English law of Evidence on the plea of private defence and that the majority view in Parbhoo's case, 1941 All

LJ 619=AIR 1941 All 402 (FB) were meant to answer questions which only arise in a case of reasonable doubt on the ingredients of an offence even where the exception pleaded is not established or completely proved. These questions did not arise in AIR 1968 SC 702 at p. 702 and in other cases of the Supreme Court which lay down that an exception pleaded can be completely proved only by a preponderance of probability. Application of different principles due to differing degrees of proof given by each side in different types of cases on facts does not involve a conflict of principles applied which have been taken from English law. For this reason and others, explained below in detail, I respectfully differ from the opinion expressed by my learned brethren who have referred this case to a Full Bench on the ground that decisions of the Supreme Court have "cast a cloud of doubt" on the correctness of the majority view in Parbhoo's case. I concur with the views expressed and conclusions recorded by my learned brethren Broome, Gupta, and Parekh JJ., and also with the conclusions reached by my learned brethren Gyanendra Kumar and Yashoda Nandan, JJ. My learned brother Mukherjee, J. has also dissented from the majority view here which only reaffirms and explains the majority view in Parbhoo's case. I share the majority view here expressed, also by my learned brother D. S. Mathur, J., on this point, that the plea of private defence falls in the category of cases in which proof of the exception affects ingredients of the offence which the prosecution has to prove beyond reasonable doubt. I entirely agree with D. S. Mathur, J., that the majority view in Parbhoo's case correctly states the law, but I am unable to go so far as to hold that the majority actually committed an error of law in stating its conclusion in such a way that its answer does not accord with the reasoning. I prefer to use the word "answer" in place of the word "dictum" (which has a special significance attached to it), used in the question referred to us. I do not, with great respect, find it possible to go beyond saying that, if the answer has been misunderstood, it may be restated so as to bring out its real meaning more clearly. Before I restate the answer, as I understand it, or proceed to elaborate my reasons to support the restatement, I will summarise the main contentions of the two sides.

Woolmington's case did not apply to cases of statutory exceptions, such as those covered by Section 105 of the Act, because Lord Sankey said so clearly there. The majority view in Parbhoo's case, according to the Advocate General, substitutes the negative test of a doubtful plea for the positive statutory requirement of a proved exception laid down by S. 105. It was submitted that a negative test, requiring elimination of reasonable doubts was to be satisfied only by the prosecution, but the accused had to prove a positive case and could not succeed by merely raising doubts that his plea may be true. It was contended that the two burdens, one of the prosecution to prove its case beyond reasonable doubt, and the other of the accused, to prove his plea by a "preponderance of probabilities" had to be kept distinct and apart. It was urged that evidence tendered to discharge each burden had to be viewed separately and not confused. The majority view, in Parbhoo's case, 1941 All LJ 619=AIR 1941 All 402 (FB) (supra) had, according to the Advocate General, wrongly treated the accused's burden as a "minor" one of "bringing his case within an exception" and had then held it to be capable of discharge by mere doubts instead of by credible or acceptable evidence. All proof, according to the Advocate General, has to rest on "preponderance of probabilities" so as to appeal to reason and prudence, but the test adopted by the majority, for judging the accused's plea, was imprudent and unreasonable, and, therefore, illegal. Such a test, it was submitted, was inconsistent with the test of what was "proved" propounded by the Supreme Court in several recent cases, AIR 1960 SC 7; AIR 1966 SC 1; AIR 1966 SC 97; AIR 1966 SC 1762; AIR 1968 SC 702. The Advocate General went so far as to contend that, if the majority view in Parbhoo's case was correct, the weaker the case of an accused, and, therefore, the greater the doubt about it, the brighter would be the prospect of an acquittal before the accused. This amounted, the learned counsel urged, to a direction to acquit accused with doubtful defences instead of acquitting them only on doubtful prosecution cases against them. It had, he informed us, actually resulted in a number of unjustified acquittals and miscarriages of justice. Doubt, the Advocate General argued, could only be an obstacle or impediment in the way of the prosecution but it could not be the foundation of or substitute for the positive proof required by law. It could not, therefore, be converted into an aid given to the accused to help them to surmount what Section 105 compels them to prove before claiming acquittal. Considerable emphasis was laid on the duty of the Court, under the last part of Section 105, read with Section 4

95. The Advocate General of Uttar Pradesh assailed the correctness as well as the validity today of the majority view in Parbhoo's case. He submitted that this view was based on a misapprehension and misapplication of what was decided in Woolmington's case. According to learned counsel, the principle laid down in

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Andhra Pradesh High Court

AIR 1970 ANDHRA PRADESH 1
(V 57 C 1)

FULL BENCH

P. JAGANMOHAN REDDY, C. J.,
PARTHASARATHI AND
RAMACHANDRA RAO, JJ.

Penumatcha Neelakanteswararaju and others, Appellants v. Jaddu Mangamma and others, Respondents.

Appeal No. 63 of 1962 D/- 8-10-1968, decided by Full Bench on order of reference made by Divn. Bench D/- 19-2-1968.

(A) Tenancy Laws — Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), Ss. 56(1) and 1(4) — Dispute arising after estate is notified — Interpretation of — Dispute already pending before.. Civil Court is not divested by S. 56(1).

The provisions of S. 56(1) are not retrospective in operation in divesting the jurisdiction of the Civil Courts in matters arising before the date when the section came into operation and accordingly, where a dispute is not pending on the date when the estate is notified before a Civil Court vested with the jurisdiction to decide or determine the matters referred to in that section, that dispute if it falls for adjudication on or after that date can only be decided by the Settlement Officer; but where the dispute was already before a Civil Court, Civil Courts alone have jurisdiction to decide that dispute.

(Para 17)

A jurisdiction once vested cannot be divested unless the legislature has expressly or by necessary intendment directed otherwise. The object of Section 56 is to prescribe an authority to settle a dispute of the kind referred to therein; and a dispute that is not already seized by some authority cannot be said to 'arise', and will arise only when steps are taken for having it adjudicated. In

that sense, though a dispute may arise earlier, in fact it arises only when one person avers before a competent tribunal and the other denies it. It may be that there have been wranglings between the parties, one party asserting and the other denying the liability and though in the wider sense of the term "dispute" such wranglings or quarrels, may be termed dispute, the Legislature did not use the word in that sense, but used it as a noun in the sense that it arises in a contest. But where a dispute in fact so arises for adjudication before any of these authorities competent to determine it prior to an estate being notified it cannot be said that the dispute arises again subsequently at any other time. Where, however, a dispute arises and continues without any steps being taken for its adjudication, because all disputes must ultimately culminate in steps being taken for their adjudication, the dispute will be deemed to continue and arise only when such steps are taken. (Case law discussed) (Para 10)

(B) Tenancy Laws — Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), Ss. 56(1), 1(4) — Abolition of estate — Issue of notification under S. 1(4) — Effect — Civil Court's jurisdiction — (Civil P. C. (1908) S. 9).

Section 56 of the Act cannot have retrospective operation and a civil Court cannot be divested of its jurisdiction when it is already seized of jurisdiction to decide matters contemplated by section 56 of the Act. Where the plaintiff sues for recovery of possession and profits even after abolition of an estate, the civil Court has jurisdiction to entertain a suit for such reliefs which cannot be given by the Settlement Officer under Section 56 of the Act and the questions contemplated by Section 56 of the Act can be incidentally decided by the Civil Court. (Para 21)

(C) Tenancy Laws — Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 56 (1) — Vesting of estate in Government — Ryotwari Patta not issued in favour of person in previous occupation — He has, nevertheless, right to protection against trespasser — (1964) 2 Andh WR 332, Overruled.

Though the entire estate vests in the Government the persons in previous occupation and having a right to possession are certainly entitled under general law to protect their own rights by resorting to the civil Court for appropriate relief and whatever decree that is passed in favour of such persons, it is always subject to the right of the Government under the Act to evict the particular person if he is not entitled to a ryotwari patta. Such a right to protect one's possession is based upon the general principle that a person in possession of the property even without title can always protect his rights by suing either for recovery of possession or for an injunction as against a trespasser as his previous possession is always good against everybody in the world except the real owner.

(Para 25)

The object of vesting the property in the Government is to enable the Government, firstly, to issue pattas in favour of persons entitled to such pattas and in all other cases to assign the land, to whomsoever the Government desires as the owner of the property. The estate having vested in the Government, it is the Government alone that can take proceedings to take possession of the property after evicting persons in occupation. It therefore follows that it is not open to any person to trespass upon the land in the actual possession of a landholder or a ryot and to plead that in view of the vesting of the estate in the Government he is entitled to trespass on the land and that the only remedy of the erstwhile Landholder or ryot is to obtain a patta under the provisions of the Act. This was not the intention of the Legislature. The rights of persons in actual possession or those having a right to possession on the date of the notification are left intact and specifically preserved by section 64 of the Act. It is common knowledge that after the notified date, it is not possible in the nature of things for the Government to conduct survey and settlement operations and issue pattas to the various persons within a short time; and in many cases it has taken more than 10 to 15 years. If before the issue of such a patta, a person is wrongfully ousted from possession by a trespasser or if his peaceful possession is illegally threatened by another or if a person commits or threatens to commit other wrongful acts by way of cutting trees or otherwise causing damage to the

property, the owner of the property is certainly entitled under general law to protect his own possession either by suing in ejectment or for an injunction on the basis of his prior possession or possessory title. Such a person can always say that his possession cannot be disturbed except by the real owner who is the Government or any other person claiming from the Government. It is not open to the Government to disturb the possession and enjoyment of the previous pattadars unless the Government holds that the person is not prima facie entitled to a ryotwari patta. (1964) 2 Andh WR 332 Overruled. (Case law discussed).

(Para 25)

Cases Referred: Chronological Paras

- (1963) S. A. No. 12 of 1964 D/- 15-4-1968 (Andh Pra), State of Andhra Pra v. Mutta Venkata Rajamma 31
- (1964) 1964-1 Andh LT 292=ILR (1965) Andh Pra 613, A. K. Sas-trulu v. Uttandimatta Swamulu-varu 30, 31, 33
- (1964) 1964-2 Andh WR 332, Guddi-wadi v. Murugappa Mudali 32
- (1963) 1963-2 Andh WR 90, Silva Kutumba Rao v. Saralak-shamma 29
- (1962) AIR 1962 SC 1230 (V 49)= 1962 Supp (1) SCR 123, Haji Sk. Subhan v. Madhorao 33
- (1960) 1960-2 Andh WR 215, Nara-simhayya v. Perayya 13, 14
- (1959) AIR 1959 Mad 447 (V 46)= (1959) 1 Mad LJ 314, Adakala Thammal v. C. Panipundar 28
- (1958) 1958-1 Andh WR 420, ILR (1958) Andh Pra 396, Paidi Peda Appanna v. Mocherla Sri-ramamorthy 12, 13, 14
- (1957) AIR 1957 SC 540 (V 44)= 1957 SCR 399, Garikapati Vteeraya v. Subbiah Chaudhary 10
- (1957) 1957-1 Andh WR 332, Bobbili Srimamamurthy v. Bachu Dhan Raju 27, 29, 30
- (1957) 1957-2 Andh WR 204: 1957 Andh LT 670, Chigurupati Venkatasubbiah v. Ravi Punayya 1
- (1957) 1957-1 Mad LJ 183: 70 Mad LW 291, Arunachalam Chettiar v. Narayanan Chettiar 11
- (1956) 1956 Andh WR 725, Rama Rao v. State of Andhra 26
- (1955) AIR 1955 Hyd 56 (V 42)= ILR (1954) Hyd 737, Maramraji v. Aknoor Yelluga 16
- (1951) A. S. No. 312 of 1947 D/- 23-11-1951 (Andhra) 11
- (1905) 1905 AC 369: 74 LJ PC 77, Colonial Sugar Refining Co. Ltd. v. Irving 10

(1903) ILR 26 Mad 514, Narayana Rao v. Dharmachari 25
 (1898) 2 QB 547= 67 LJQB 935, In re, Athlunney 15
 (1848) 2-Exch 22= 154 ER 389, Moon v. Durden 15
 T. Veerabhadrayya, for Appellants; K. Narasimham, for Respondent No. 1.

JUDGMENT OF FULL BENCH

P. J. REDDY, C. J.:— The question that has been referred to us by a Bench of this Court consisting of Satyanarayana Rao and Obul Reddi, JJ., is whether Section 56 of the Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) (hereinafter referred to as "the Abolition Act") applies to a case where the dispute contemplated by that section arose before the notification. A preliminary objection was raised by the respondent's advocate, Sri K. Narasimham, that this question does not arise because it is said that a Bench of this Court had earlier in *Chigurupati Venkatasubbiah v. Ravi Punneyya*, (1957) 2 Andh WR 204 held that a suit for possession and mesne profits is exclusively within the jurisdiction of a civil Court to decide. In our view, a perusal of the plaint would show that the question referred is incidental to the main question relating to the title of the suit properties.

2. The plaintiff had filed the suit on 25-4-1959 for recovery of the plaint schedule lands situate in Kunchanapalli Mokhasa in Tadepalligudem in West Godavari District, which is admittedly an under-tenure estate, claiming that she has occupancy rights therein and that the 2nd defendant even though he was a tenant for a short while, has no manner of right therein. The second defendant on the other hand, averred that he has occupancy rights in the suit lands as per the provisions of the Madras Estates Land Act (1 of 1908) and that no one else has got any right to dispute his rights. He further averred that the question whether the plaintiff has the right or not is to be determined by the Settlement Officer under Section 56 of the Abolition Act and that the Civil Court has no jurisdiction to decide that question.

3. The issues as framed required a determination as to whether the plaintiff and her predecessors-in-title own the Melvaram and the Kudiaram interests in the suit lands, and whether the 2nd defendant and his predecessors-in-interest acquired occupancy rights in them. There was also an issue as to whether the trial Court has no jurisdiction to try the suit.

4. It would appear that before the Bench which referred this matter, it was apparently contended that the question as referred does not arise for determination, having regard to the nature of the suit; but that contention does not seem to have been considered because Satyanarayana

Rao, J., at the end of his referring order, had clearly stated that they have not considered the other points that arise in the case and that the appeal may be posted after the Full Bench gives its opinion. We are, therefore, not concerned with any other question other than the one referred to us.

5. As we have earlier stated, the suit was filed on 25-4-1959 and was decreed in favour of the plaintiff on 24-1-1962, against which the present appeal was filed in this Court on 1-3-1962. During the pendency of this appeal, the notification under sub-section (4) of Section 1 was published on 27-8-1964, and as and from that date, estate of Kunchanapalli Mokhasa stood transferred to the Government. Section 1(4) of the Abolition Act provides thus:

"This section and Sections 2, 4, 5, 7, 8, 9, 58-A, 62, 67 and 68 shall come into force at once; and the rest of this Act shall come into force in regard to any zamindari, under-tenure or inam estate, on such date as Government may, by notification, appoint."

In order to apply the other sections of the Act therefore, the Government have to issue a notification, and Section 56 becomes applicable only after such notification, namely, in this case, after the suit has been filed. The question therefore, is whether in a case where the dispute arose before the notification, Section 56 is attracted.

Section 56 (1) is in these terms:

"Where after an estate is notified, a dispute arises as to (a) whether any rent due from a ryot for any fasli year is in arrear or (b) what amount of rent is in arrear or (c) who the lawful ryot in respect of any holding is, the dispute shall be decided by the Settlement Officer."

It is apparent from the above provision that in a case where disputes arise in respect of matters pertaining to (a), (b) or (c) enumerated in the section, it is only the Settlement Officer that can decide that dispute.

6. Sri Veerabhadrayya for the appellants contends that inasmuch as an appeal is a continuation of the suit and the dispute is one which has not been finally decided, though the suit was filed prior to the notification, the dispute must be held to arise subsequent to the notification.

7. Before we deal with the several decisions referred to us by the learned Advocates for the appellants and the respondents it will be profitable to examine the language of the section itself and the other provisions relating thereto. It may be stated that before the Abolition Act, whether any rent due for any fasli year is in arrear or what amount of rent is in arrears, had to be determined under Section 77 of the Madras Estates Land Act, which provided that subject to the pro-

visions contained in that Act, a landholder shall be entitled to recover any arrear of rent by a suit before the Collector, by distraint and sale of movable property or by sale of a ryot's holding. As to when rent becomes an arrear, is stated in Section 60 of the said Estates Land Act, namely, that "an instalment of rent not paid on the day on which it falls due becomes on the following day an arrear of rent."

8. It is obvious from the above provisions, that in so far as matters relating to (a) and (b) specified in Section 56(1) of the Abolition Act are concerned, prior to the estate being taken over under the Abolition Act, the dispute had to be determined by the Collector, not only in respect of whether any rent due from a ryot for any fasli year is in arrear, but also what amount of rent is in arrear, and the Collector would, after an enquiry, grant a decree and the same could be executed in accordance with the provisions of that Act.

9. By virtue of Section 3 (a) of the Abolition Act, the Estates Land Act stood repealed as and from the date on which each of the villages is notified and in place of the Collector, the Settlement Officer was prescribed as the authority before whom these matters could be agitated. In respect of the matter referred to in cl. (c) of sub-section (1) of Section 56, as to who the lawful ryot in respect of any holding is, a dispute relating thereto prior to the notification can only be agitated in a civil court. It is a matter for consideration therefore whether disputes which were pending before a civil court prior to the notification, and for that matter, before a Collector, are disputes which could be said to arise after the estate is notified, within the meaning of Section 56(1) of the Abolition Act. This in turn raises the further question: When does a dispute arise?

10. It appears to us that a dispute will arise for consideration only when such a dispute has to be determined by some authority competent to determine it, because the object of S. 56(1) is to confer jurisdiction in respect of disputes arising after the notification on the Settlement Officer. It may be that there have been wranglings between the parties, one party asserting and the other denying the liability and though in the wider sense of the term "dispute" such wranglings or quarrels may be termed dispute, the Legislature was not in our view using the word in that sense, but was using it as a noun in the sense that it arises in a contest. But where a dispute in fact so arises for adjudication before any of these authorities competent to determine it prior to an estate being notified it cannot be said that the dispute arises again subsequently at any other time. Where however a dispute

arises and continues without any steps being taken for its adjudication,—because all disputes must ultimately culminate in steps being taken for their adjudication—the dispute will be deemed to continue and arise only when such steps are taken. The object of Section 56, as we have said earlier, is to prescribe an authority to settle a dispute of the kind referred to therein; and a dispute that is not already seized by some authority cannot be said to 'arise', and will arise only when steps are taken for having it adjudicated. In that sense, though a dispute may arise earlier, in fact it arises only when one person avers before a competent tribunal and the other denies it. We are, therefore clear in our minds that where a dispute arises for the first time for adjudication after the notification, it is said to 'arise' within the meaning of Section 56(1) of the Abolition Act. In that Sub-section, the Legislature has clearly indicated this intention when it provided that where 'a dispute' arises after the estate is notified the dispute "shall be decided by the Settlement Officer". The indefinite article "a" used in the first part of that sub-section refers to a dispute which requires a decision, and in the second part, the definite article "the" emphasises that the dispute which has to be adjudicated shall be decided by the Settlement Officer. The language of Section 56(1) does not lend itself to the interpretation, whether express or implied that the authorities already seized of a dispute in respect of matters referred to in that sub-section are prohibited from adjudicating thereon.

It is a well-established principle that a jurisdiction once vested cannot be divested unless the legislature has expressly or by necessary intendment directed otherwise. Maxwell on Interpretation of Statutes 11th Edition page 122 states:

"It is, perhaps on the general presumption against an intention to disturb the established state of the law, or to interfere with the vested rights of the subject, that so strong a leaning now exists against construing a statute so as to oust or restrict the jurisdiction of the superior courts, although this feeling may owe its origin to the pecuniary interests of the judges in former times, when their emoluments depended mainly on fees." Whatever be its origin, the presumption is in favour of the continuance of the jurisdiction vested in the Courts unless otherwise so directed by the statute. It would not be inferred merely from the grant of jurisdiction to a new tribunal over certain matters that the legislature intended to deprive the superior Court of the Jurisdiction which it had already possessed over the same cases. A vested right of appeal can be taken away only by express enactment and not otherwise. In *Garikapati Veeraya v. Subbal Choudary*,

AIR 1957 SC 540 the question was whether an appeal filed against a decision in a suit decided prior to the Constitution had to satisfy the condition of valuation of Rs. 10,000/- prescribed by Sections 109 and 110 of the Code of Civil Procedure or Rs. 20,000/- as modified by the Adaptation of Laws Order for purposes of an appeal to the Federal Court and consequently by virtue of Article 135 to the Supreme Court. S. R. Das, C. J., referring to the observations of their Lordships of the Privy Council in the well-known case of Colonial Sugar Refining Co. Ltd. v. Irving, 1905 AC 369, pointed out that the provisions of law there enunciated have been firmly established in English jurisprudence and the decision is accepted as sound and cited with approval in leading text-books and that the same has been followed and applied in numerous decisions in England and India and its authority has not been questioned by any of the learned counsel appearing before them. A few sentences in the observations of their Lordships of the Privy Council in the Colonial Sugar Co.'s case, 1905 AC 369, will bear repetition:

"To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new Tribunal. In either case there is an interference with existing rights contrary to the well known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

11. None of the decisions to which we have been referred by the learned advocates militates against these basic principles. In fact, those cases are easily distinguishable on facts and we do not think that anything has been stated therein which supports the contention of the learned Advocate for the appellants. Great reliance has been placed on the observations of Rajagopala Ayyangar, J., (as he then was) sitting singly in *Arjunachalam Chettiar v. Narayanan Chettiar* (1957) 1 Mad LJ 183, as supporting the contention advanced by the learned Advocate for the appellants. The learned Judge had observed at page 184 while dealing with Section 56 of the Abolition Act thus: "If therefore, a dispute in relation to matters mentioned in Section 56(1) (a) and (b) would take in disputes originating earlier than the notified date but continuing even afterwards the nature of the dispute referred to in Sub-clause (c) of Section 56 (1) would not be different. In my opinion, the proper construction of that section is to hold that all disputes which are factually present

after the notified date come within the jurisdiction of the settlement officer and within Section 56(1). Disputes which are excluded are only those in regard to which there have been binding adjudications by the ordinary Courts before that date or matters pending before other authorities before the notified date. In regard to all others the dispute 'arises' after the notified date within the meaning of Section 56(1) if notwithstanding its having originated at an earlier date it continues thereafter, for the dispute is a difference which exists until it is settled and it is the existence of the dispute that is referred to in the section and not its origin." From these observations it is sought to be contended that unless there is a binding decision by the Civil Court, of a dispute which is before it, the dispute is still said to arise on the date when the estate is notified. But this contention ignores the fact that the learned Judge had specifically stated that all disputes which are factually present after the notified date come within the jurisdiction of the Settlement Officer and he further pointed out that the disputes which are excluded and matter pending before other authorities before the notified date was one such. It cannot, therefore, be said that while disputes pending before the other authorities are not disputes within the meaning of Section 56(1), disputes pending before the Civil Courts are disputes which are factually present on the date when the estate is notified.

Reliance is also placed on the observation "that the dispute is difference which exists only until it is settled" for the contention that a dispute exists until it is finally decided by the ultimate appellate Court, because that alone can be a binding adjudication; as such it is said to arise on the date when the estate is notified. We do not think that the learned Judge intended his observations to be construed in that manner. Even if he did, with great respect, we are unable to subscribe to that view as arising on a plain interpretation of Section 56(1), nor do we think that the question which is before us fell for decision in that case, where the petitions for pattas were filed before the Settlement Officer after the estate was notified and though the Settlement Officer granted the pattas, the Estates Abolition Tribunal held that the Settlement Officer had no jurisdiction because the dispute in respect of that matter had arisen prior to the notification. It is obvious that the Tribunal was clearly wrong in holding that the Settlement Officer had no jurisdiction because dispute between ryots as to who is the lawful ryot arose before the notification of the estate. The dispute as to whether pattas should be granted to the appellants or not arose after the estate was notified when the Settlement

Officer had clearly jurisdiction to decide that matter. An earlier unreported Bench decision of the same Court (consisting of Govinda Menon and Chandra Reddi, J.J.) is A. S. No. 312/1947 decided on 23-11-1951 (Andhra) where the facts were similar to those in the instant case, does not seem to have been brought to the notice of Rajagopala Ayyangar, J. In that case, the 1st respondent had instituted a suit — O. S. 34/1946 — for a declaration that he alone is the occupancy ryot and none of the defendants-appellants had rights of occupancy in them and as such he is entitled to immediate possession thereof with profits from 1-6-1945. The trial Court decreed the suit as prayed for and negated the contentions of the defendants. Against that judgment and decree, an appeal was filed which was being considered by the Bench. The learned counsel for the respondents raised preliminary objection that Section 56(1) of the Act takes away the jurisdiction of the civil courts to decide questions as to who is the lawful ryot in respect of any holding in an estate after coming into force of that Act and that such a dispute can only be decided by the Settlement Officer. The contention on behalf of the appellants was that Section 56(1) has no application and that having regard to the fact that the suit for declaration of the plaintiff's rights as occupancy tenant was filed long before the notification of the estate, the provisions of Section 56(1) do not govern the case. Section 8 of the Madras General Clauses Act, similar to Section 6 of the General Clauses Act 10 of 1897 as adopted by the Government of India was referred to by the learned Advocate in support of the contention that once proceedings are started in a Civil Court, all rights which the parties had on the date of the institution of the suit are preserved to them through the rest of its career unless they are expressly or by necessary intendment taken away by the amending Act. In other words, the argument was that Section 56 of the Abolition Act does not affect pending proceedings in civil courts, nor does it take away the rights incidental to the filing of the suit. This contention was accepted by the Bench.

Chandra Reddi, J. (as he then was) after referring to some of the meanings of the word "arises", in the Oxford Dictionary as "be beard", "to originate", "be born", and "come into notice", thought that the expression can only mean "disputes born or disputes originating after the estate is notified", i.e., disputes which, are raised for the first time after the notification. The learned judge further observed:

"If it was the intention of the legislature to cover and to include disputes already in existence on the date of the notification of the estate, it would have

made its intention clear in unambiguous terms by providing for pending disputes also. It is well-settled rule of law that it is only by express provisions that jurisdiction of Civil Courts can be taken away. In our opinion, therefore Section 56 has not the effect of depriving Civil Courts of their jurisdiction to decide questions relating to occupancy rights in respect of a holding in an estate already pending before them and, therefore, cannot have any application to the present case."

12. The case of Paidi Peda Appanna v. Mecherla Sriramamurthy, (1958) 1 Andh WR 420, also is of no assistance, because in that case the estate was notified on 7-9-1950 and the suit was filed in the Sub-Court on 6-4-1951 when clearly it had no jurisdiction and the Bench consisting of Subba Rao C. J. (as he then was) and Ranganadham Chetti, J. so held it. At page 426, Subba Rao C. J. observed: "In the present case the suit was filed after the notified date for recovery of rent 'from the defendant. The defendant raised the question that he is the lawful ryot and not the plaintiff and also questioned the correctness of the quantum of rent claimed. Both questions fall under Section 56(1) of the Act and therefore, these questions cannot be agitated in a Civil Court."

13. Narasimhayya v. Perayya (1960), 2 Andh WR 215 is also a case where the suit was filed after the estate was notified. The estate was notified on 7th September 1949 and the suit was filed on 11-7-1951. Bhimasankaram, J. delivering the judgment of the Bench consisting of himself and Srinivasachari, J. while referring to the case of (1958) 1 Andh WR 420 (supra) and doubting the soundness of the actual decision in the case, nonetheless, observed: "This does not mean, however, that the general principles as to the Civil Courts' jurisdiction which 'that decision enunciates are unsound. Moreover, we are inclined to adopt the interpretation the learned Judges put upon the expression: where after an estate is notified, a dispute arises as covering also a pre-existing dispute which subsists after the notification, The dispute is clearly one which was pending when the Act came into effect and can thus be properly said to be within the scope of the Act, as pointed out in the above decision. It is manifest that if that is so, the procedure to be followed by the plaintiff is to file an application before the Settlement Officer, in accordance with the rules framed by the State Government under their rule-making power for the determination of the dispute between him and the defendant. The Civil Court has no jurisdiction to give a declaration as to a right the determination of which is expressly committed to the officer and the Tribunal appointed

under the Act. It seems to us, therefore that the present suit should fail."

14. It appears to us that neither in Appanna's case (1958) 1 Andh WR 420 nor in Narasimhayya's case, (1960) 2 Andh WR 215 were the learned Judges called upon to consider a case where a suit had been filed prior to the date when the estate was notified, and the adjudication thereof was pending before the trial Court or if it was adjudicated, was the subject-matter of an appeal, which was either filed before the said date or subsequent thereto; nor are there any observations which can be construed as divesting the Civil Courts of their jurisdiction in respect of the said proceedings.

15. Sri Veerabhadrayya, however, contends that the effect of a postponing clause such as Section 1(4) of the Abolition Act, whereunder Section 56(1) along with other sections not specified in the sub-section came into operation on the date when the estate was notified, was to give it a retrospective effect. In support of this proposition, he has cited a passage, from Craies On Statute Law, 6th Edition, page 392, but this passage itself throws great doubt on such a proposition. It is observed by the learned author: "A postponement clause in an Act has been sometimes said to be an indication against the presumption that a retrospective intent is not to be inferred". Wright, J. in *Re. Athlunney* (1898) 2 QB 547 cited in support of these observations, said: "one exception to the general rule has sometimes been suggested, viz., that where as here, (Section 23 of the Bankruptcy Act) the commencement of the operation of an Act is suspended for a time, this is an indication that no further restriction upon retrospective operation is intended. But this exception seems never to have been suggested except in relation to enactments such as statutes of limitations and even in relation to these, it is questioned in *Moon v. Durden*, 1848-2, Exch. 22." After examining several decisions, again at page 393, Craies states: "The result of these decisions seems to be that the suggested exceptions, rarely if ever applicable, cannot be accepted as an undoubted rule of construction."

16. The decision by a Bench of the erstwhile Hyderabad High Court consisting of Misra, C. J. and Deshpande, J. in *Maram Raj v. Aknoor Yelluga*, AIR 1955 Hyd 56, is also distinguishable because in that case Section 99 of the Hyderabad Tenancy & Agricultural Lands Act (XX of 1950) which specifically prohibited civil Courts from entertaining disputes arising from the enactment, came up for consideration. The language of the section, it will be observed, was categorical in its prohibition and expressly barred the jurisdiction of the Civil Courts from

entertaining matters dealt with under the Tenancy Act.

17. The result of the examination of the provisions of Section 56(1) and the consideration of the decisions referred before us is that the provisions of that section are not retrospective in operation in divesting the jurisdiction of the Civil Courts in matters arising before the date when the section came into operation and accordingly where a dispute is not pending on the date when the estate is notified before a Civil Court vested with the jurisdiction to decide or determine the matters referred to in that section, that dispute if it falls for adjudication on or after that date can only be decided by the Settlement Officer; but where the dispute was already before a Civil Court, Civil Courts alone have jurisdiction to decide that dispute.

18. The reference is answered accordingly.

x x x x

Judgment of Division Bench consisting of Krishna Rao J. and Madhava Reddy J. delivered by

19. **KRISHNA RAO, J.:** This appeal is filed by defendants 1, 3 and 4. The first respondent herein filed a suit O. S. No. 28 of 1959 in the Court of the Subordinate Judge, Eluru, out of which this appeal arises, for recovery of possession of the plaint schedule lands after ejecting the defendants therefrom for recovery of Rs. 300/- towards past profits for three years and also for future profits. The plaint schedule land is situate within the Mokhasa agharam of Kunchanapalli, West Godavari District. One Jaddu Subbayya purchased an extent of Ac. 70-00 of land in the said Agharam by a deed of Sale, Ex. A-1 dated 18-2-1907, that is, before the passing of the Madras Estates Land Act, from the Mokhasadar. Out of the property thus acquired, Subbayya retained Ac. 35-00 and sold away the rest to the father of the second defendant. In a division of the property between the sons of Subbayya, the plaintiff's husband, who was one of the two sons, got the suit property of Ac. 17-50 cents for his share. The second defendant who was admittedly a tenant of the plaintiff refused to vacate the land after the expiry of his lease in 1947. The plaintiff came to know that defendants 1, 3 and 4 began to set up rights under the second defendant. Hence, the plaintiff filed the present suit for recovery of possession on 25-4-1959.

20. The second defendant was adjudicated insolvent in I. P. 11 of 1955. The Official Receiver in whom the estate of the second defendant vested, sold among others, the kudivaram rights in the suit land belonging to the insolvent for the insolvent showed the same as his property in the schedule filed before the Insolvency Court. In the sale conducted by the Offi-

cial Receiver, the Kudivaram rights in the suit property were purchased by one M. Rajagopalaram and after his death his legal representative sold the said interest to the first defendant under Ex. B.4 dated 20-9-1957. Defendants 3 and 4 claimed to be lessees under the second defendant under Exhibits B.1 and B. 2 of the year 1954. The case of the contesting defendants is that the plaintiff was landlord entitled only to the Melvaram right, that the second defendant being a tenant under the plaintiff, became a ryot acquiring occupancy rights under the provisions of the Madras Estates Land Act, 1908, that defendants 1, 3 and 4 who claimed under the second defendant are entitled to remain in possession and that the plaintiff's suit should be dismissed. The court below decreed the suit for possession together with past profits of Rs. 300/- and directed an enquiry into future profits by a separate application holding that the plaintiff is entitled to both Kudivaram and Melvaram rights obtained under the sale-deed Ex. A-1 by her father-in-law Subbayya from the original Mokhasadars and that the second defendant is not therefore a ryot but a mere tenant without a right of occupancy. The court below also held that the plaintiff was in possession within 12 years of the suit and that the last payment of rent by the second defendant to the plaintiff was on 6-8-1947 evidenced by Ex. A-4. The second defendant thereafter did not pay any rents and he continued in possession not as a tenant holding over but as a person in unauthorised occupation. The case of defendants 1, 3 and 4 depends upon the merits of the second defendant's plea of occupancy rights.

21. The above appeal was filed on 1-3-1962 and during the pendency of the appeal in this Court, the suit Mokhasa village was abolished as an inam estate under the Madras Estates Abolition Act, (1948) and the relevant notification under the Act was made on 27-8-1964. In the above appeal, the following question was referred for consideration to a Full Bench viz.,

"Whether section 56 of the Andhra Pradesh (Telangana Area) Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948) applies to a case where the dispute contemplated by that section arose before the notification."

A Full Bench consisting of Jaganmohan Reddi, C. J., Parthasarathi and K. Ramachandra Rao, JJ. gave its opinion dated 16-9-1968 holding that Section 56 of the Act cannot have retrospective operation and that a civil Court cannot be divested of its jurisdiction when it is already seized of jurisdiction to decide matters contemplated by Section 56 of the Act. Subsequently, the appeal was again posted before us for disposal on merits. It is

however, necessary for us to clarify, that in the instant case where the plaintiff sued for recovery of possession and profits, the preponderance of authority in this Court as well as in the Madras High Court is that even after abolition of an estate, the civil Court has jurisdiction to entertain a suit for such reliefs which cannot be given by the Settlement Officer under Section 56 of the Act and that the questions contemplated by Section 56 of the Act can be incidentally decided by the Civil Court. In the present case, even if the suit had been brought subsequent to the notification, the Civil Court is competent to entertain the suit and there is no bar of jurisdiction under S. 56 of the Act. This position is not disputed by the learned counsel for the appellant Sri Veerabhadrayya.

22. The learned counsel for the appellant raised the following two questions for our consideration:

(i) The plaintiff is a landholder owning only the Melvaram right and that the second defendant under whom defendants 1, 3 and 4 claim, is a ryot entitled to occupancy rights in the suit land; and

(ii) In view of the abolition of the estate, the property stands vested in the State Government and that no decree for possession can be granted in favour of the plaintiff.

23. Taking up the first point for consideration, the learned counsel for the appellant has not been able to place any material before us for disturbing the finding of the trial Court. It is not suggested by the learned counsel that on the date of Ex. A-1 of the year 1907 there were cultivating tenants in possession of the land and that the Mokhasadar conveyed only the Melvaram right to Subbayya the plaintiff's father-in-law. The case of the second defendant is that his father was let into possession only by the plaintiff after she became entitled to the suit property. We, therefore, confirm the finding of the trial Court that plaintiff is entitled to both Melvaram and Kudivaram rights with respect to the suit land and that the second defendant is a mere tenant and not entitled to any occupancy right. No arguments are advanced before us as regards the decree and the direction for profits granted by the lower Court.

24. The second question for consideration which is practically the main point argued before us by the learned counsel for the appellant is that the plaintiff cannot be given any decree in view of the estate having vested in the Government. This question has arisen on account of a subsequent event, namely, the abolition of the estate in 1964 and hence we permitted the learned counsel to raise the same as it is one of law. Though there

is preponderance of authority on this question against the contention of the appellant's learned counsel, he placed reliance upon a recent judgment of a learned Single Judge of this Court in support of his contention. We would not have considered this point but for the fact that we are invited to deal with the correctness of the said decision, relied upon by the learned counsel for the appellant. Before referring to the decisions relating to this question, it is necessary to set out the relevant provisions in the Estates Abolition Act (1948) in order to appreciate the argument.

Section 1(4) is as follows:

"This section and Sections 2, 4, 5, 7, 8, 9, 58-A, 62, 67 and 68 shall come into force at once; and the rest of this Act shall come into force in regard to any zamindari under-tenure or inam estate, on such date as Government may, by notification, appoint."

Section 3. With effect on and from the notified date and save as otherwise expressly provided in this Act—

(a) x x x x

(b) The entire estate (including minor inams (post-settlement or pre-settlement) included in the assets of the zamindari estate at the permanent settlement of that estate, all communal lands and porombokes; other non-ryoti lands, waste lands, pasture lands, lanka lands forests, mines and minerals, quarries, rivers and streams; tanks and irrigation works, fisheries and ferries), shall stand transferred to the Government and vest in them, free of all encumbrances;"

3. (c) all rights and interests created in or over the estate before the notified date by the principal or any other landholder, shall as against the Government cease and determine;

(d) the Government may, after removing any obstruction that may be offered, forthwith take possession of the estate, and all accounts, registers, pattas, muchilikas, maps, plans and other documents relating to the estate which the Government may require for the administration thereof;

Provided that the Government shall not dispossess any person of any land in the estate in respect of which they consider he is prima facie entitled to a ryotwari patta—

(i) if such person is a ryot, pending the decision of the Settlement Officer as to whether he is actually entitled to such patta;

(ii) if such person is a landholder pending the decision of the Settlement Officer and the Tribunal on appeal, if any, to it as to whether he is actually entitled to such patta;

(e) xx xx xx
(f) x x x

(g) ryots in the estate and persons holding under them shall, as against the Government, be entitled only to such rights and privileges, as are recognised or conferred on them by or under this Act, and any other rights and privileges which may have accrued to them in the estate before the notified date against the principal or any other land-holder thereof shall cease and determine and shall not be enforceable against the Government or such landholder.

Section 11. Every ryot in an estate shall, with effect on and from the notified date, be entitled to a ryotwari patta in respect of—

(a) xx xx xx
(b) xx xx xx

Section 12. In the case of a zamindari estate, the land-holder shall with effect on and from the notified date, be entitled to a ryotwari patta in respect of—

(a) xx xx xx
(b) xx xx xx

Section. 13. In the case of an inam estate, the landholder shall, with effect on and from the notified date, be entitled to ryotwari patta in respect of—

(a) xx xx xx
(b) xx xx xx

S. 20(1). In cases not governed by Sections 18 and 19, where before the notified date, a landholder had created any right in any land (whether by way of lease or otherwise) including rights in any forest, mines or minerals, quarries, fisheries or ferries the transaction shall be deemed to be valid; and all rights and obligations arising thereunder, on or after the notified date, shall be enforceable by or against the Government.

Provided.....

S. 64. Where a person—

(a) is entitled to the ownership or to the possession or occupation of any land or building immediately before the notified date, but has transferred his right to the possession or occupation thereof or has been temporarily dispossessed or deprived of his right to the occupation thereof; and

(b) has not on that date lost his right to recover possession or occupation of such land or building;

he shall, for the purposes of this Act and subject to the provisions thereof, be deemed to be the owner, or to be in possession or occupation, of such land or building;

Provided that any lawful transferee of the right to the possession or occupation of such land or building shall, save as otherwise expressly provided in this Act, continue to have the same rights against his transferor, as he had immediately before the notified date;

Provided further that any lawful transferee of the title to such land or building

shall be entitled to all the rights under this Act of his transferor."

25. The above provisions may be summed up as follows: On and from the notified date, the entire estate vests in the Government. The Government may take possession of the estate and all other things required for the administration thereof. No person shall be dispossessed whom the Government considers as being *prima facie* entitled for a ryotwari patta. If any proceeding for the issue of a patta is pending before the appropriate tribunal no action will be taken by the Government for dispossessing any person pending such adjudication before the tribunal. Special provisions are made for the constitution of tribunal and for the grant of ryotwari pattas in favour of ryots and landholders in the case of Zamindari as well as inam estates. Subject to some conditions, certain rights created by the landholder before the notified date in favour of third parties are saved. All persons whose rights of ownership, possession or occupation were not extinguished by the date of the notification are deemed to be persons holding such rights for the purposes of the Act. It is also significant to note that there is no provision in the Act requiring the existing landholders or the ryots to abandon their lands and surrender the same in favour of the Government. There is also no provision in the Act requiring that the persons entitled to ryotwari pattas should apply within a specified date in default of which they should be deemed to have lost their rights in the property. In cases where proceedings are actually pending for the issue of pattas, it is provided that the persons claiming such rights shall not be dispossessed pending adjudication of such rights. In cases where no proceedings are pending for the issue of patta under the relevant provisions of the Act, the question arises whether it is open to the Government to evict persons forthwith from the land as persons in unauthorised occupation under the Madras Land Encroachment Act. The provisions of Section 3(d) proviso clearly indicate that even in such a case, the right of the Government to dispossess any person arises only when it considers that the person is not *prima facie* entitled to a ryotwari patta. If the question is under consideration before the tribunals, it is provided that the Government shall not dispossess the persons until their claims are adjudicated upon by the tribunals. In other cases, that is, where the parties have not applied for pattas, it follows on a reasonable interpretation of the proviso that the Government should take suo motu proceedings to consider whether a person is *prima facie* entitled to a patta or not. Unless the Government decides the said question either in such proceedings taken suo motu or in the proceedings started on

the application of the parties no person in actual possession or entitled to such possession, will be deprived of his rights by the Government. Therefore until the claims of the persons are examined as aforesaid, the persons in actual possession are entitled to continue as before, even after the notified date.

The object of vesting the property in the Government is to enable the Government, firstly, to issue pattas in favour of persons entitled to such pattas and in all other cases to assign the land, to whomsoever the Government desires as the owner of the property. The estate having vested in the Government, it is the Government alone that can take proceedings to take possession of the property after evicting persons in occupation. It therefore, follows that it is not open to any person to trespass upon the land in the actual possession of a landholder or a ryot and to plead that in view of the vesting of the estate in the Government he is entitled to trespass on the land and that the only remedy of the erstwhile landholder or ryot is to obtain a patta under the provisions of the Act. This, in our opinion, was not the intention of the legislature. Having regard to the summary of the relevant provisions set out above, the right of persons in actual possession or those having a right to possession on the date of the notification are left intact and specifically preserved by Section 64 of the Act. It is common knowledge that after the notified date, it is not possible in the nature of things for the Government to conduct survey and settlement operations and issue pattas to the various persons within a short time; and in many cases it has taken more than 10 to 15 years. Even today, in the case of several estates which have been taken possession of even as early as 1950, pattas have not been issued to persons. If before the issue of such a patta, a person is wrongfully ousted from possession by a trespasser or if his peaceful possession is illegally threatened by another or if a person commits or threatens to commit other wrongful acts by way of cutting trees or otherwise causing damage to the property, the owner of the property should certainly be entitled under general law to protect his own possession either by suing in ejectment or for an injunction on the basis of his prior possession or possessory title. Such a person can always say that his possession cannot be disturbed except by the real owner who is the Government or any other person claiming from the Government. It is not open even to the Government to disturb the possession and enjoyment of the previous pattadars unless the Government holds that the person is not *prima facie* entitled to a ryotwari patta. We are of the opinion that though the entire estate vests in the Government the

persons in previous occupation and having a right to possession are certainly entitled under general law to protect their own rights by resorting to the civil court for appropriate relief and whatever decree that is passed in favour of such persons, it is always subject to the right of the Government under the Act to evict the particular person if he is not entitled to a ryotwari patta. Such a right to protect one's possession is based upon the general principle that a person in possession of the property even without title can always protect his rights by suing either for recovery of possession or for an injunction as against a trespasser as his previous possession is always good against everybody in the world except the real owner, vide *Narayana Rao v. Dharmachari*, ILR 26 Mad 514. If the contention of the appellant's learned counsel, namely, that until a patta is obtained, the ryot or landholder cannot sue before a Court to protect his possession, it would result in dangerous consequences opening a wide door for persons to take law into their own hands and disturb persons already in peaceful possession of properties.

26. We will now refer to the decided cases on the point. In *Rama Rao v. State of Andhra* (1956) Andh WR 725 *Satyana-rayana Raju, J.* (as he then was) sitting alone, held that so long as the claim for a ryotwari patta is pending before the Settlement Officer and on appeal before the Tribunal, it is not possible to say that the persons already in possession should be treated as trespassers liable to be evicted under the Land Encroachment Act.

27. In *Bobbili Sriramamurthy v. Bachu Dhan Raju*, (1957) 1 Andh WR 332, a landholder filed a suit claiming that the land was his private land and that the defendants are trespassers who set up false claims for occupancy rights. It was found that the land was not ryoti land and that the defendants had no rights of occupancy. In answer to a contention that the entire estate vested in the Government after the abolition of the same and that the plaintiff has no right to sue in ejectment as he did not obtain a patta from the Government under the relevant provisions of the Act, it was held by *N. D. Krishna Rao, J.* (as he then was) who delivered the judgment of the Division Bench, consisting of himself and *Chandra Reddy, J.* (as he then was) that under proviso (ii) to Section 3(d) of the Act, the landholder is entitled to continue in possession until the Government considered that he had no prima facie right to obtain a patta and that he is therefore surely entitled to evict any trespasser from the land. It was further pointed out that there was nothing in the Act to support the view that the landholder has no right to possession of private land until he gets a ryotwari patta in respect of it under Section 12.

28. In *Adakalathammal v. C. Palni-pundar*, AIR 1959 Mad 447 a Division Bench of the Madras High Court held that if a person has been in possession of a ryoti land and another person has trespassed on his holding and no ryotwari patta has actually been granted to either of the persons, there is nothing prima facie in any of the provisions of the Act which prevents the civil Court from entertaining a suit for possession by a person who had been in possession and who had been dispossessed.

29. In *Siva Kutumba Rao v. Sarvalakshmma* (1963) 2 Andh WR 90, *Kumarayya, J.* sitting alone, following the decision in (1957) 1 Andh WR 332, held that even if the property in question had vested in the Government, it was not open to the defendants to set up that plea in defence of continuance of their unlawful possession as against the plaintiffs who are proved to be the owners of property at the time of the trespass, at the time of action and even on the date immediately before the notification and who, in the eye of law, should be deemed to be owners in occupation and entitled to continue in possession and enjoyment until dispossessed by the Government. On a consideration of the relevant provisions of the Act the learned Judge held that even if the position of the plaintiffs be equated with that of a mere possessory owner on account of the vesting of the estate by reason of the notification, the plaintiffs in that capacity as well can claim back the property which they were wrongfully deprived of by any person other than the true owner.

30. In *A. K. Sastrulu v. Uttandimatta Swamuluvaru*, (1964) 1 Andh LT 292, a Division Bench of this Court consisting of *Chandra Reddy, C. J.*, and *Gopalakrishnan Nair, J.* repelled a similar contention and held after considering the provisions of Section 3 and the proviso thereto and Section 64 of the Estates Abolition Act as follows:—

"The effect of this section is that the respondent shall be deemed to be in possession of the lands notwithstanding the temporary dispossession of the lands by the appellants. What then is the result of these two sections? Could it be posited that notwithstanding these two provisions the appellant could continue in possession of the land which he obtained by trespassing on them? If the argument of the learned counsel for the appellant is to be accepted, it would amount to this namely: That despite the fiction created by Section 64 the appellant should be permitted to continue to be in possession driving the respondent to seek his remedies elsewhere. We are not persuaded that this argument is substantial. If really a person is deemed to be in possession of certain lands and the Government cannot dispossess him of the lands in similar circumstances, that

person is surely entitled to evict the trespasser with the aid of the Court."

In coming to this conclusion, the ruling in (1957) 1 Andh WR 332, was followed.

31. Reference may next be made to an unreported decision of Satyanarayana Rao, J. in Second Appeal No. 12 of 1964 D/- 15-4-1968 in State of Andhra Pradesh v. Mutta Venkata Rajamma, in which the learned Judge construing S. 3(d) proviso held that it is the imperative duty of the Government to maintain the possession of persons as stated in Section 3(d) proviso and that the Government shall not dispossess any person if they consider prima facie that he is entitled to a ryotwari patta, following the decision of this court in (1964) 1 Andh LT 292. The learned Judge held that a suit for possession and profits is maintainable at the instance of a party even if the estate is abolished and without the plaintiff having obtained a patta. In the said case the Government was also impleaded as a supplemental defendant in view of the objection taken that the property vested in the Government.

32. I will now refer to two decisions on which the learned counsel for the appellant Sri Veerbhadrayya placed strong reliance in support of his contention. The first one is a recent judgment of this court delivered by Basi Reddy, J. (as he then was) in *Guddivadu v. Murugappa Mudoll* (1964) 2 Andh WR 332. It was a suit filed for a declaration that the plaintiff is the owner of certain trees and for an injunction restraining the defendants, who had cut away some trees from cutting the other trees on the land. It was argued that the plaintiff had no right to maintain the suit in view of the fact that he failed to obtain a patta after the abolition of the estate in consequence of which the property stood vested in the State Government. In upholding this contention the learned Judge held that the provisions of Section 3 proviso do not in any way whittle down the absolute vesting title in the Government or create any title in the party in possession of the property. Further, the learned Judge was not prepared to call in aid the provisions of Section 64 as they related only to land and buildings and not to trees. In view of the foregoing preponderance of authority, we are of the opinion with great respect that the decision of Basi Reddy, J. is not correct. Applying the principles stated above, the person who is in actual enjoyment of the trees as well as the land can always maintain an action against the wrongful acts of mischief committed on his land by strangers by way of cutting the trees, etc. and such a right is undoubtedly based upon his possessory title and it is no defence for the wrong-doer to say that the quondam owner of the trees has no right to protest and that it is only the

Government that can raise the objection. We are therefore, constrained to overrule the above decision of Basi Reddy, J. In this connection we cannot avoid observing that none of the previous decisions of this court was brought to the notice of the learned Judge.

33. The second case relied upon by the appellant's learned counsel is the decision of the Supreme Court in *Haji Sk. Subhan v. Madhorao*, AIR 1962 SC 1230, which arose under the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950. A purchaser of certain property in a revenue sale filed a suit for possession and obtained a decree therein and the said decree was also upheld by the High Court. Before the confirmation of the decree by the High Court, the estate in question was abolished under the provisions of the Madhya Pradesh Act and it was not brought to the notice of the High Court. When the decree-holder sought to execute the decree, the judgment-debtor whose cultivation right in the said land was recognised by the concerned authorities after the abolition of the estate, objected to the execution on the ground that the decree-holder cannot obtain any rights in the property except in accordance with the provisions of the said Act. This objection was upheld by the Supreme Court. In order to appreciate the decision of the Supreme Court, it is necessary to refer to the relevant sections of the said Madhya Pradesh Act which are as follows:—

Section 3(1): "Save as otherwise provided in this Act, on and from a date to be specified by a notification by the State Government in this behalf, all proprietary rights in an estate shall pass..... and vest in the State for the purposes of the State free of all encumbrances.

(2) After the issue of a notification under sub-section (1), no right shall be acquired in or over the land to which the said notification relates, except by succession or under a grant or contract in writing made or entered into by or on behalf of the State....."

In view of these specific provisions, it was held by the Supreme Court that the only manner in which a person can acquire rights in property is the one contemplated in sub-section (2) and that the decree of the High Court which was passed after the notified date confers no rights upon the decree-holder therein. There is no provision in the Madras Estates Abolition Act corresponding to Section 3(2) of the Madhya Pradesh Act and there is also no provision in the Madhya Pradesh Act corresponding to Section 3 proviso of the Madras Act. There is, therefore, no analogy between the scheme of the Madhya

Pradesh Act and the Madras Estates Abolition Act. Reliance was placed upon this decision of the Supreme Court in the case already cited, namely (1964) 1 Andh LT 292 where it was held that the provisions of the two Acts are not analogous and that no reliance can be placed upon the said decision for the purpose of construing the provisions of the Madras Estates Abolition Act.

34. For the above reasons, we hold that the plaintiff is entitled to continue the suit even after the estate vested in the Government. The second defendant had no right to remain in possession after August 1947. The plaintiff filed the suit within 12 years thereof for recovery of possession. It may also be noted that after the estate was abolished in 1964, neither the second defendant nor defendants 1, 3 and 4 who claim rights under him applied for any patta under Section 11 of the Act claiming to be ryots entitled to a ryotwari patta. The decree of the court below is therefore, confirmed and this appeal is accordingly dismissed with costs payable to the plaintiff by the appellants.

Appeal dismissed.

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(V 57 C 2)

**MOHAMED MIRZA AND
CHINNAPPA REDDY, JJ.**

Syed Jaferuklah Jaferi, Petitioner v. Abdul Aziz and others, Respondents.

Criminal Revn. Case No: 903 of 1967 and Criminal Revn. Petn. No. 786 of 1967 D/- 3-4-1969.

Criminal P. C. (1898), S. 197 — Wakfs Act (1954), S. 65 — Relative scope of two provisions — Complaint against 8 accused under Ss. 448, 454, 341, 295-A and 426 I. P. C. for invading premises housing private library in possession of complainant — Accused 1, Secretary of Wakfs Board and 2 to 4, employees thereof — S. 65 of Wakfs Act is no bar to prosecution — Sanction under S. 197 Cr. P. C. is not necessary. Cri. Revn. Case No. 441 of 1964, D/- 12-8-1864 (A. P.), Overruled.

The object of Section 197 Cr. P. C. and similar provisions in other statutes is to protect public servants and persons acting under statutory powers against unnecessary harassment. Similar provisions in other Acts offer two kinds of protection to persons exercising statutory or official powers, absolute or limited. In the case of some enactments the protection is absolute, that is to say, no proceeding can at all be instituted against persons exercising powers under some statu-

tes, but in such cases the Legislature has invariably taken care to insist that the protected act should have been done in good faith. The protection given by Section 65 of the Wakfs Act is of this category. In some statutes the protection is not absolute but limited; in some it is limited in the sense that a short period of limitation is prescribed so that no officer need be in perpetual dread of some ghost rising from the distant past; in others it is limited by making the sanction of a prescribed authority a condition precedent to the launching of a prosecution. The protection given by Section 197 of Cr. P. C. is of the last category.

(Para 7)

The phraseology used in Section 197 of the Cr. P. C. and Section 65 of the Wakfs Act is different. The difference in phraseology of the expressions 'any offence alleged to have been committed while acting or purporting to act in the discharge of his official duty' and 'anything done or intended to be done under the Act' is not of any great significance. A temporal meaning should not be given to such expressions and if such a meaning is not given the expressions have precisely the same connotation at least in so far as acts done by persons appointed under the provisions of the Wakfs Act. (Para 8)

Section 197 of the Criminal Procedure Code and provisions like Section 65 of the Wakfs Act protect two classes of acts: (1) Where the act complained of is the very act which he is expected or authorised to do under the statute or the law but which becomes reprehensible because it is alleged to be done fraudulently or dishonestly, i.e., where the machinery of the Act is employed to do an authorised act in an unauthorised manner or for an unauthorised purpose, (2) where the act complained of though not itself sanctioned by statute or enjoined by his official duty is, however, so intimately and integrally connected with his official or statutory duty that it can be said to have been done in furtherance of the duty prescribed by statute or for achieving the object enjoined by his duty. There must be a reasonable nexus between the act and the duty. Case law disc. (Para 14)

A filed complaint before City Magistrate against 8 accused persons under Sections 448, 454, 341, 295-A and 426 I. P. C. for invading premises housing private library in possession of complainant and belonging to his ward. Accused 1 is Secretary of Wakf Board. Accused 2 to 5 are employees of Wakf Board while accused 6 to 8 do not have official status. Question is whether accused persons 1 to 5 are entitled to protection under Section 197 Cr. P. C., and under Section 65 of Wakfs Act.

Held, that the Wakf Board is not invested under the Wakfs Act with power

to take possession of property in the possession of another by direct action without recourse to legal process. There is no reasonable nexus between the duty to take measures to recover lost properties and the alleged acts of the accused complained of. (Para 16)

Thus, Section 65 of the Wakfs Act is not a bar to the prosecution of any of the accused nor is sanction under Section 197 of the Criminal Procedure Code necessary for their prosecution. Cr. Rev. Case No. 441 of 1964 D/- 12-8-1964 (AP) Overruled. (Para 17)

Cases Referred: Chronological Paras

- (1964) AIR 1964 SC 33 (V 51)=
1964 (1) Cri LJ 16, State of
Andhra Pradesh v. Venugopal 12
(1964) Cri R C No. 441 of 1964,
D/ 12-8-1964 (AP) 1, 17
(1963) AIR 1963 SC 849 (V 50)=
1963 (1) Cri LJ 814, Virupaxappa
Veerappa v State of Mysore 11
(1956) AIR 1956 SC 44 (V 43)=
1966 Cri LJ 140, Matajog
Dobey v. H. C. Bhari 9, 10
(1955) AIR 1955 SC 287 (V 42)=
1955 Cri LJ 857, S Ramayya
Munipalli v State of Bombay 9, 10
(1955) AIR 1955 SC 309 (V 42)=
1955 Cri LJ 865, Amrik Singh v.
State of Pepsu 9, 10
(1948) AIR 1948 PC 128 (V 35)=
49 Cri LJ 503, H. H. B. Gill v.
The King 8, 9, 10
(1947) AIR 1947 PC 78 (V 34)=
1947-2 Mad LJ 16, Raleigh
Investment Co. Ltd v.
Governor General in Council 13
(1939) AIR 1939 FC 43 (V 26)=
40 Cri LJ 468=1939 FCR 159,
Hori Ram Singh v. Emperor 9, 10

Peri Subbarao, for Petitioner; Public Prosecutor, for the State; Mohammed Rasheed Ahmed, for Respondents (Nos. 1 to 7).

CHINNAPPA REDDY, J.:— This case has been placed before us to consider whether CrL R. C. No. 441 of 1964 (AP) was rightly decided by a learned Single Judge of this Court.

2. The facts of the present case are as follows:—

The petitioner filed a complaint before the 8th City Magistrate against respondents 2 to 8 for alleged offences under Sections 448, 454, 341, 295-A and 426, I. P. C. and against respondent No. 1 for abetment of those offences. The first respondent is the Secretary of the Wakf Board, appointed by the State Government under the provisions of Section 21 of the Wakfs Act, 1954. The Wakf Board is a body corporate having perpetual succession and a common seal, established by the State Government under Section 9 of the Wakfs Act. Respondents 2 to 5 are stated to be employees of the Wakf Board while

respondents 6 to 8 are not stated to have any official status. It is alleged in the complaint that under the instructions of respondent 1, respondents 2 to 8 invaded premises No. 17-2-940, Rain Bazar Hyderabad in the possession of the complainant and belonging to this ward M. Zaman Mohammed. The premises houses the private library of late Hanamuz Zaman Mohamed ancestor of M. Zaman Mohamad in one of its rooms. The library contains many ancient and valuable manuscripts and books. It is the property of M. Zaman Mohammed.

On 30-7-1966, when the complainant was absent from the premises, respondents 2 to 8 despite the protests and in violation of the privacy of the pardanashin women folk in the premises, entered the premises, broke open the locks on the doors of the library, put their own locks and departed. The complainant arrived on the scene towards the end but was helpless.

He reported to the police but without avail. It is stated in the complaint that the Wakf Board has no executive powers and cannot evict persons from any premises without the due process of law. It is also alleged in the complaint that the Wakf Board is inimically disposed towards the complainant because he has filed a suit O. P. No. 97/1966 in the Court of the 1st Additional Chief Judge, City Civil Court, Hyderabad, in respect of this very property against the first respondent and others. It is further alleged in the complaint that the actions of the first respondent are actuated by malice against the complainant.

3. The respondents after appearing before the learned Magistrate raised a preliminary objection that the complaint was not maintainable for want of requisite sanction under Section 197 CrL P. C. and also because Section 65 of the Wakfs Act, 1954 barred the prosecution. Upholding the objection, the learned Magistrate purported to dismiss the complaint and on revision petition filed by the complainant, the Principal Sessions Judge confirmed the order. Both the learned Magistrate and the learned Sessions Judge followed an unreported judgment of a learned single Judge of this Court in CrL R. C. No. 441 of 1964 decided on 12-8-1964. The complainant has filed the present revision against the orders of the learned Magistrate and the learned Sessions Judge and it is contended on his behalf that CrL R. C. 441 of 1964 was wrongly decided.

4. Section 197(1) Criminal Procedure Code is as follows:—

"197(1) When any person who is a Judge within the meaning of Section 19 of the Indian Penal Code (45 of 1860) or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a State Government or the Central Govern-

ment is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction:—

(a) in the case of a person employed in connection with the affairs of the Union, of the Central Government; and

(b) in the case of a person employed in connection with the affairs of a State, of the State Government."

5. Section 65 of the Wakfs Act is as follows:—

"65. No suit or other legal proceeding shall lie against the Board or the commissioner or any other person duly appointed under this Act in respect of anything which is in good faith done or intended to be done under this Act."

6. It may be mentioned at the outset that, respondents 6 to 8 are not public servants or persons appointed under the Wakfs Act and they cannot therefore, claim the protection of either Section 197 Cr. P. C. or Section 65 of the Wakfs Act. Again respondents 2 to 5 are not public servants not removable from office save with the sanction of the Government and hence Section 197 Cr. P. C. is not applicable to them. The question therefore, is whether respondents 1 to 5 are protected by Section 65 of the Wakfs Act and whether in the case of respondent 1, sanction of the State Government is necessary.

7. The object of Section 197 Cr. P. C. and similar provisions in other statutes is to protect public servants and persons acting under statutory powers against unnecessary harassment. A reference to the provisions of various enactments such as Section 197 of the Criminal Procedure Code, Section 293 of the Indian Income-Tax Act, 1961, Section 34 of the Drugs Act 1940, Section 117 of the Factories Act, Section 82(i) of the Indian Railways Act, Section 14 of the Mines and Minerals (Regulation and Development) Act 1948, Section 15 of the Preventive Detention Act 1950, Section 37 of the Industrial Disputes Act, 1947, Section 198 of the Sea Customs Act of 1878, Section 33 of the Arms Act, Section 42 of the Police Act, Section 53 of the Madras District Police Act, Section 22 of the Prevention of Food Adulteration Act etc., shows that these provisions offer two kinds of protection to persons exercising statutory or official powers, absolute or limited.

In the case of some enactments the protection is absolute, that is to say, no proceeding can at all be instituted against persons exercising powers under some statutes, but in such cases the Legislature has invariably taken care to insist that the protected act should have been done in good faith. The protection given by

Section 65 of the Wakfs Act is of this category. In some statutes the protection is not absolute but limited; in some it is limited in the sense that a short period of limitation is prescribed so that no officer need be in perpetual dread of some ghost rising from the distant past; in others it is limited by making the sanction of a prescribed authority a condition precedent to the launching of a prosecution. The protection given by Section 197 of Cr. P. C. is of the last category.

8. It may be noticed that the phraseology used in Section 197 of the Cr. P. C. and Section 65 of the Wakfs Act is different. Under Section 197 of the Cr. P. C. sanction of the Government is necessary if a public servant not removable from office save by the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. Under Section 65 of the Wakfs Act a person appointed under the Act is protected in respect of anything which is in good faith done or intended to be done under the Act. The difference in phraseology of the expressions 'any offence alleged to have been committed while acting or purporting to act in the discharge of his official duty' and 'anything done or intended to be done under the Act' is not of any great significance. As pointed out by the Privy Council in *H. H. B. Gill v. The King*, AIR 1948 PC 128 a temporal meaning should not be given to such expressions and if such a meaning is not given the expressions have precisely the same connotation at least in so far as acts done by persons appointed under the provisions of the Wakfs Act.

9. Cases under Section 197 of the Criminal Procedure Code are legion. To mention a few leading cases they are: *Hori Ram Singh v. Emperor*, AIR 1939 FC 43, AIR 1948 PC 128 *S. Ramayya Muniipalli v. State of Bombay*, AIR 1955 SC 287, *Amrik Singh v. State of Pepsu*, AIR 1955 SC 309 and *Matajog Dobe v. H. C. Bhari*, AIR 1956 SC 44.

10. In *Hori Ram Singh's* case, AIR 1939 FC 43 *Varadachariar, J.* with whom *Sir Morris Gwyer C. J.* observed as follows:—

"It does not seem to me necessary to review in detail the decisions given under Section 197 Cr. P. C. which may roughly be classified as falling into three groups, so far as they attempted to state something in the nature of a test. In one group of cases, it is insisted that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it. In another group, more stress has been laid on the circumstance that the official character or status of the accused gave him the opportunity to commit the offence. It seems to me that the first is

the correct view. In the third group of cases, stress is laid almost exclusively on the fact that it was at a time when the accused was engaged in his official duty that the alleged offence was said to have been committed. The use of the expression "while acting" in Section 197 Cr. P. C. has been held to lend some support to this view. While I do not wish to ignore the significance of the time factor, it does not seem to me right to make it the test."

Referring to Hori Ram Singh's case, AIR 1939 FC 43 the Privy Council in, AIR 1948 PC 128 observed:

"In the consideration of Section 197 much assistance is to be derived from the Judgment of the Federal Court in 1939 FCR 159: AIR 1939 FC 43, and in particular from the careful analysis of previous authorities which is to be found in the opinion of Varadachariar J. Their Lordships, while admitting the cogency of the argument that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials cannot accede to the view that the relevant words have the scope that has in some cases been given to them. A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the Judgment which he delivers may be such an act; nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that what he does he does in virtue of his office."

In the case of AIR 1955 SC 237 their Lordships of the Supreme Court did not lay down any principle though Section 197 was discussed at length with reference to the facts of that case, Bose J., finally observing:

"There are cases and cases and each must be decided on its own facts."

In AIR 1955 SC 309 Venkatarama Ayyar J. summed up the authorities in the following words:—

"It is not every offence committed by a public servant that requires sanction for prosecution under Section 197(1), Cr. P. C. nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office then sanction would be necessary; and that would be so irrespective of whether it was, in fact, a proper discharge

of his duties, because that would really be a matter of defence of the merits, which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the prosecution." Later he again observed:—

"If the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction under Section 197(1) would be necessary; but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required".

In AIR 1956 SC 44, Chandrasekhara Aiyar J. laid down the following test:

"There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds that is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What we must find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation. There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but no a pretended or fanciful claim, that he did it in the course of the performance of his duty."

In order, therefore, to insist upon sanction under Section 197 of the Criminal Procedure Code in the words of Varadachariar J. "there must be something in the nature of the act complained of that attaches it to official character of the person doing it." In the words of Lord Simon, "the act must be such as to lie within the scope of his official duty". In the words of Venkatarama Ayyar J., "the act complained of must be integrally concerned with his official duties", and in the words of Chandrasekhara Aiyar, J., there must be a reasonable connection between the act and the official duty.

11. In Virupaxappa Veerappa v. State of Mysore, AIR 1963 SC 849 the Supreme Court considered Section 161 of the Bombay Police Act which prescribed a period of six months as the period within which a prosecution may be launched against a Police Officer for an act done under colour or in excess of his duty or authority. Construing the words "colour of office", their Lordships observed as follows:

"the expression 'under colour of something' or 'under colour of duty', or 'under colour of office' is not infrequently used in law as well as in common

parlance. Thus in common parlance when a person is entrusted with the duty of collecting funds for, say, some charity and he uses that opportunity to get money for himself, we say of him that he is collecting money for himself under colour of making collection for a charity. Whether or not when the act bears the true colour of the office or duty or right, the act may be said to be done under colour of that right, office or duty, it is clear that when the colour is assumed as a cover or a cloak for something which cannot properly be done in performance of the duty or in exercise of the right or office, the act is said to be done under colour of the office or duty or right. It is reasonable to think that the Legislature used the words "under colour" in Section 161(1) to include this sense. . . . It appears to us that the words "under colour of duty" have been used in Section 161(1) to include acts done under the cloak of duty, even though not by virtue of the duty."

12. In *State of Andhra Pradesh v. Venugopal*, AIR 1964 SC 33 the Supreme Court had occasion to consider Section 53 of the Madras District Police Act which provided that all actions and prosecutions against any persons, which may be lawfully brought for having done or intended to be done under the provisions of that Act or under the provision of any other law conferring powers on the police should be brought within three months of the act complained of. They observed:

"It is easy to see that if the act complained of is wholly justified by law, it would not amount to an offence at all in view of the provisions of Section 79 of the Indian Penal Code. Many cases may however arise where in acting under the provisions of the Police Act or other law conferring powers on the Police, the police officer or some other persons may go beyond what is strictly justified in law. Though Section 79 of the Indian Penal Code will have no application to such cases, Section 53 of the Police Act, will apply. But Section 53 applies to only a limited class of persons. So, it becomes the task of the Court, whenever any question whether this section applies or not arises to bestow particular care on its decision. In doing this it has to ascertain first what act is complained of and then to examine if there is any provision of the Police Act or other law conferring powers on the Police under which it may be said to have been done or intended to be done. The Court has to remember in this connection that an act is not "under" a provision of law merely because the point of time at which it is done coincides with the point of time when some act is done in the exercise of the powers granted by the provision or in performance of the duty imposed by it. To be

able to say that an act is done "under" a provision of law, one must discover the existence of a reasonable relationship between the provisions and the act. In the absence of such a relation the act cannot be said to be done "under the particular provision of law."

13. In addition to these cases there is one other decision of the Privy Council to which I would like to refer though it is not in point. Construing the words "assessment made under the Act" occurring in Section 67 of the Indian Income-Tax Act 1922 in *Raleigh Investment Co. Ltd. v. Governor-General in Council*, (1947) 2 Mad LJ 16 = (AIR 1947 PC 78) their Lordships observed:—

"The obvious meaning, and in their Lordships' opinion the correct meaning, of the phrase "assessment made under the Act" is an assessment finding its origin in an activity of the assessing Officer acting as such. . . . the phrase describes the provenance of the assessment; it does not relate to its accuracy in point of law. The use of the machinery provided by the Act, not the result of that use, is the test."

14. A study of decided cases shows that Sec. 197 of the Criminal Procedure Code and provisions like Section 65 of the Wakfs Act protect two classes of acts: (1) Where the act complained of is the very act which he is expected or authorised to do under the statute or the law but which becomes reprehensible because it is alleged to be done fraudulently or dishonestly, i.e., where the machinery of the Act is employed to do an authorised act in an unauthorised manner or for an unauthorised purpose, (2) where the act complained of though not itself sanctioned by statute or enjoined by his official duty is, however, so intimately and integrally connected with his official or statutory duty that it can be said to have been done in furtherance of the duty prescribed by statute or for achieving the object enjoined by his duty. There must be a reasonable nexus between the act and the duty.

15. A few illustrations will help to understand the position clearly. The delivery of an alleged dishonest judgment by a Judge, the making of alleged false entries in accounts by an accountant are instances of the first category of acts because the writing of a judgment is itself the official duty of a judge and the writing of accounts is the official duty of an accountant. The use of reasonable force by a police officer effecting an arrest, the removal of an obstruction to a lawful search etc., are illustrations of the second category of acts because the use of reasonable force is reasonably connected with the effecting of an arrest and the removal of an obstruction with a lawful search. The receipt of a bribe by a Judge for deliver-

ing a dishonest judgment does not come within either of the categories because, while writing a judgment is his official duty, receipt of a bribe is not; nor is there any reasonable connection between the receipt of the bribe and the writing of the judgment. His position as a judge and his official duty to write a judgment merely place him with the opportunity to commit the offence of receiving a bribe.

Again, a police officer causing injuries to an accused person with a view to extort a confession from him does not come within either of the categories. While it is the duty of a police officer to investigate into an offence it is not part of his duty to extort a confession; nor can it be said that the extortion of a confession is reasonably connected with the duty of a police officer to investigate. Similarly, while an Income-tax Officer has the right to make orders of assessment, issue demand notices, and to initiate recovery proceedings by issuing certificates under Section 222 of the Income-Tax Act of 1961, he cannot claim the protection of Section 197 if he trespasses into the premises of an assessee and seizes the cash from the till in order to appropriate it towards arrears of tax due from the assessee. He cannot claim protection notwithstanding the fact that the act is done by him in his official capacity only. That is because his act is neither authorised by the Income-Tax Act nor is there any nexus between his act and his statutory duties.

15A. In the light of the foregoing discussion we will now proceed to examine whether the acts of the respondents are protected by Section 65 of the Wakfs Act and whether sanction under Section 197 of the Criminal Procedure Code is necessary in the case of the 1st respondent. *The Wakfs Act is an Act intended to provide for the better administration and supervision of Wakfs.* Section 4 casts a duty on the Commissioner of Wakfs to make a survey of wakf properties in the State and to submit a report to the Government and to the Wakf Board. The Board after examining the report is authorised to publish a list of Wakfs existing in the State. Section 6 provides for the institution of a suit in a Civil Court by the Wakf Board, a mutawalli of a Wakf or any person interested in the Wakf, if any question arises whether particular property is Wakf property or not. Section 15 enumerates the functions of the Wakf Board among which clauses (h) and (i) relate to taking measures for the recovery of lost properties of any wakf and institution and defence of suits and proceedings in a court of law relating to Wakfs.

Section 27 authorises the Wakf Board to collect information regarding any pro-

perty which it has reason to believe to be Wakf property and if any question arises whether it is wakf property or not to decide such question after making enquiry. The decision of the Board is subject to the decision of a Civil Court of competent jurisdiction. Section 36 prescribes the duties of a mutawalli and Section 36-A prohibits transfer of immovable property of a Wakf without the previous sanction of the Board. Where Wakf property is transferred without the sanction of the Board, Sec. 36-B enables the Board to send a requisition to the Collector to obtain and deliver possession of the property to the Board. The Collector may do so by making an order calling upon the party in possession to deliver possession. Such a party is given a right to prefer an appeal to the District Court against the order of the Collector directing delivery of possession.

16. Apart from Section 36-B which deals with wakf property alienated by a mutawalli without sanction of the Board, there is no provision in the Wakfs Act which enables the Wakf Board to recover possession of alleged wakf property in some other's possession without recourse to legal process. Even Section 36-B does not enable the Board to get such possession itself but enables it to move the Collector to obtain and deliver possession to it. Section 36-B prescribes how the Collector may obtain possession and deliver it to the Board. What is of importance is that the party in possession is given a right to appeal to the District Court against the order of the Collector directing delivery of possession. In the case of properties not covered by Section 36-B, the Board, like all other persons must seek the aid of legal process to recover possession. The learned counsel for respondents urges that clause (h) of Section 15 enables the Board to recover possession of Wakf properties directly without recourse to legal process.

The function of the Board under clause (h) is to take measures for the recovery of lost properties of a wakf that is, by legal process and not by taking the law into its hands. We are unable to conceive of any statutory body-corporate being vested with a power directly to take possession of property in the possession of strangers on the bare allegation that the property is one which ought to be in the custody of that body, without even the issue of a prior notice. Such a power would be a drastic curtailment of a citizen's rights. Even under the Land Encroachment Act and Public Premises (Eviction of Unauthorised Occupants) Act, persons in unlawful possession cannot be ejected summarily. Notice has to be given and the prescribed procedure has to be followed. We have no hesitation to hold that the Wakf Board is not invested under the

Wakfs Act with power to take possession of property in the possession of another by direct action without recourse to legal process. We are further unable to hold that there is any reasonable nexus between the duty to take measures to recover lost properties and the alleged acts of the respondents of which complaint is made.

17. Both the lower Courts have followed the Judgment of a learned single Judge of this Court in Criminal Revn. Case No. 441 of 1964 (AP). In that case the allegation was that the accused, the Secretary and Inspector of the Wakf Board conspired to have the hut of the complainant dismantled with the help of the Municipality. They were alleged to have done that because the complainant who had taken the plot on which the hut stood on lease from the Wakf Board, failed to vacate the land when asked to do so by the Wakf Board. The learned single Judge held:

"Having regard to the nature of the complaint and the allegations contained therein, it is obvious that the petitioners had committed the offence, if any, while acting or purporting to act in the discharge of their official duties."

We think the learned Judge was not right in his conclusion. The learned Judge appears to have thought the fact that the accused were acting in their official capacity when they were alleged to have committed the offences was sufficient to attract Section 197 of the Criminal Procedure Code. We have explained that it is not so. The acts complained of should themselves be authorised by statute or there should be a reasonable nexus between the acts and the duties enjoined by statute. This aspect was not considered by the learned Judge. We think that Criminal Revn. Case No. 441 of 1964 (AP) was wrongly decided. We therefore hold that in the present case Section 65 of the Wakfs Act is not a bar to the prosecution of any of the respondents; nor is sanction under Section 197 of the Criminal Procedure Code necessary for the prosecution of any of the respondents.

18. Before parting with the case we would like to emphasise that Courts should not be too ready to throw out complaints in limine and without any enquiry on the ground of want of sanction etc. Often times the question whether sanction is necessary or not, dependent as it is on the nature of the act and the nature of the accused's official duty, is not a pure question of law but a mixed question of law and fact which can only be decided after the adduction of some evidence. Further, we do not see how questions of 'good faith' can possibly be decided without evidence being adduced.

19. In the result the orders of the learned Magistrate and the Sessions

Judge are set aside. The Magistrate is directed to entertain the complaint against all the accused and proceed in accordance with law.

Petition allowed.

AIR 1970 ANDHRA PRADESH 19 (V 57 C 3)

P. JAGANMOHAN REDDY, C. J., AND
PARTHASARATHI, J.

Syed Jalal and others, Appellants v.
Targopal Ram Reddy and others, Respondents.

Second Appeals Nos. 340, 541, 641 and 753 of 1963; 881 of 1964; A. S. No. 26 of 1963 and CRP No. 1792 of 1966 D/-25-4-1968.

(A) Tenancy Laws — A. P. (Telangana Area) Tenancy and Agricultural Lands Act (21 of 1961), S. 47 — Scope — Suit for specific performance of agreement to direct the vendor to apply for permission under S. 47 and then to execute a sale deed maintainable — S. 47 does not bar such a suit. (1963) 1 Andh WR 165 & (1965) 2 Andh WR 61 Overruled and AIR 1963 Andh Pra 232 Partly Overruled — (Civil P. C. (1908), O. 39, R. 1) — (T. P. Act (1882), Ss. 53-A and 55) — (Specific Relief Act (1877), S. 18 (b)).

Under Section 47 there can be no bar to the maintainability of a suit for specific performance of an agreement to direct the defendant (seller) to apply for permission under Section 47 and after he obtains it to execute a sale deed. This result would follow whether or not there was a specific term in the agreement that permission would be obtained under Section 47 and that thereafter a sale deed will be executed. (1963) 1 Andh WR 165 & (1965) 2 Andh WR 61, Overruled; AIR 1963 Andh Pra 232 Partly Overruled; AIR 1966 Andh Pra 361 & AIR 1966 Andh Pra 70 & (1964) 2 Andh WR (SN) 43, Approved.

(Para 25)

What is prohibited and what is invalid is transfer or alienation of legal right, title or interest, which confers a right to possession, of agricultural land if it is without the permission of the Tahsildar. Agreements to enter into transactions to confer such a right, title and interest, if the provisions of law are complied with, namely, after obtaining the permission of the Tahsildar, are not prohibited; nor do they by themselves confer a right to possession so that if any possession is delivered in pursuance thereto, it cannot be said that that possession has been delivered in conformity with the statute or in a manner that would be according recognition thereunder. (Para 24)

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Whether there was a specific condition in the agreement for obtaining the permission or not, the result would be the same, for the seller is bound to do everything in his power to effect valid sale. The provisions of the Tenancy Act do not specifically or otherwise make contracts of sale invalid. (Para 31)

A contract of sale followed by possession, under the general law, would, subject to the fulfilment of the requirements of Section 53-A of the Transfer of Property Act, have enabled a person in possession to use it as a shield to defend his possession. But having regard to the provisions of Section 47 read with Section 98, no right to possession capable of being upheld under the special enactment can be conferred by means of a permanent alienation or other transfer, unless the prior permission of the Tahsildar is obtained. (Para 32)

If possession is wrongful or unauthorised, no suit for a permanent injunction or for delivery of possession can be brought. But where in a suit for specific performance, the plaintiff who is in possession, asks for an injunction restraining the defendant from applying to the Tahsildar under Section 98 of the Tenancy Act for summary eviction, an injunction can be granted pending the suit, till such time as a decree is not passed, or if a decree is passed granting specific performance, till such time as permission under Section 47 is not refused. (Para 34)

(B) Tenancy Laws — A. P. (Telangana Area) Tenancy and Agricultural Lands Act (21 of 1961), Ss. 2 (o) and 2 (p) and 47 — Transfer — Meaning.

There is no definition of the word transfer in the Act. So that when Section 47 refers to other transfer of agricultural land, it is presumed that a permanent alienation is a transfer and permanent alienation includes the several kinds of transfers referred to therein namely sale, exchange or gift which under the general law, namely, the Transfer of Property Act, would come within the definition of transfer of property. Transfer of a right of occupancy or a patta of a holding in so far as the Land Revenue Act (Hyderabad Act 8 of 1317 F) is concerned, would equally be a transfer of all that is necessary to effectually transfer agricultural land and vest a title in the person to whom it is transferred. A mere sale or conveyance effected in accordance with the general law, viz., by a written instrument duly stamped and registered if it is immoveable property of more than Rs. 100/- value by itself, in so far as agricultural land is concerned is not completely efficacious until the patta is mutated in the name of the vendee. While a sale, exchange or gift vests legal title in the vendee on execution of the conveyance, in

so far as payment of revenue to the Government is concerned, it can only be recognised on the vendee's name being mutated in the registers of pattas which could be effected on the presentation of a deed of sale, exchange or gift duly executed in accordance with law. (Para 18)

A person who is in occupation of a land having complied with the terms of this provision would be said to have a right of occupancy, which is heritable and transferable, though, under Section 58-A of that Act, notwithstanding anything contained in Sec. 58, Government may, by notification in the Jarida, declare that in any village or tract of H. E. H.'s Dominions occupancies granted under Section 54 after the date of the said notification shall not be transferable without the previous sanction of the Taluqdar. In another sense, the right of a pattadar who dies intestate and without leaving any heirs is considered a right of occupancy under Section 60. This right of occupancy of land held by a deceased pattadar, according to that section, has to be auctioned and the sale proceeds, after deducting the expenses of sale, have first to be appropriated towards payment of land revenue if any is due, and the remainder has to be dealt with as unclaimed property. It is therefore, obvious from these provisions of the Land Revenue Act that a person who is legally entitled to be in possession, whether with the permission of the Tahsildar in respect of vacant lands under Section 54 or of a pattadar who is in possession, has a right of occupancy, which is heritable and transferable under Section 58. It is this right of occupancy that is included in the definition of "permanent alienation" in Section 2 (o) of the Tenancy Act. Indubitably, the patta of an agricultural land itself is evidence of the right of the holder, a transfer of which is also deemed to be a permanent alienation. (Para 19)

Cases Referred: Chronological Paras

- (1966) AIR 1966 Andh Pra 70 (V 53) =
1964-2 Andh WR 161, Ramulu v. Anantharamulu 1, 33
- (1966) AIR 1966 Andh Pra 361
(V 53) = 1966-2 Andh WR 121, C. B. Taraporwala v. Kazim Ali Pasha 1, 33
- (1966) AIR 1966 Mys 154 (V 53) =
(1965) 1 Mys LJ 442, Nemnath Appayya v. Jamboorao 31
- (1965) 1965-2 Andh WR 61 =
ILR (1965) Andh Pra 1226, Raghavachari v. Ramkrishna Reddy 1, 23, 33
- (1964) AIR 1964 SC 978 (V 51) =
(1964) 2 SCR 495, Mrs. Chandnee Widya Vati v. Dr. C. L. Katial 30, 33
- (1964) 1964-2 Andh WR (SN) 43, Venkata Rao v. Ch. Sattaiah 1, 33

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Reddy 1, 5, 32
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v. Narasimhulu 1, 5, 6, 8, 26, 33
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bad Municipal Corporation 5
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Fu. Vasantrya Mukhedkar, (in S. A. No.
th 40 of 1963); A. Anandareddy, (in S. As.
Nos. 541 and 641 of 1963); M. P. Ugle, (in
S. A. No. 753 of 1963), Upendralal Wag-
h-ray and P. Yadgirirao, (in S. A. No. 881
of 1964); G. Vedantha Rao, (in Appeal No.
26 of 1963); for Appellants; K. Narasim-
ham, for Petitioner (in CRP No. 1792/66);
B. V. Subbarayudu, for Respondents Nos.
1 and 2 (in CRP. No. 1792 of 1966) and
Respondent No. 1 (in S. A. No. 340 of 1963);
G. P. Paropakari, for Respondents Nos.
2, 4 and 5 (in S. A. No. 340 of 1963); T.
Dasaratharamaiah, for Respondent No. 1
(in S. A. No. 541 of 1963); G. Suryanara-
yana Murthy, for Principal Govt. Plea-
der on behalf of the Respondent No. 2 (in
S. A. No. 541 of 1963); N. V. Rangarao, for
Respondent No. 1 (in S. A. No. 641 of
1963); K. Madhavareddy, for Respondent
(in S. A. No. 753 of 1963); and Respon-
dent (in Appeal No. 26 of 1963) and D.
Venkata Reddy and S. Rangareddy, for
Respondent (in S. A. No. 881 of 1964).

P. JAGANMOHAN REDDY C. J.:—
These five second appeals, the first appeal
and the Civil revision petition have been
referred to a Bench by our learned
others Venkatesam, J., Krishna Rao, J.,
Obul Reddy, J., by their respec-
tively resolving the conflict
between two decisions of Gopal Rao
Ramulu v. Narasimhulu,
WR 165 and Raghavachari
Reddy (1965) 2 Andh WR
and two decisions of

N. D. Krishna Rao J., (as he then was)
in Ramulu v. Anantharamulu, 1964 (2)
Andh WR 161=(AIR 1966 Andh Pra 70)
& C. B. Taraporwala v. Kazim Ali Pasha,
1966 (2) Andh WR 121=(AIR 1966 Andh
Pra 361), one of Munikanniah J. in
Vasudev Reddy v. Venkata Reddy, 1962
(2) Andh WR 462 = (AIR 1963 Andh Pra
232) and one of Chandrasekhara Sastry, J.,
in Venkata Rao v. Ch. Sattaiah, 1964 (2)
Andh WR (SN) 43 on the other, involving
the determination of the scope and ambit
of S. 47 of the Andhra Pradesh (Telangana
Area) Tenancy and Agricultural Lands Act
(21 of 1961) hereinafter called "the Ten-
ancy Act). These several appeals and
revision petition challenge the validity of
(a) agreement of sale entered into be-
tween vendor and vendee to sell agricul-
tural lands, the terms of which are that
the vendor would take necessary steps to
obtain permission under Section 47 of
the Tenancy Act and execute a regular
sale deed, but without putting the vendee
in possession;
(b) agreement of sale followed by
possession with a clause that permission
would be obtained; and
(c) agreements of sale, whether sim-
pliciter or followed by possession without
the clause that permission will be obtain-
ed under Section 47.

2. In all these three categories of cases,
the questions are (1) whether a suit for
specific performance is maintainable com-
pelling the vendor to apply for permis-
sion; (2) whether in a suit for ejectment
on the ground that the vendee is in pos-
session of agricultural land without the
permission of the Tahsildar, the vendee
can plead part performance under Sec-
tion 53-A of the Transfer of Property
Act to defend his possession; and (3) whe-
ther a suit for injunction restraining the
defendant from interfering with the plain-
tiff-vendee's possession lies.

3. In S. A. No. 340/63 the 1st defend-
ant who was the owner and pattadar of
the suit lands put the plaintiff in posses-
sion of his lands by virtue of an agree-
ment of sale dated 25-12-1959, agreeing to
sell them for a consideration of Rs. 5500.
Prior to the agreement it is alleged the
plaintiff paid Rs. 500/- to the 1st defend-
ant in 1957 and on the date of the agree-
ment of sale he paid Rs. 2500/- to him. In
addition to this the plaintiff cleared off the
debts due by the 1st defendant to Masetty
Venkatesam and Burhanuddin of Dhobipet.
The plaintiff further alleged that the 4th
and 5th defendants, in spite of their know-
ing that the 1st defendant had entered
into an agreement with the plaintiff and
had put him in possession, joined hands
with defendants 2 and 3 and persuaded the
1st defendant to sell the lands to the 4th
defendant. Thereafter defendants 1 to 4
made an application to the concerned

Tahsildar for permission to alienate the suit lands. Defendants 2 to 5 are interfering with the plaintiff's possession of the suit lands and are intending to dispossess him by unlawful means. He accordingly filed the suit for a permanent injunction against defendants 1 to 5 to restrain them from interfering with his possession.

4. Defendants 2 and 3 were *ex parte*. The 1st defendant denied that he ever entered into an agreement in favour of the plaintiff, or put him in possession, or obtained any money from him. He further contended that the plaintiff is his agricultural servant and that he was never in possession of the suit land. In any case the suit is not maintainable against him who is admittedly the owner of the suit lands. He contended that the alleged transaction between him and the plaintiff being contrary to Sections 47 and 48 of the Tenancy Act is a nullity. Defendants 4 and 5 denied the allegations made in the plaint.

5. The Munsif-Magistrate, West Hyderabad District, decreed the suit and it may be stated that the counsel for the 1st defendant did not press issue No. 5 relating to the validity of the transaction under Sections 47 and 48. At any rate the Munsif having found that the agreement was true and valid and that possession was given, held that the agreement of sale is not hit by Sections 47 and 48 and that the plaintiff can use this agreement to show the nature of his possession. Against this decree and judgment, defendants, 1, 4 and 5 preferred an appeal. The learned 1st Addl. Chief Judge, City Civil Court, held that the 1st defendant after receiving Rs. 2,500/- executed the agreement in favour of the plaintiff agreeing to sell the lands for Rs. 5,500/- but there is absolutely no proof that the plaintiff cleared off the debts owed by the 1st defendant to P. Ws. 3 and 6; and that pursuant to the agreement, the plaintiff came into possession of the land and was in possession at the time of the institution of the suit. On the question of legality of the transaction under Sections 47 and 48 following the decision in 1963-1 Andh WR 165 (*supra*), he held that in view of the fact that no permission was obtained under Section 47 before the agreement of the sale was entered into, the plaintiff's possession is unauthorised and unlawful; and following yet another decision in *Akram Miya v. Secunderabad Municipal Corporation*, AIR 1957 Andh Pra 859 he held that as the possession of the plaintiff is unlawful, no permanent injunction can be granted in his favour. In so far as the decision of *Munikannaiah, J.*, in 1962-2 Andh WR 462=(AIR 1963 Andh Pra 232) is concerned, (*supra*) which held that in such cases the person in possession can set up part performance in de-

fence of his possession the learned judge stated that there was no discussion as to whether a person in unlawful possession can be granted the relief of permanent injunction, and in the view that the transaction is invalid, he reversed the decree of the trial Court and dismissed the suit. The plaintiff has therefore, come up in second appeal.

6. In S. A. 541/63, the defendant executed an agreement of sale of agricultural lands on 7-4-1958 in favour of the plaintiff, and obtained part consideration. The plaintiff promised to pay the balance of sale consideration at the time of registration of the sale deed after the defendant obtains permission of the Tahsildar under Section 47. The plaintiff was thereafter put in possession of the suit lands. But since no permission was obtained the plaintiff filed the suit for specific performance. The defendant denied that he ever executed the agreement in favour of the plaintiff or put the plaintiff in possession. The trial Court held that the agreement was true and that possession was given but that the transaction was hit by Section 47. The appellate court confirmed the findings on fact and dismissed the appeal following the decision of *Gopal Rao Ekbote, J.* in 1963-1 Andh WR 165 (*supra*).

7. In S. A. No. 641/63 the suit for specific performance was decreed by the trial court, directing the defendant to obtain permission under Section 47, but this decree was reversed in appeal relying on the judgment of *Gopal Rao Ekbote J.*, to which we have referred.

8. In S. A. 753/63 the plaintiff filed the suit for a declaration of his right in respect of an agricultural land and for possession alleging that in 1952, as a protected tenant he purchased the suit land from the landholder and obtained a certificate Ex. A-1, from the Collector and that since then he has been in possession of the property till 1955, when the defendant caused obstruction and trespassed into the suit land. The defendant pleaded that though the plaintiff has purchased the suit land he did not have sufficient funds to pay the sale price and, therefore, he borrowed Rs. 800/- from the defendant. Subsequently, the plaintiff could not repay the debt and therefore, entered into an agreement to sell the property in satisfaction of the debt in pursuance of which he executed an agreement in March, 1954, and put the defendant in possession. One of the terms of the agreement was that he will execute a registered sale deed after obtaining the permission from the revenue authorities. Since 1954, the defendant has been in possession and it is wrong to say that he had interfered with the possession of the plaintiff. The trial court dismissed the suit on the ground that the trespass

pleaded in 1955 is not true. The District Judge on appeal thought that this was not a correct approach, allowed the appeal and decreed the suit of the plaintiff for declaration of his right to and for possession of the suit property, holding that Section 53-A of the Transfer of Property Act cannot be invoked in cases where a transfer is not valid unless it is preceded by permission from the Collector. He relied on the decision of Gopal Rao Ekbote, J., in 1963-1 Andh WR 165 (supra).

9. In S. A. 881 of 1964 the respondent filed the suit for specific performance of an agreement of sale of the suit agricultural land. The trial court dismissed the suit holding that the agreement was not proved and that the decree for specific performance cannot be maintained. The learned Chief Judge City Civil Court on appeal reversed that decree holding that the agreement was proved, and granted specific performance. The defendant preferred the second appeal.

10. In A. S. 26/63, the plaintiff filed the suit for a perpetual injunction on the allegations that the defendant agreed to sell the suit land to the plaintiff for Rs. 6,000/-, under an agreement of sale dated 25-1-1954 received part consideration of Rs. 4,000/- and passed a receipt and gave possession of the land to the plaintiff. The defendant received the balance of sale consideration on 5-6-1967 and took a receipt. Since the defendant did not execute a registered sale deed, the plaintiff filed the suit for specific performance, and it was decreed with the consent of the defendant. The plaintiff was in continuous possession of the suit land since then. However, the defendant did not take permission of the Collector in pursuance of the decree; and on the other hand, started to interfere with the peaceful possession and enjoyment of the suit land by the plaintiff. Since the plaintiff is in possession of the suit land in pursuance of a lawful agreement of sale, he is entitled to have his possession protected.

The defendant denied that the plaintiff is in possession of the suit land. He never entered into any agreement of sale with the plaintiff and did not receive any consideration from him. He did not file any written statement in the District Munsif's Court and the decree passed by that Court is a nullity as it has no jurisdiction to pass such a decree. The suit land was given to the plaintiff and another Kashinath in 1963 under a Khandgutta for 7 years, and after termination of the said period the defendant was put in possession of the suit land and he cultivated it in 1961. Mere agreement of sale does not confer any right on the plaintiff, and the suit agreement is also void as the permission of the Collector was not obtained as required by the Ten-

ancy Act. The subordinate Judge, Nizamabad held that the prior decree was without jurisdiction and it was, therefore, null and void; that the agreement of sale entered into was also null and void, as according to him, actual alienations as well as agreements of sale entered into after the commencement of the Tenancy Act are subject to the restrictions imposed in Sections 47 and 48 of the Tenancy Act and sanction of the Collector has not so far been obtained permitting the defendant to alienate the suit land to the plaintiff. In this view he dismissed the suit, against which the plaintiff filed the appeal.

11. In C. R. P. 1792/66 one Rayala Venkatappaiah executed an agreement of sale in favour of the petitioner agreeing to sell his agricultural land within 6 months after obtaining permission from the Collector under Section 47 and obtained part consideration thereof. After his death his legal representatives filed a petition under Section 98 of the Tenancy Act for summary eviction of the petitioner on the ground that the petitioner's possession was unlawful. The Sub-Collector held following the decision of Gopal Rao Ekbote J., cited above that the petitioner's possession was unauthorised and directed eviction which was confirmed by the Collector on appeal. Against this order, the petitioner filed the C. R. P.

12. The Tenancy Act, which is applicable to the Telangana area of the erstwhile Hyderabad State in its preamble stated: "Whereas it is expedient to amend the Law regulating the relations of landholders and tenants of agricultural land and the alienation of such land, and whereas it is also expedient to enable landholders to prevent the excessive sub-division of agricultural holdings, to empower Government to assume in certain circumstances the management of agricultural lands, to provide for the registration of Co-operative Farms and to make further provision for matters incidental to the aforesaid purpose." This Act was struck down by a decision of this court in *Inamdars of Sulhagar v. Government of Andhra Pradesh*, 1961 Andh LT 580=(AIR 1961 Andh Pra 523), as a result of which an Ordinance validating it was issued and later an Act, being XXI of 1961 was passed after obtaining the permission of the President, as required by Clause (3) of Art. 31 of the Constitution. The reason for the 1950 Act being struck down was that Chapter IV beginning with Section 61 dealing with acquisition and requisition of lands brings the Act within the range of Art. 31 and since it was not reserved for the consideration of the President and was not assented to by him, the proceedings initiated under that Act were held to be null and void.

13. Section 47 of the Act reads thus—
 "(1) Notwithstanding anything contained in any other law for the time being in force or in any decree or order of a court, no permanent alienation and no other transfer of agricultural land shall be valid unless it has been made with the previous sanction of the Tahsildar:

Provided that the Tahsildar may declare a permanent alienation or any other transfer of agricultural land to be valid if the permanent alienation or transfer took place before the commencement of the Hyderabad Tenancy and Agricultural Lands (Amendment) Act, 1954 and possession of the land transferred was given to the vendee before such commencement if application for sanction is made within one year after such commencement.

(2) Applications for such previous sanction shall be made and disposed of in accordance with such procedure as may be prescribed."

The proviso was added by Act 3 of 1954, which came into force on 4-2-1954. Section 48 deals with general restrictions on grant of sanction and provides that in the case of permanent alienation or transfer the Tahsildar shall not sanction the same. Firstly if the area of the land held by the alienor or transferor after the alienation or transfer would be less than a family holding determined under Section 4 for the local area concerned, provided that where the alienor or transferor as the case may be is not an agriculturist or intends to give up the profession of an agriculturist or is alienating the whole of the land in his possession or that the transfer is being made by an agriculturist for good and sufficient reasons subject to his retaining a basic holding, the requirements of sanction may be dispensed with; and secondly if the area of the land held by the alienor or transferee after the alienation or transfer would exceed three times the family holding so determined after excluding therefrom certain areas specified therein and thirdly, in the case of a mortgage, the Tahsildar shall not sanction the same if the terms of the mortgage are such that possession of the land is to be or may be delivered to the mortgagee as security for the money advanced or to be advanced. In 1959, by Act 39/59, the Legislature added Section 48-A, whereunder restrictions were imposed on permanent alienation or transfer of land acquired by a protected tenant under Section 38 or Section 38-D of the Act. In Section 49, additional restrictions were imposed where the alienor or transferee is a non-agriculturist. Section 50 which was added by Act 3/54 along with the addition of the proviso to Section 47 deals with cases in which restrictions imposed by Sections 47, 48 and 49 shall not apply. This section is as follows:—

"The restrictions imposed by Sections 47, 48 and 49 shall not apply to—

(a) a permanent alienation or transfer of agricultural lands made with the previous permission of the Tahsildar for any non-agricultural use;

(b) registered sales of agricultural lands before the commencement of this Act;

(c) agreement to sell agricultural lands entered into before the commencement of this Act, if possession of the lands had been transferred to the vendee before such commencement in pursuance of such agreements".

14. It is contended by the learned advocates on behalf of the appellants and respondents who support the proposition that a suit for specific performance will lie and Section 53-A of the Transfer of Property Act can be used as a shield to protect the possession where under agreement of sale possession is delivered to the purchaser even though no permission of the Tahsildar was obtained, that the relief sought and the defence put forward could be validly sustained because what Section 47 inhibits is permanent alienations and other transfers without the permission of the Tahsildar which means alienations and transfers according to law and not possession, while on the other hand, the learned advocates for the contrary proposition contend that the words "permanent alienation" or "other transfer" having regard to the history of legislation and what was intended to be achieved by the Tenancy Act, would include delivery or transfer of possession in whatever manner effected if it is done without the permission of the Tahsildar.

15. Sri Subbarayudu and Sri Madhavareddy, who appear for the respondent *Ar S. A. 753/63* and for the appellant *Ar S. A. 753/63* and for respondent in A. S. 26/63 contended that though agreement simpliciter unaccompanied by delivery of possession is not hit by Section 47 suits for specific performance can be maintained. If such an agreement is followed by possession without the prior sanction of the Tahsildar, the possession would be unauthorised and no specific performance of suit can be maintained. Mr. Madhavareddy further contends in A. S. 26/63 that if this court came to the conclusion that the trial court was wrong in law in holding that the suit for injunction is not maintainable it should remand the case for further enquiry as to whether the agreement was executed and whether possession was delivered as both these were denied.

16. Sri Waghay for respondents in S. A. 881/64, apart from the contention that no decree for specific performance can be given has contended that the ap-

pellate Court has erred in reversing the finding of the trial court. He further contends that it is for the plaintiff to show that the provisions of Sections 48 and 49 have been complied with.

17. Before we deal with the decisions which are said to be in conflict, we propose to examine the provisions of the Act to ascertain what is the true intent and purpose of Section 47 and what is intended to be prohibited if the previous sanction of the Tahsildar is not obtained, i.e., whether it is transfer of legal title or mere delivery of possession, that is prohibited. In other words does the terms "permanent alienation" and "other transfer" connote also transfer of possession.

18. The term 'permanent alienation' has been defined in Section 2 (o) to include any sale, exchange or gift and any transfer of a right of occupancy or of the patta of a holding but excluding any disposition by will. Section 2(p) defines 'prescribed' as meaning prescribed by the rules made under the Act. It may be noted that there is no definition of the word 'transfer' so that when Section 47 refers to 'other transfer' of agricultural land, it is presumed that a permanent alienation is a transfer and permanent alienation, according to the definition as we have seen, includes the several kinds of transfers referred to therein namely, sale, exchange or gift which under the general law, namely the Transfer of Property Act would come within the definition of transfer of property. Transfer of a right of occupancy or a patta of a holding in so far as the Land Revenue Act (Hyderabad Act 8 of 1317F) is concerned, would equally be a transfer of all that is necessary to effectually transfer agricultural land and vest a title in the person to whom it is transferred. It may be noted that a mere sale or conveyance effected in accordance with the general law, viz., by a written instrument duly stamped and registered if it is immoveable property of more than Rs. 100/- value by itself, in so far as agricultural land is concerned, is not completely efficacious until the patta is mutated in the name of the vendee. While a sale, exchange or gift vests legal title in the vendee on execution of the conveyance, in so far as payment of revenue to the Government is concerned, it can only be recognised on the vendee's name being mutated in the registers of pattas which could be effected on the presentation of a deed of sale, exchange or gift duly executed in accordance with law. The right of occupancy it is stated by the learned advocates is the mere act of giving possession in that any person who is in possession can be said to be an occupant having a right of occupancy and therefore permanent aliena-

tion connotes a transfer of possession. It is difficult for us to accept this contention.

19. The definitions in the Land Revenue Act 8 of 1317 F. have been referred to. Section 2 (8-A) defines 'occupation' as meaning possession; Section 2 (8-B) "To occupy land" means "to possess or to take possession of land." Section 2 (8-C) 'occupant' means a holder in actual possession of unalienated land other than an asami shikmi; provided that where the holder in actual possession is an asami shikmi, the superior holder shall be deemed to be the occupant". Section 2 (8-D) defines "occupancy" to mean a portion of land held by an occupant. These definitions in Section 2 (8-A), (8-B), (8-C) and (8-D) were added by the Record of Rights-in-land Regulation, in 1358 F. From these definitions it is sought to be contended that mere possession itself connotes occupancy and therefore a person who has a right to possession has occupancy rights. But this argument recognises the notion that possession in so far as a right of occupancy is concerned cannot be divorced from the right to possession. The latter right is something distinct from a right under an agreement which is given in contemplation of the vesting of title. It is the perfected title alone that can confer an indispensable right of possession or make it 'authorised' within the meaning of Sec. 98. If possession is given in contemplation of an effective legal conveyance on payment of the full consideration, and if the full consideration is not paid or is refused to be paid, possession will at once become wrongful or unauthorised. It cannot be said that the legislature has intended this kind of 'possession' when it included in permanent alienation the term 'right of occupancy'. A reference to Section 58 of the Land Revenue Act would further show that a right of occupancy is heritable and transferable. This has reference to Section 54, under which it is provided:

"Any person desirous of taking up unoccupied land must, previously to entering upon occupation, by submitting a petition to the Tahsildar, obtain his permission in writing.

(2) On such a petition being submitted the Tahsildar may, subject to the rules framed by Government in this behalf from time to time, give written permission for occupation."

A person who is in occupation of a land having complied with the terms of this provision would be said to have a right of occupancy, which is heritable and transferable, though, under Section 58-A of that Act, notwithstanding anything contained in Section 58, Government may, by notification in the Jarida, declare that in any village or tract of H. E. H's Dominions, occupancies granted under

Section 54 after the date of the said notification shall not be transferable without the previous sanction of the Taluqdar. In another sense, the right of a pattadar who dies intestate and without leaving any heirs, is considered a right of occupancy under Section 50. This right of occupancy of land held by a deceased pattadar, according to that section, has to be auctioned and the sale proceeds, after deducting the expenses of sale, have first to be appropriated towards payment of land revenue, if any is due, and the remainder has to be dealt with as unclaimed property. It is therefore, obvious from these provisions of the Land Revenue Act that any person who is legally entitled to be in possession, whether with the permission of the Tahsildar in respect of vacant lands under Section 54 or of a pattadar who is in possession, has a right of occupancy, which is heritable and transferable under Section 58. It is this right of occupancy that is included in the definition of "permanent alienation" in Section 2 (o) of that Tenancy Act. Indubitably, the patta of an agricultural land itself is evidence of the right of the holder, a transfer of which is also deemed to be a permanent alienation. We do not, therefore, consider that there is any justification in the submission that both permanent alienation and other transfer would include and connote also a mere possession without the right to it.

20. Next it is further contended that the subsequent addition of the proviso to Section 47 would itself indicate what the Legislature meant, namely, that the Legislature had intended to validate possession and consequently, possession itself without the fulfilment of these conditions and without the permission of the Tahsildar would be interdicted. We cannot accept this contention as having any force. This proviso was added presumably to remove the hardship which may have been caused by a strict interpretation of the provisions of Section 47, that where transactions generally effected prior to the commencement of the Act not only by transfer of a valid title, but also followed by possession, if previous permission of the Tahsildar is not taken for execution of the sale deed, patta of the agricultural land would not be mutated. Any legalistic arguments that the provisions have only prospective force and not retrospective force though having validity, might nonetheless create hardship to the many transferees who may be anxious to have their pattas transferred and are met with the objection by revenue authorities that since the alienations or transfers have been effected without the prior permission of the Tahsildar, they are not valid. The addition of this proviso to Section 47 as well as Section 50 was therefore made in 1954.

21. It is further contended that if the proviso to Section 47 covered all those alienations, what was the need for Section 50. The answer is simple, namely, that it was generally intended to remove the bar of Sections 47, 48 and 49 dealing with the requirements of permission, minimum holdings or restrictions where the alienee or transferee is a non-agriculturist. Under Sec. 50 (b) and (c) of the Tenancy Act, registered sales of agricultural lands before the commencement of the Act and agreements to sell agricultural lands entered into before the commencement of the Act if possession of the lands has been transferred to the vendees before such commencement in pursuance of the agreements of sale, are exempt from the provisions of Sections 47, 48 and 49. Mere registered sales, it may be noted, without possession, though entitling the vendee to obtain possession through Courts, might make the possession subsequent to the Act wrongful or unauthorised within the meaning of Section 98 because the alienation was without prior permission. Similarly, agreements to sell agricultural lands followed by possession without the execution of a valid document of title and without the prior permission of the Tahsildar, may make the alienation invalid. It is these categories of cases that are exempt. It cannot be denied that the words "other transfer" of agricultural lands in Section 47 would cover transfers other than those mentioned in the definition of permanent alienation, namely, mortgages, permanent leases etc., which, under the Transfer of Property Act confer rights in property, and it is, therefore, obvious that the Legislature does not want any rights to be conferred in land without the permission of the Tahsildar. That is the reason why in Section 48(2) it is provided that the Tahsildar is prohibited from giving sanction to a mortgage if the terms of the mortgage are such that possession of land is to be or may be delivered to the mortgagee as security for the money advanced or to be advanced, which clearly goes to show that usufructuary mortgages with possession would have to be effected with prior consent of the Tahsildar. This conclusion also militates against the proposition that the words "other transfer" connote mere transfer of possession without a right therein.

22. Section 98 of the Tenancy Act vested a power in the Collector of summary eviction of any person unauthorisedly occupying or wrongfully in possession of land, (a) the transfer of which either by the act of parties or by the operation of law is invalid under the provisions of that Act, or (b) the management of which has been assumed under the said provisions, or (c) to the use and occupation of which he is not entitled

under the said provisions. If the transfer without the permission of the Tahsildar is invalid, which satisfies the conditions in Clause (a), then the possession delivered thereunder would be deemed to be unauthorised or wrongful. The words "possession" and "transfer" have been used not as identical or synonymous terms, but as connoting different concepts. This summary remedy vested in the Collector is in consonance with the principle and policy of law, namely, that no permanent or other right in agricultural lands shall vest in any one unless it be with the prior consent of the Tahsildar. If these provisions were not incorporated therein, there is no way in which the limitations of holding or ceiling on land and the protection to be given to poor and indigent agriculturists from being bought out by money lenders or more powerful sections of the community could be enforced.

23. It is clear therefore that a person who is in possession of agricultural lands who is not entitled to the use or occupation of those lands under the provisions of the Act or by any valid transfer, can be said to be unauthorisedly in occupation. Even persons who dispossess a true owner under a claim of title which is not valid or a landlord who dispossesses his permanent tenant without sanction of Tahsildar would also be in wrongful possession. No assistance can be derived from the provisions of the Prevention of Agricultural Land Alienation Act, (Hyderabad Act 3 of 1349-F) though the definition of the expression "permanent alienation" under Section 2 (c) of that Act is more or less identical, except that even wills were included therein in the category of permanent alienations. The subsequent amendment in the Tenancy Act is in conformity with the provisions of general law, namely, that a will being ambulatory and operating from the death, can hardly be said to effect transfer of any rights within the meaning of the Transfer of Property Act, which contemplates transfers inter vivos between living persons. Even under Section 4 of that Act, it is provided that notwithstanding anything contained in any other Act for the time being in force, no permanent alienation of land shall take effect as such, unless and until sanction is given thereto by the Tahsildar and that such sanction may be given even after the permanent alienation of land is completed in any other manner. Of course the Taluqdar's sanction under Section 4 was not necessary if the alienor does not belong to the agricultural classes, or where the alienor and the alienee belong to the same agricultural group etc. It is unnecessary to consider the provisions of that section, as nothing useful would be derived therefrom, except that under the provisions of the Act, even ex

post facto sanction can be given, while the Tenancy Act is more rigorous in that it requires the sanction of the Tahsildar as a condition precedent for the validity of a permanent alienation or other transfer.

24. An examination of these several provisions may be summed up as follows: What is prohibited and what is invalid is transfer or alienation of legal right, title or interest, which confers a right to possession, of agricultural land if it is without the permission of the Tahsildar. An agreement to enter into transactions to confer such a right, title and interest, if the provisions of law are complied with, namely, after obtaining the permission of the Tahsildar, are not prohibited, nor do they by themselves confer a right to possession so that if any possession is delivered in pursuance thereto, it cannot be said that, that possession has been delivered in conformity with the statute or in a manner that would be according recognition thereunder.

25. If our conclusion on a reading of the provisions is right, then ex facie there can be no bar to the maintainability of a suit for specific performance of an agreement to direct the defendant (seller) to apply for permission under Section 47 and after he obtains it to execute a sale deed. This result would follow whether or not there was a specific term in the agreement that permission would be obtained under Section 47 and that thereafter, a sale deed will be executed.

26. In 1963-1 Andh WR 165 (supra), the respondents had filed an application under Section 98 of the Tenancy Act before the Revenue Divisional Officer, Adilabad, for eviction of the petitioner, alleging that they had sold certain lands to the petitioner under a private contract, and after the petitioner had got possession of the lands, did not give the respondents the full consideration agreed for. It was contended that inasmuch as permission under Section 47 had not been given by the Tahsildar for the alienation, the contract was invalid, and consequently it was prayed that the petitioner may be summarily evicted from the land. The defence of the petitioner was that he had purchased the lands and therefore he cannot be evicted, and at any rate, he expressed his willingness to perform his part of the contract. The Revenue Divisional Officer directed eviction, and on appeal, the Collector confirmed that order and dismissed the appeal.

In the revision filed against that order, it was contended before Gopal Rao Ekbote J., relying on Sharfuddin v. Sama Yelluga, 1957 (2) Andh WR 478 that the provisions of the Tenancy Act are mainly to regulate the relationship between landlords and tenants and that the procedure

of summary eviction under Section 98 cannot be pressed into service to evict a person in possession in terms of an agreement of sale, inasmuch as the Act did not purport to "affect the rights inter se between two persons setting up rights of ownership to a particular land or the dispute between the owner and a trespasser or a person other than a tenant." The argument proceeded that under the scheme of the Act, a land-holder who wants to take possession of the land from a tenant or a protected tenant, can proceed in the manner prescribed under the Act that is, file an application before the Tahsildar, and to that extent if any question arises whether a particular tenant is a protected tenant, the exclusive jurisdiction to decide that question is also conferred on the Tahsildar, and that in such case only the Civil Court has no jurisdiction, but in all other cases where there is a dispute of title, the matter should go to the Civil Court. This contention was rejected, and it was held that the Act is comprehensive in its scope and takes within its fold what is compendiously known as 'land reforms' and not only what is called 'tenancy reforms,' and that the term 'land reform' covers a variety of different policies, of which the learned Judge enumerated six varieties. At page 169, after setting out the substance of Section 47, the learned Judge observed: "Any contract of sale, which falls within the ambit of Section 47 will be invalid, if previous sanction of the Collector is not obtained and inasmuch as the transfer is invalid, the person in possession of the land will be considered to be occupying the same unauthorisedly or unlawfully. The Collector therefore, has jurisdiction to direct summary eviction of such a person. The conclusion therefore, is inescapable that under Section 98 the petitioner has a remedy and the Collector has jurisdiction to entertain the petition in those circumstances and direct summary eviction."

27. Now it is patently clear, as we have already noticed, that what Section 47 prohibits is permanent alienations or other transfers of agricultural land without the previous sanction of the Tahsildar, and not the entering into contracts of sale, as such, with great respect, we cannot agree that contracts of sale fall within the ambit of Section 47 or are invalid, if previous sanction of the Tahsildar is not obtained. We may, however, state that no exception can be taken to the subsequent statement that since the possession in pursuance of the agreement of sale is invalid as there is no alienation or transfer of land with the prior sanction of the Tahsildar, a person in possession of the land will be considered to be occupying the same unauthorisedly or unlawfully, as in that case no transfer of agricultural

land was purported to have been effected, and in the facts and circumstances of that case, under general law also, the possession would be unlawful, the moment the transferee commits a breach of the condition to pay the balance of consideration. This itself would empower the Tahsildar, under Section 98, to evict the person in possession who is in unauthorised occupation.

Finally in dealing with a contention pressed by the learned advocate in that case that Section 98 does not destroy the petitioner's common law right to file a suit against the land-holder who has sold his land to him, Ekbote, J., said at page 169: "If he has any such right and that is de hors of the Act, he may adopt the remedies available to him. His contention that the respondents ought to have filed a regular suit, however, has no substance obviously because section 98 of the Act provides a summary remedy to him. He has chosen to avail of the remedy and no fault can be found therefor." This observation that the Tenancy Act does not debar a person from availing of any remedy which is de hors that Act, can also be supported by Sections 2(2) and 104 of the Act which saves any other laws. Section 2(2) provides: "In any provision of this Act which is expressed in whatever form words to have effect notwithstanding anything contained in any other law, the reference to any other law shall be read as including only laws with respect to matters enumerated in List II in the Seventh Schedule to the Constitution of India." Similarly, Section 104 provides that the Act and any rule, order or notification made or issued thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other enactment with respect to matters enumerated in List II in the Seventh Schedule to the Constitution of India or in any instrument having effect by virtue of any such other enactment. Therefore, the general law and the laws specified in List II of the Seventh Schedule which are not inconsistent with the provisions of the Tenancy Act will have validity.

One of us (Jaganmohan Reddy, J.) sitting singly in *Pichamma v. Guraviah*, 1956 Andh LT 993, was considering a case where the question was whether the jurisdiction of Civil Courts is barred from entertaining a suit under Section 9 of the Specific Relief Act for possession by reason of Section 99 of the Tenancy Act. After setting out the provisions of Section 99, it was observed: "The essential thing which bars the jurisdiction of the civil courts is that which is required to be settled or decided or dealt with by a Tahsildar, Tribunal or Collector or by the Board of Revenue or Government under the provisions of the Act. It is, there-

fore, necessary to see whether the remedy sought for by the revision petitioner is required to be settled or decided under the provisions of the aforesaid Act." After referring to Section 2(2) and Section 104 and a decision in Mohd. Abdul Khader v. Sedam Asru, ILR (1955) Hyd 695=(AIR 1955 Hyd 271), it was held that a suit under Section 9 of the Specific Relief Act is outside the purview of the Tenancy Act, and as such Section 99 has no application and the civil suit is not barred. It was further held following a decision of the same High Court in Gandipalli Rama Krishna Rao v. Mucha Badrappa, ILR (1954) Hyd 855, that even to cases arising under the Indian Penal Code or Criminal Procedure Code, which are Central enactments, Section 99 does not apply and that they can be enquired into by criminal Courts in spite of a tenancy certificate granted by the Tahsildar. At page 994 it was observed: "Here the land-holder has been ejected from her possession. There is no provision in the Tenancy Act whereunder she could apply for restoration of possession and it, therefore, follows that she must have recourse to the civil or criminal law and seek remedy in a civil or criminal Court as the case may be." The view expressed by Gopal Rao Ekbote, J., that if there is any remedy available de hors the Act, the plaintiff could always avail of it, is in consonance with the view enunciated in the above case.

28. In the subsequent decision of Gopal Rao Ekbote, J., in 1965-2 Andh WR 61 (supra), the facts were the plaintiff filed a suit for declaration of his title and recovery of possession on the basis of title. The defendant resisted the suit contending, inter alia, that the plaintiff executed an agreement to sell the suit property and transferred possession in pursuance of the same and that he was entitled to protection under Section 53-A of the Transfer of Property Act. Before Gopal Rao Ekbote, J., in second appeal, it was contended that the agreement of sale without obtaining the permission of the Collector under Section 47 was illegal and that no protection can be given to such possession under Section 53-A. It was held that the contract contemplated by Section 53-A of the Transfer of Property Act is a valid and concluded contract and that if the contract is invalid under any law, Section 53-A cannot be pressed into service to protect the possession. It was further held that the provisions of Section 23 of the Contract Act attach illegality not only to transfers and alienations made in contravention of Section 47, but even to a device of an agreement to sell which, if permitted, would defeat the purpose of Section 47 and other relevant provisions of the Tenancy Act. In the result, it was held that the plaintiff would

be entitled to recovery of possession of the property on payment of the amount which he received in pursuance of the agreement. No exception can be taken to the conclusions that since possession had been delivered pursuant to a contract of sale, which did not confer a right to possession, that possession is unauthorised and if the possession is unauthorised, Section 53-A cannot be used as a defence; as such the Collector, under Section 98, could summarily evict him, and if instead of applying to the Collector the plaintiff had come to a civil Court, the result could not be any the different. However, with great respect, as we have said dealing with the earlier decision of Gopal Rao Ekbote, J., we are unable to accept the basis of the decision, namely, that Section 47 interdicts agreements to sell and that these agreements of sale were illegal under Section 23 of the Contract Act.

29. As noticed earlier, sub-section (2) of Section 47 provides that applications for previous sanction of the Tahsildar shall have to be made and disposed of in accordance with such procedure as may be prescribed. Rule 3 of the Rules made under this provision provides that an application under sub-section (2) of Section 47 requiring of a previous sanction of a permanent alienation (or other transfer, or in the case of a disposition by will, confirmation) by the Collector for agricultural land, may be made by the alienor or transferor, or testator or by the alienee or transferee, in Form I, and that it shall be signed and verified by or on behalf of the persons making it and shall be duly stamped. Rule 5 says that on receipt of an application under Rule 3, the Collector shall call upon the other party, i.e., the alienor or transferor or alienee or transferee, as the case may be, to file within 15 days from the date of receipt of a notice in that behalf, in Form II, a statement in Form I.

The other provisions of that rule as well as rules 6 and 7 etc., deal with filing of affidavits by the alienor or alienee, setting out the economic holdings that he is prepared to sell or buy, as the case may be, and stating that he intends to take up the profession of an agriculturist, the conduct of enquiry, and Collector's satisfaction that the Government dues are paid. The Act in the first instance required permission to be obtained from the Collector, but the subsequent amendment of the Act substituted Tahsildar as the permission granting authority. It may further be noted that Item (4) of Form I requires the applicant to state whether he is the alienor or transferor, or the alienee or transferee, and item 5 requires particulars of name of the alienee or transferee, or alienor or transferor, as the case may be, to be filled in. These

rules and the Form would also indicate that there is some contractual relationship existing between the alienor and the alienee before the application for permission is made. If there is no agreement between the parties, any application by the alienee, at any rate, can have no effect, unless the alienor comes and admits that he intends to alienate the lands. Even if this can be done without a concluded agreement or contract of sale between the parties and permission is granted on the strength of a mere statement by the alienor before the Tahsildar, that permission by itself may not bind the alienor to execute a sale deed.

It can easily be contended that the permission was obtained in contemplation of an agreement to be entered into between the parties, but in fact there was no concluded contract of sale. This would deprive the alienee of a right to obtain specific performance of the agreement. It could not have been the intention of the Legislature as indeed we have stated earlier, to render invalid contracts of sale which are not inconsistent with the subsequent compliance with the provisions of the Act. The relevant provisions of the Tenancy Act which we have referred to, are only regulatory and impose certain restrictions, and compliance with certain conditions. But there is no prohibition for entering into contracts of sale, as long as they do not contravene those provisions.

30. In order to invalidate an agreement, there must be an express statutory enactment prohibiting the same, or there must be something in the general law which would make the agreement invalid, and these may make the agreement itself invalid or some purpose which one or both of the parties intended to make of it. *The law may also refuse to assist in any way a person who founds his cause of action upon such agreement or it may simply say that such an agreement is not to have legal effect.* On the other hand, there are certain statutes which do not prohibit entirely the making of a particular type of contract, but merely impose conditions as to its performance. If these conditions are not fulfilled, the party in default will not be able to sue on the contract. Anson on the "Principles of the English Law of Contract" (22nd Edn. p. 299) cites the case of *Anderson Ltd. v. Daniel*, (1924) 1 KB 138 where a vendor who sold fertilizer without the delivery to the purchaser of an invoice, specifically required by the Fertilizers and Feeding Stuffs Act, 1906, was unable to recover the price, as he could not rely on his own illegal performance. Such contracts are not, however, unlawful in their inception; there is nothing unlawful per se in a contract to sell fertilizer. There is no reason

why the innocent party should not bring an action for non-delivery or for breach of warranty. He does not have to rely on the illegal performance in order to establish his cause of action.

Their Lordships of the Supreme Court in *Mrs. Chandnee Widya Vati v. Dr. C. L. Katial*, AIR 1964 SC 978, had occasion to deal with a case where the plaintiffs had entered into a contract of sale in respect of a house property in New Delhi belonging to the defendant, who built the same on a leasehold plot granted by the Government in 1935 to the defendant's predecessor-in-title. In the contract of sale, there was a term that the vendor shall obtain the necessary permission of the Government within 2 months from the date of the agreement and that if the said permission was not forthcoming within that time, it was open to the purchasers to extend the date or to treat the agreement as cancelled. The appellant had made an application to the proper authorities for the necessary permission, but withdrew her application later. In the suit filed for specific performance of the contract, or in the alternative for damages, it was contended that the contract was not enforceable, being of a contingent nature. The trial Court had held that the agreement was inchoate in view of the fact that the previous sanction of the Chief Commissioner to the proposed transfer had not been obtained, and that therefore, no specific performance of the contract could be granted. The High Court reversed that finding, holding that the agreement was a completed contract for sale, subject to the sanction of the Chief Commissioner before the sale transaction could be completed. It relied upon a decision of their Lordships of the Privy Council in *Motilal v. Nanhelal*, AIR 1930 PC 287. It pointed out that it was the duty of the defendant to apply for the necessary permission and if ultimately the Chief Commissioner refused to grant the sanction to the sale, the plaintiffs may not be able to enforce the decree for specific performance of the contract, but that was no bar to the court passing a decree for that relief. Their Lordships of the Supreme Court agreeing with this view, observed at page 979: "On the findings that the plaintiffs have always been ready and willing to perform their part of the contract and that it was the defendant who wilfully refused to perform her part of the contract, and that time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the defendant-appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction".

31. Whether there was a specific condition in the agreement for obtaining the

permission or not, the result, in our view, would be the same, for the seller is bound to do everything in his power to effect a valid sale. We are, therefore, clear in our minds that the provisions of the Tenancy Act do not specifically or otherwise make contracts of sale invalid. Even where, in Tenancy Laws, there is a condition that a valid alienation can be effected only on the fulfilment of certain conditions relating to ceiling, it was held by a Bench of the Mysore High Court in *Neminath Appayya v. Jamboorao*, AIR 1966 Mys 154, that the agreements were not invalid, but are enforceable. That was a case where the plaintiff sued for specific performance of an agreement of sale executed by the defendant in his favour, under which he agreed to convey to the plaintiff certain lands. Section 34 of the Bombay Tenancy and Agricultural Lands Act (67 of 1948) prohibits a person from holding land in excess of the ceiling area. This section is subject to Section 35, which declares that where the area of land in the possession of a person exceeds the ceiling area, in consequence of an acquisition made by any of the modes or processes referred to by it, the excess acquisition would be an invalid acquisition.

It was held, that the nullification of only the excess acquisition which is the limited aim of the section does not fit into the theory that it prohibits an agreement of sale whose implementation might assist the purchaser to be in possession of land exceeding the ceiling area; that there is nothing either in Section 34 or Section 35 expressly or impliedly prohibiting any such agreement of sale; that the agreement would fall within the third paragraph of Section 23 of the Contract Act only when it was possible to say that such illegal acquisition was the inevitable and necessary consequence of the performance of the agreement; that if such is not the position and by reason of many things which are possible, the plaintiff who wishes to sue on the agreement can ask for delivery of possession of the property which had been agreed to be sold to him without such delivery of possession producing any illegal acquisition to which Section 35 refers, the performance of the agreement would not defeat the provisions of the law, and that such an agreement can therefore, be enforced. By a parity of reasoning, in this case in our view, there is nothing in the contracts of sale of agricultural lands which contemplate performance of an unlawful act or that an unlawful or illegal act is a necessary consequence of the agreement. In *Vita Food Products Incorporated Ltd. v. Unus Shipping Co. Ltd.*, (1939) A. C. 277 Lord Wright observed at p. 293: "Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly

forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

32. It is, therefore, apparent, and has been admitted by both Sri Subbarayudu and Sri K. M. Reddy that a mere agreement to sell simpliciter, not followed by possession, can be enforced by a suit for specific performance and that is also our view on an examination of the various provisions and the law on the subject. A contract of sale followed by possession, under the general law, would, subject to the fulfilment of the requirements of Section 53-A of the Transfer of Property Act, have enabled a person in possession to use it as a shield to defend his possession. But having regard to the provisions of Section 47 read with Section 98, in the view we have taken, no right to possession capable of being upheld under the special enactment can be conferred by means of a permanent alienation or other transfer, unless the prior permission of the Tahsildar is obtained. For the purpose of Section 53-A, not only should there be a valid contract of sale, but the transferee should in part performance of the contract, take possession of the property or any part thereof or the transferee being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and further that the transferee has performed or is willing to perform his part of the contract. If any of these conditions are not fulfilled, the defence of Section 53-A will not be available. The possession referred to here is lawful possession, not unauthorised or unlawful or wrongful possession. It is not necessary to negative the defence of Section 53-A that the contract of sale should also be void or illegal. Though the contract is lawful, as indeed we have held it so, since possession without the prior sanction of the Tahsildar cannot be regarded as authorised under Section 98, the remedy of Section 53-A will not be available. However, if the vendee files a suit for specific performance on the basis of the agreement of sale, and a decree is granted and the vendor applies for and obtains sanction from the Tahsildar in terms of the decree, a sale deed will have to be executed by him, or if not by him, by the Court, in which case the possession of the vendee would be legal. For these reasons, we are unable to agree with the decision of *Munikanniah, J.* in 1962-2 Andh WR 462=(AIR 1963 Andh Pra 232) (*supra*), that the defence of Section 53-A would be available to a person who has entered into possession under a contract of sale without a valid right to possession

under a permanent alienation or other transfer effected without obtaining the sanction of the Tahsildar. With great respect, we dissent from this decision.

33. Our view is also supported by a judgment of Chandrasekhara Sastry, J., in C. R. P. 2046/63 dated 21-7-1948, short notes of which case were reported in 1964-2 Andh WR (SN) 43 (supra).

In that case the question for determination was whether the agreement of sale is illegal without the previous sanction of the Tahsildar and whether a suit for specific performance is maintainable. The learned Judge referred to certain observations of Gopal Rao Ekbote, J., in 1963-1 Andh WR 165 (Supra), to which we have already adverted, and stated that the real question that was decided by Gopal Rao Ekbote J., in that case whether the remedy of the land-holder was only to file a regular suit for eviction in the civil Court or whether he could avail himself of the summary remedy provided by Section 98 of the Tenancy Act. He also considered the effect of Section 23 of the Contract Act upon agreements of sale as defeating the provisions of Section 47 of the Tenancy Act. In dealing with these matters, he considered the decision of Krishna Rao J., in 1964-2 Andh WR 161=(AIR 1966 Andh Pra 70) (supra), who held that a suit for specific performance of an agreement to sell agricultural lands for which the previous sanction of the Tahsildar is not obtained, is maintainable and that Section 47 does not bar such a suit. Following the decision of the Supreme Court in AIR 1964 SC 978 (Supra), Chandrasekhara Sastry, J., upheld the decision of the lower Court which decreed the suit for specific performance; and dismissed the revision petition. Subsequently in another case in 1966-2 Andh WR 121=(AIR 1966 Andh Pra 361) (Supra), Krishna Rao, J. referred to the decision of Gopal Rao Ekbote, J., in 1965-2 Andh WR 61 (Supra) and stated that his decision in 1964-2 Andh WR 161=(AIR 1966 Andh Pra 70) (Supra), was not cited before the learned Judge, and after referring to the judgment of Chandrasekhara Sastry, J., in the C. R. P. referred to above, he said that for the reasons given by him in 1964-2 Andh WR 161=(AIR 1966 Andh Pra 70) (Supra) he is unable to subscribe to the view that such an agreement of sale is void.

34. It follows, therefore, that if possession is wrongful or unauthorised, no suit for a permanent injunction or for delivery of possession can be brought. But where in a suit for specific performance, the plaintiff who is in possession, asks for an injunction restraining the defendant from applying to the Tahsildar under Section 98 of the Tenancy Act for summary eviction, an injunction can be granted pending the suit, till such time as a decree is not

passed, or if a decree is passed granting specific performance, till such time as permission under Section 47 is not refused.

35. On these conclusions, we will now deal with the appeals individually. S.A. 340/63 arises out of a suit for permanent injunction. The suit is not maintainable, and the second appeal is accordingly dismissed with costs.

36. S.A. 541/63 is an appeal arising out of a suit for specific performance, in which both the Courts concurrently held that the agreement was true and that possession was given, but that the transaction is hit by Section 47. In the view we have taken, the second appeal is allowed, the judgments and decrees of the Courts below are set aside and the suit is decreed with costs throughout, directing the defendant to apply for permission under Section 47 and on permission being granted, to execute a sale deed.

37. S.A. 641/63 is also allowed, and the decree of the appellate court is set aside and that of the trial court decreeing the suit for specific performance restored. The appellant will have his costs both here and the Court below.

38. S. A. 753/63 which arises out of a suit for declaration of right and possession, on the ground that the defendant is in unauthorised occupation as the alienation made is without the permission of the Tahsildar, the decree of the District Judge on appeal, reversing that of the trial Court which dismissed it, is confirmed. The defendant-appellant can have no right of defence under Section 53-A. The appeal is accordingly dismissed with costs.

39. S. A. 881/64 arises out of a suit for specific performance of an agreement of sale. The agreement contains a clause that the vendor will apply for and obtain permission of the Tahsildar under Section 47, but no permission was obtained. Sri Upendralal Waghray for the respondent contends firstly that no decree for specific performance can be given compelling the defendant to file a petition under Section 47, without the plaintiff showing that the provisions of Sections 48 and 49 relating to minimum holding etc., have been complied with; secondly, that the appellate Court has erred in reversing the finding of the trial Court that there is no evidence of execution of the agreement of sale Ex. A-1, and the same should be reversed as it is perverse; and thirdly, that if Section 53-A of the Transfer of Property Act cannot be availed of, as a necessary corollary the suit for specific performance cannot be decreed. On the first point, it is obvious that when an application is filed for permission, it is for the Tahsildar to go into that question, since the revenue records are available with him, and a duty has been imposed upon him to satisfy himself on an enquiry

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Assam & Nagaland High Court

AIR 1970 ASSAM & NAGALAND 1
(V 57 C 1)

FULL BENCH

S. K. DUTTA, C. J., K. C. SEN
AND M. C. PATHAK, JJ.

Premadhar Baruah and others, Petitioners v. State of Assam and others, Opposite Parties.

Civil Rules Nos. 308, 316 and 323 of 1968, D/- 28-3-1969.

(A) Constitution of India, Arts. 309, 13 (3) (a), 226 — Executive instruction raising superannuation age from 55 to 58 years, issued under F. R. 56 — It has force of law — Mandamus can be issued to enforce right under such instruction.

An executive instruction which is an order issued in exercise of statutory power has the "force of law" and as such, it is a law within the definition of Article 13 (3) (a). (Para 11)

Where in spite of the fact that F. R. 56, prescribing the superannuation age at 55 years, is not accordingly amended, a government servant is continued in service even after his attaining the age of 55 years on the strength of memorandum issued under F. R. 56, raising the retirement age of all government servants in general from 55 to 58 years, the memorandum creates a legal right and not merely a contractual right between the parties. Consequently, mandamus can be issued for enforcement of any right of the government servant continued in service after attaining 55 years of age. Under the second part of the first paragraph of F. R. 56, the superannuation age can be extended by the Government by an individual as well as a general order and the memorandum which is a general order under F. R. 56 has as much force of law as of rule

framed under Art. 309. AIR 1969 Assam 46 & AIR 1967 SC 1264 & AIR 1954 SC 493, Foll. (Para 3)

(B) Constitution of India, Arts. 311 (2), 14 — Compulsory retirement — Ingredients of — Provision prescribing compulsory retirement before age of superannuation and after specified period of service but without assigning any reason — Provision offends Art. 14 but not Article 311 (2).

Where the memorandum issued by the Government as a general order under F. R. 56 raising the retirement age to 58 years, inter alia provides that the appointing authority may, without assigning any reason, require the government servant to retire after he has completed 55 years of age, the provision for compulsory retirement does not offend Article 311 (2). The provision complies with the two ingredients of compulsory retirement viz. the retirement must be before the age of superannuation and it must be after service for a special period. AIR 1964 SC 600, Disting.

(Paras 14, 15, 40)

Per Majority (Pathak, J. Contra):—

The provision, however, contravenes Art. 14 as it authorises the appointing authority to compulsory retire any servant without assigning any reason and thus leaves arbitrary and uncontrolled power with the authority to discriminate between two servants. (Para 20)

(C) Constitution of India, Arts. 310, 311, 14 — Pleasure of Governor cannot be exercised so as to abridge fundamental right of employee.

All civil posts are held at the pleasure of the Governor or the President. But this pleasure is not only subject to Article 311 but also fundamental right of employee. This pleasure cannot be exercised so as to abridge a fundamental right of an employee. (Para 21)

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The pleasure of the President or a Governor under Art. 310 cannot be curtailed by any law made by Parliament or the Legislature of a State, as the case may be. But that does not mean that the pleasure can be exercised so as to take away or curtail a Fundamental Right. The Fundamental rights incorporated in the Constitution are inviolate. They cannot be taken away by any other method than by another Constituent Assembly. On the other hand, Art 310 itself can be amended by the ordinary process of amending the Constitution laid down in Art. 368. Absolute arbitrary power in defiance of Fundamental Rights exists nowhere under the Constitution, not even in the largest majority. A Fundamental Right is sacrosanct and it is a sacrilege to violate it. Art. 14 is a command issued by the Constitution to the State as a matter of public policy. It is not even open to a citizen to waive it. It is obvious that the President or Governor cannot exercise his pleasure under Art. 310 so as to abridge or curtail a Fundamental Right. AIR 1967 SC 1643, Foll.

(Para 21)

Cases Referred: Chronological Paras

- (1969) AIR 1969 Assam 46 (V 56)=
1969 Lab I.C. 534, Civil Rule No.
319 of 1966, Banai Ram Das v.
Secy. to Govt of Assam, Educa-
tion (General) Dept. 3, 8, 21
(1967) AIR 1967 SC 1264 (V 54)=
1967-2 SCR 496, I. N. Saksena v.
State of M. P. 3, 14, 36, 39, 40
(1967) AIR 1967 SC 1643 (V 54)=
1967-2 SCR 762, Golak Nath v.
State of Punjab 21
(1965) AIR 1965 SC 1567 (V 52)=
(1965) 1 SCR 693, Bishnu Narain
Misra v. State of U. P. 50
(1964) AIR 1964 SC 600 (V 51)=
(1964) 5 SCR 683, Motiram v. N.
E. F. Railway 14, 19, 36
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mia v. Justice Tendolkar 16, 46
(1954) AIR 1954 SC 493 (V 41)=
1955 SCR 599, State of M. P. v.
G. C. Mandawar 9

Dr. J. C. Medhi, K. Lahlri, K. N. Saikia, P. G. Baruah, M. Sulaiman and N. Chakravarty, for Petitioners; B. C. Baruah, Advocate General, G. K. Talukdar, Sr. Govt. Advocate and A. M. Mazumdar, Jr. Govt. Advocate, for Opposite Parties.

DUTTA, C. J.: Civil Rule No. 306 of 1968 arises out of an application made by the petitioner under Article 226 of the Constitution of India praying for an appropriate writ quashing the order made by the Examiner of Local Accounts, Gauhati ordering the compulsory retire-

ment of the petitioner with effect from the 1st October, 1968. The petitioner's case is that he was appointed on 18-8-41 as a Typist and was confirmed in the post of Assistant Auditor on 6-5-46. Thereafter he held the post of Auditor, Local Accounts, Assam, in which he was confirmed on 1-4-50. He was born on the 1st January 1913 and would have retired on the 1st of January 1968 on completion of 55 years of age. But the Government of Assam issued an order in the form of a memorandum dated the 21st March 1963 raising the age of superannuation from 55 to 56 years subject to two conditions viz. (1) physical fitness and (2) efficiency, to be certified respectively by prescribed authorities. The petitioner was found physically fit and certified to be efficient. He was retained in service after the age of 55 years. But he received the impugned notice from the Examiner of Local Accounts, Gauhati on the 7th May, 1968 terminating his service with effect from the 1st October, 1968. The notice was purported to have been issued under paragraph 4 of the Memorandum dated the 21st March, 1963. This memorandum is as follows:

"GOVERNMENT OF ASSAM.

APPOINTMENT (A) DEPARTMENT:
APPOINTMENT BRANCH

No. AAP. 217/62/15 dated 21-3-1963.

OFFICE MEMORANDUM

Sub: Raising of age of compulsory retirement of State Government employees.

Government have been considering for sometime past the question of raising the age of compulsory retirement of Government servants from 55 years to 56 years. Sometime back, orders were issued that pending a final decision on the subject, Government servants who are due to retire on or after 16th February, 1963 should be continued in service until further orders. It has now been decided that the age of compulsory retirement of State Government servants should be 58 years.

2. This decision will apply to all Government servants who retired or will retire on or after the 1st December, 1962. Government servants who were on leave preparatory to retirement on 1st December, 1962 will be entitled to this benefit. Government servants who were on refused leave from a date prior to 1st December, 1962 will not be entitled to the benefit of the increased age of compulsory retirement. This will also not apply in case of Government servants who having reached the age of superannuation on a date prior to 1st December, 1962, have been allowed extension of service. Persons who have been allowed to continue in service vide Government Memo. No. AAP 217/62A dt.

18th February, 1963 will be entitled to this benefit.

3. No Government servant will be entitled to the benefit of the increased age of compulsory retirement unless he has been permitted to continue in service after the age of 55 years after the appointing authority is satisfied that he is efficient and physically fit for further Government service. The procedure to be followed by the appointing authorities before they permit a Government servant to continue in service is outlined in the Annexure. This procedure should be followed even in case of those who were continued in service in pursuance of Government orders communicated, vide Memo No. AAP. 217/62A dated 18th February, 1963.

4. Notwithstanding anything contained in the foregoing paragraphs, the appointing authority may require a Government servant to retire after he attains the age of 55 years on 3 months' notice without assigning any reason. This will be in addition to the provisions already contained in Rule 1 (2) of the Assam Liberalised Pension Rules to retire an officer who has completed 30 years' qualifying service or 25 years' qualifying service as the case may be. The Government servant also may after attaining the age of 55 years voluntarily retire after giving 3 months' notice to the appointing authority.

5. The age of compulsory retirement of Grade IV staff who are at present entitled to serve up to the age of 60 years including new entrants will continue to be 60 years.

6. As regards regularisation of the period of absence of those who retired on or after the 1st December, 1962 till the date of assuming duties, a separate communication will follow.

7. These provisions will have effect from 1st of December, 1962.

8. Necessary amendments to the relevant rules will be issued, in due course.

Sd. A. N. Kidwai,

Chief Secretary to the Govt. of Assam."

2. In the annexure the procedure for finding out the physical fitness and the efficiency of the Government servant is laid down.

3. The first question that arises is whether the above memorandum has any force of law. If the memorandum merely creates a contractual right between the parties, and not a legal right, obviously no mandamus can be issued for enforcement of any right of the petitioner. In the case of Bansi Ram Das v. Secy. to Govt. of Assam, Education (General) Dept. Civil Rule No. 319 of 1966 : (AIR 1969 Assam 46) a Division Bench of this Court held that the memorandum hav-

ing statutory sanction behind it, had the force of law. That Bench considered the decision of the Supreme Court in the case of I. N. Saksena v. State of M. P., AIR 1967 S. C. 1264. In that case the Government of Madhya Pradesh issued a memorandum (hereinafter called the M. P. memorandum) similar to the one which is under consideration in the instant case. By this memorandum the age of superannuation was raised from 55 to 58 years. Paragraphs 5, 6 and 7 of the memorandum were as follows:

"5. Notwithstanding anything contained in the foregoing paragraphs, the appointing authority may require a Government servant to retire after he attains the age of 55 years on three months' notice without assigning any reason. . . the power will normally be exercised to weed out unsuitable employees after they have attained the age of 55 years. A Government servant may also after attaining the age of 55 years voluntarily retire after giving three months' notice to the appointing authority.

6. These orders will have effect from the 1st March 1963.

7. Necessary amendments to the State Civil Service Regulations will be issued in due course."

4. In consequence of this memorandum, one Sri I. K. Saksena who was a District and Sessions Judge in the service of the State of Madhya Pradesh and who would have otherwise retired in August, 1963 on attaining 55 years of age continued in service. On the 11th September, 1963 the Government sent an order deciding to retire him on the 31st December, 1963. On November 29, 1963, F. R. 56 was amended raising the age of superannuation from 55 to 58 years. In that rule the condition laid down in Paragraph 5 of the M. P. memorandum was not incorporated. Sri Saksena by a writ petition before the High Court challenged the order dated the 11th September, 1963 retiring him from service. His contention was two-fold viz. (1) that the rule which was framed, did not reserve the power to the Government to retire an employee on three months' notice; (2) that his compulsory retirement cast a stigma on him and therefore Article 311 (2) of the Constitution was attracted. Under the said Article a Government servant could not be removed from service without being given a reasonable opportunity to be heard.

5. The High Court held that the order retiring the appellant cast no stigma on him. It further held that the memorandum itself was a rule under Article 309 of the Constitution and the appellant therefore could not get the benefit of the amended rule. The Supreme Court held that as the order for compulsory retire-

ment did not contain words which cast stigma, Article 311 was not attracted. It further held that the memorandum was not a rule but a mere executive instruction.

6. Then it was urged that if the memorandum did not amount to a rule under Article 309 of the Constitution, the appellant would have to retire in August 1963 and therefore, could not take advantage of the rule published in December, 1963 fixing the retirement age at 58 years. This argument was repelled by the Supreme Court. It was pointed out that under the second part of the first paragraph of F. R. 56, the superannuation age could be extended by the Government by an individual as well as a general order. We may at this stage state the relevant portion of F. R. 56.

"F. R. 56. — (a) The date of compulsory retirement of a Government servant is the date on which he attains the age of 55 years. He may be retained in service after this age with the sanction of the State Government on public grounds which must be recorded in writing, and proposals for the retention of a Government servant in service after this age should not be made except in very special circumstances. . . ."

7. The Supreme Court held that the memorandum was a general order under F. R. 56 and therefore it has as much force as that rule. It was observed as follows:

"It is true that the extension contemplated by this rule was generally for individuals and an individual order is passed in such a case. But we see nothing illegal if the Government came to the conclusion generally that services of all Government servants should be retained till the age of 58 in public interest. In such a case a general order would be enough and no individual orders need be passed. We are of opinion that the memorandum of February 28, 1963 is merely in the nature of such a general order of extension of service by Government under F. R. 56 as it existed on that date. It seems that the Government thought it proper in the public interest to retain all Government servants up to the age of 58 under F. R. 56 and these executive instructions must be taken to provide such retention till a proper rule, as envisaged in the memorandum came to be made. As we have indicated already, we see nothing in F. R. 56 as it was which would in any way bar the Government from passing such a general order retaining the services of all Government servants up to the age of 58, though one would ordinarily expect an individual order in each individual case under that rule."

8. The Division Bench of this Court, held in Bansi Ram Das's case, Civil Rule

No. 319 of 1966 : (AIR 1969 Assam 46) (mentioned above) that the general order being issued under F. R. 56, it had statutory sanction and as such the force of law. If the memorandum issued by the Madhya Pradesh Government did not have the force of law, Sri Saksena could not remain in service beyond 55 years of age which was the superannuation age fixed by F. R. 56 as it stood at the time. In Assam also, under F. R. 56 the superannuation age continued to be 55. How could it be raised to 58 by a mere executive order, if such an order had no force? The petitioner could not continue in service after he attained the age of 55 in view of F. R. 56, had the memorandum no legal force.

9. In this connection we may also refer to the case of State of M. P. v. G. C. Mandawar, AIR 1954 SC 493. The facts of that case are briefly as follows. The Central Government on the recommendation of the Pay Commission, adopted a scheme for grant of dearness allowance to its employees. The M. P. Government on the recommendation of its Pay Committee, adopted a resolution granting dearness allowance to its employees on a scale which, though practically identical with that granted by the Central Government in respect of salaries above Rs. 400/- per month, was less than it, as regards salaries of Rs. 400/- per month or less. One G. C. Mandawar challenged the resolution of the Madhya Pradesh Government by a writ petition before the High Court on the ground that it was discriminatory and thus violative of Article 14 of the Constitution. This contention was accepted by the High Court which issued a mandamus on the Government asking it to reconsider the resolution. It may be mentioned here that F. R. 44 laid down that the local Government might grant such allowance to any Government servant under its control and might make rules prescribing their amounts and the conditions under which they might be drawn. The resolution of the M. P. Government was under this F. R. The Supreme Court in an appeal filed by the State of M. P. against the aforesaid order of the High Court, rejected the contention of the respondent that under F. R. 44, the Government had a duty to grant dearness allowance. Thereafter it went on to say as follows:

"Mr. Nambiar, the learned counsel for the respondent, did not dispute the correctness of this position. But he argued that when once the Government passed a Resolution fixing a scale of allowance under Rule 44, that would be law as defined in Article 13 (3) (a) of the Constitution, and if that law infringed Article 14, it could be declared void. That is a contention which is clearly open to

him, and the question therefore that falls to be decided is whether the Resolution dated 26-9-1948 is bad as infringing Article 14."

10. The Supreme Court found that the resolution was not discriminatory. Another contention was that the resolution and the Central Government scheme if read together were discriminatory. The Supreme Court held that the sources of authority of the two "Statutes" being different, Article 14 had no application. Thus the Supreme Court treated a resolution and a scheme adopted under a Fundamental Rule to be Laws.

11. In Article 13 (3) (a) of the Constitution, law has been defined so as to include any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. An executive instruction which is an order issued in exercise of statutory power has no doubt the "force of law" and as such, it will be law within the above definition.

12. Dr. Medhi, the learned counsel for the petitioner, makes three submissions.

(1) Under paragraph 4 of the memorandum, three months' notice could be given before the employee reached the age of 55 years and not after.

(2) The compulsory retirement permitted by the above paragraph contravenes the provisions of Article 311 (2) of the Constitution.

(3) The aforesaid compulsory retirement is violative of Article 14 of the Constitution.

13. In paragraph 4 of the memorandum, it is said that "the appointing authority may require a Government servant to retire after he attains the age of 55 on three months' notice without assigning any reason". According to Dr. Medhi, this provision does not mean that the Government servant can be asked to retire on three months' notice "at any time" after he attains the age of 55 years. He contends that there can be no justification for importing the words "at any time" into the provision. The argument is that if the Government did not want to retain any employee after the age of 55, or if any employee did not want to remain in service after that age, the Government or the employee, as the case might be, should have given three months' notice before the employee reached the age of 55. I am not prepared to give such a meaning to this provision. The word "after" does not mean "on". It means "later". It may also be noted that the M. P. memorandum contained a provision under which an employee could be retired "after he attained the age of 55 on three months' notice". Shri Saksena was due to retire in August, 1963

when he attained the age of 55. But by virtue of the M. P. memorandum, he remained in service and the three months' notice was given to him only on the 11th September 1963. It was nobody's case either before the High Court or before the Supreme Court, that the notice on Sri Saksena was bad because it was served on him in September although he attained the age of 55 in August 1963.

14. As regards the next argument of Dr. Medhi, reference may be made to the case of Motiram v. N. E. F. Railway, AIR 1964 SC 600. In this case the validity of Rule 148 (3) contained in the Indian Railway Establishment Code was considered. This Rule empowered the appropriate authority to terminate the services of "other non-pensionable" railway servants after giving them notice for a specified period. The Supreme Court held that this rule was void as it was hit by Article 311 (2) and Article 14 of the Constitution. It observed that compulsory retirement did not offend Article 311 (2). But compulsory retirement had two ingredients viz. the retirement must be before the age of superannuation and it must be after service for a specified period. But the above rule 148 (3) allowed termination of service without reference to any specified period of service and as such it could not be treated as simple compulsory retirement. It was hit by Article 311 (2). The Supreme Court also pointed out in Saksena's case, AIR 1967 SC 1264 that if any stigma was attached to compulsory retirement, such retirement would amount to removal within the meaning of Article 311 (2).

15. In the instant case, paragraph 4 of the memorandum empowers termination of service only after an employee attains the age of 55 and before he is 58. Thus it provides for compulsory retirement which is not hit by Article 311 (2). In short, the Supreme Court held the above-mentioned Rule 148 (3) to be invalid as it provided for termination of service without reference to any specified period of service. Such a rule is undoubtedly hit by Article 311 (2) of the Constitution. But in the present case paragraph 4 provides for termination of service of an employee after he completes 55 years of his age. So, I hold that paragraph 4 of the memorandum does not offend Article 311 (2).

16. Rule 148 (3) of the Indian Railway Establishment Code was attacked also on the ground that it was hit by Art. 14 of the Constitution. Two points were raised. Firstly that the Rule gave no guidance to the authority who would take action on it. Secondly, it was urged that the Rule discriminated between Railway servants and other public servants. Gajendragadkar, J. (as he then was) said that as the second attack must be sustained,

It was not necessary to express any opinion on the first one. Das Gupta, J. however, went into the first contention. He referred to the case of Shri Ram Krishna Dalmia, 1959 S.C.R. 279=(AIR 1958 SC 538) and quoted the following passage from the judgment of the Supreme Court in the said case, viz:

"A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification."

17. Then his Lordship went on to say—

"Applying the principle laid down in the above case to the present Rule, I find on scrutiny of the Rule that it does not lay down any principle or policy for guiding the exercise of discretion by the authority who will terminate the service in the matter of selection or classification. Arbitrary and uncontrolled power is left in the authority to select at its will any person against whom action will be taken. The Rule, thus enables the authority concerned to discriminate between two railway servants to both of whom R. 148 (3) equally applied by taking action in one case and not taking it in the other. In the absence of any guiding principle in the exercise of the discretion by the authority the Rule has therefore to be struck down as contravening the requirements of Article 14 of the Constitution."

18. There is no doubt that paragraph 4 of the memorandum gives a naked power to the appointing authority to sack any employee by giving him a three months' notice and without assigning any reason. It may be noted that in the M. P. memorandum also it was provided that the appointing authority might require a Government servant to retire after he attained 55 years on three months' notice without assigning any reason but this power would normally be exercised to weed out unsuitable employees after they attained the age of 55 years. But this provision was dropped and I think very correctly, when the Rule was made within a few months. In Assam, although it was said in the memorandum that necessary amendment to the relevant rules would be issued in due course, this was never

done although more than five years rolled by. The purpose of termination of service on three months' notice is not indicated in the memorandum. In Assam, therefore, a person who was found to be physically fit and efficient could be asked to retire on a three months' notice without any rhyme and reason. In short, under paragraph 4 of the memorandum, a person who was found physically fit and efficient could be allowed to continue in service till he was 58 years of age, whereas another person who satisfied the above conditions could be asked to retire on a three months' notice which could be served even on the very next day of his attaining 55 years of age. Thus two individuals similarly circumstanced, could be treated differently under paragraph 4 of the memorandum.

19. The learned Advocate-General submits that the employee has also been given the power to retire on a three months' notice and hence the power given to the Government is not arbitrary. The following observation of the Supreme Court in Motiram's case, AIR 1964 SC 600, gives an answer to this contention:

"It is true that the termination of service authorised by R. 148 (3) or R. 149 (3) contemplates the right to terminate on either side. For all practical purposes, the right conferred on the servant to terminate his services after giving due notice to the employer does not mean much in the present position of unemployment in this country; but apart from it, the fact that a servant has been given a corresponding right cannot detract from the position that the right which is conferred on the railway authorities by the impugned Rules is inconsistent with Article 311 (2), and so, it has to be struck down in spite of the fact that a similar right is given to the servant concerned."

20. Dr. Medhi points out that although all the Government servants were served with three months' notices terminating their service, exceptions were made in a couple of cases. But in the present case the legal provision i.e. paragraph 4 having given unfettered power to the appointing authority is hit by Article 14. Here we are not concerned with the discriminatory administration of a law which is otherwise valid. Here the law itself is invalid. It may be further noted that the unfettered power is given not to the Government but to the "appointing authority" which is not the Government in all cases. The appointing authority in many cases, including the case before us, is a subordinate authority. I therefore hold that Paragraph 4 of the memorandum is violative of Article 14 of the Constitution.

21. Lastly, the learned Advocate-General submits that under Article 310 of the Constitution, all Civil Posts are

held at the pleasure of the Governor and that this pleasure is only subject to Article 311. The contention is that the pleasure can be exercised so as to abridge a Fundamental Right of an employee. This contention appears to be somewhat startling after the decision of the Supreme Court in *Golak Nath's case*, AIR 1967 SC 1643. This contention was rejected by the Division Bench of this Court in *Bansi Ram Das's case*, Civil Rule No. 319 of 1966 : (AIR 1969 Assam 46). The doctrine of pleasure is derived from the English Constitutional law and based on the prerogative maxim "The King can do no wrong". The British Parliament being supreme can abolish or amend a prerogative. But we have a written Constitution and our legislatures are not sovereign. The pleasure of the President or a Governor under Article 310 of the Constitution cannot be curtailed by any law made by Parliament or the legislature of a State, as the case may be. But that does not mean that the pleasure can be exercised so as to take away or curtail a Fundamental Right. The Fundamental Rights incorporated in our Constitution are inviolate. The Supreme Court has pointed out in *Golak Nath's case*, AIR 1967 SC 1643 that they cannot be taken away by any other method than by another Constituent Assembly. On the other hand, Article 310 itself can be amended by the ordinary process of amending the Constitution laid down in Article 368. As pointed out by *Hidayatullah, J.* (as he then was) in his lordship's judgment in *Golak Nath's case*, AIR 1967 SC 1643 (vide paragraph 141) absolute, arbitrary power in defiance of Fundamental Rights exists nowhere under our Constitution, not even in the largest majority. A Fundamental Right is sacrosanct and it is a sacrilege to violate it. The Supreme Court in *Bashehar Nath v. Commissioner of Income-tax*, AIR 1959 SC 149 held Article 14 to be a command issued by the Constitution to the State as a matter of public policy. It was not even open to a citizen to waive it. It is obvious that the President or a Governor cannot exercise his pleasure under Article 310 so as to abridge or curtail a Fundamental Right.

22. Dr. Medhi has raised a minor point which I may dispose of now. The impugned notice, terminating the service of the petitioner was given by the Examiner of Local Accounts. The petitioner was an Auditor, Local Accounts. It is contended that under the Assam Local Funds Audit & Accounts Act 1930 the Government is the appointing authority of an auditor and as such the notice should have been given by the Government. There is no force in this argument. Under the Assam Subordinate Audit Service Rules 1963, the Examiner

of Local Accounts has become the appointing authority. Under Article 313 of the Constitution a law applicable to any public service remains in force until other provision is made. Hence the above provision in the Act of 1930 remained in force till provision was made by a rule as aforesaid.

23. As I have held that paragraph 4 of the memorandum is violative of Art. 14 of the Constitution, the petition is allowed. The impugned notice issued under the said paragraph is quashed. The petitioner shall be deemed to have continued in the service of the Government in spite of the said notice and shall be reinstated to his post forthwith.

24. Civil Rules Nos. 316 and 323 of 1968 are placed before us for hearing along with Civil Rule 308 of 1968 as they raise common questions of law.

25. In Civil Rule No. 316 of 1968 the petitioner held the post of Head Assistant in the Office of the District Registrar, Kamrup, Gauhati. He was born on 1-1-13 and would have retired on the 1st January, 1968 on completion of 55 years of age. But in the meantime the memorandum extending the age up to 58 years was issued. The petitioner was found to be physically fit and efficient by the competent authorities and so he was allowed to continue in service after attaining the age of 55 years. But his service was terminated by a notice dated the 1st July, 1968 under paragraph 4 of the memorandum. This case is covered by the judgment in Civil Rule No. 308 of 1968 and hence the petition is allowed. The petitioner shall be deemed to have continued in service of the Government and shall be reinstated to his post forthwith.

26. In Civil Rule No. 323 of 1968, the petitioner was holding the post of a Mohurer in the office of the Executive Engineer, P. W. D., Jorhat. His date of birth as shown in the official record is 15th May, 1911. He was due to retire on the 15th May, 1966. But he continued in service under the memorandum as he was found physically fit and efficient. His service was terminated by a notice dated 28-5-68 issued under Paragraph 4 of the memorandum. This case is covered by the judgment in Civil Rule No. 308 of 1968 and hence the petition is allowed. The petitioner shall be deemed to have continued in service of the Government and shall be reinstated to his post forthwith.

27. Parties will bear their own costs in Civil Rules Nos. 316 of 1968 and 323 of 1968. Cost is allowed in Civil Rule No. 308 of 1968. Hearing fee is fixed at Rs. 200/-.

28. K. C. Sen J.: I agree with my Lord the Chief Justice.

29. PATHAK, J: I had the privilege of seeing the judgment of My Lord the Chief Justice just now delivered. I am unable to agree with his finding that para 4 of the Government Memorandum dated 21-3-63 is violative of Article 14 of the Constitution of India and consequently I respectfully differ from the conclusion that the three petitions should be allowed. For the reasons stated below, I hold that para 4 of the Government memorandum dated 21-3-63 does not offend Article 14 of the Constitution and therefore I would dismiss all the three petitions and discharge the Rules.

30. By these three writ petitions the petitioners have challenged the Government orders by which they have been compulsorily retired with effect from 30-9-68.

31. The petitioner in Civil Rule 308/68 was appointed on 18-8-41 in the post of a typist. He was then appointed an Assistant Auditor in which post he was confirmed on 6-5-46. Thereafter he was appointed an Auditor, Local Accounts, Assam, in which post he was confirmed on 1-4-50 and he was continuing in that post under the Government of Assam. He was born on 1-1-1913 and has completed 55 years of age on 1-1-68. In the meantime, the Government of Assam decided to raise the age of retirement of all Government servants from 55 years to 58 years and an Office Memorandum being No. AAP. 217/62/15 dated 21-3-63 was issued, which is Annexure 'B' to the petition. In the said memorandum, the Government decision of raising the superannuation age was to be given effect to with retrospective effect from 1st December 1962. The petitioner was found both physically fit and also sufficiently efficient as laid down in the annexure to the said memorandum and he was allowed to continue in service beyond the age of 55 years by order dated 21-12-67, a copy of which is annexed as Annexure 'C' to the petition. On 7-5-68, the petitioner was served with a notice by the Examiner of Local Accounts that the petitioner would not be retained in service beyond 30-9-68; a copy of the said notice is annexure 'D' to the petition. The petitioner has challenged this notice dated 7-5-68.

32. Dr. J. C. Medhi, the learned counsel appearing for the petitioner, challenged the said notice dated 7-5-68 as bad in law on the following grounds:

(i) That a notice under para 4 of the Government Memorandum dated 21-3-63 could not be issued after the Government servant had attained the age of 55 years and had been allowed to continue in the post beyond 55 years;

(ii) That the impugned notice was not issued by the appointing authority;

(iii) That the provision of compulsory retirement with three months' notice provided in para 4 of the Government Memorandum dated 21-3-63 offended Article 311 (2) of the Constitution; and

(iv) That the provisions laid down in para 4 of the Government Memorandum dated 21-3-63 offended Article 14 of the Constitution of India.

33. The learned Counsel's submission that the notice contemplated under para 4 of the Government Memorandum dated 21-3-63 could be issued only before the Government servant attained the age of 55 years and not after he was allowed to continue in the post beyond 55 years does not appear to have any substance. Under F. R. 56, Government servant has the right to continue in service till he attains the age of 55 years unless he is removed from service in accordance with law and procedure laid down in this respect. The question of requiring the Government servant to retire after he attained the age of 55 years on three months' notice would arise only when the Government servant was retained in service under F. R. 56 beyond the age of superannuation. In the circumstances, the notice contemplated under para 4 of the Government Memorandum of 1963 would be issued only after the Government servant attained the age of 55 years. If a Government servant wanted to get the benefit of the Government memorandum of 1963 he would have to satisfy the appointing authority regarding his efficiency and physical fitness as prescribed by the memorandum. If he did not want to continue in service beyond the age of 55 years, he would be entitled to retire on the attainment of the age of superannuation. I therefore hold that the submission of the learned counsel that the notice contemplated under para 4 of the Government memorandum of 1963 could not be issued after the Government servant attained the age of superannuation has no substance and the impugned order of compulsory retirement is not bad on this ground.

34. The second submission of the learned counsel is that the notice requiring the petitioner to retire with effect from 30-9-68 was issued by the Examiner, Local Accounts, who was not the appointing authority of the petitioner and as such it was bad in law. But under the Assam Subordinate Audit Service Rules, 1963, the Examiner of Local Accounts has been the appointing authority of the petitioner and as such I hold that the notice has been issued by the competent authority and it is not bad in law.

35. The third submission of the learned counsel is that the order of compulsory retirement made under para 4 of the Government memorandum dated 21-

3-63 was violative of Article 311 (2) of the Constitution.

36. In the case of AIR 1964 SC 600, the Supreme Court has laid down that if a Government servant holding substantially a permanent post is compulsorily retired under the relevant service rules, such compulsory retirement does not amount to removal under Article 311 (2). Similarly the retirement of a permanent Government servant on his attaining the age of superannuation does not amount to his removal within the meaning of Article 311 (2). In the instant case, the age of superannuation is 55 years under F. R. 56 and the petitioner attained the age of superannuation on 1-1-68. Therefore his compulsory retirement with effect from 30-9-68 does not attract the provisions of Article 311 (2) of the Constitution of India. The Supreme Court has held that where an order directing compulsory retirement does not expressly contain the words prescribing stigma on Government servant, the order will not amount to removal and action under Article 311 is not necessary. In the order of compulsory retirement in the instant case, there are no express words from which any stigma can be inferred. In the circumstances, I hold that the notice dated 7-5-68 could not be said to be an order of removal attracting Art. 311 (2) of the Constitution.

37. Dr. Medhi, the learned counsel appearing for the petitioner, has submitted that the Government memorandum dated 21-3-63 raised the superannuation age of the Government servants from 55 years to 58 years and it created a right in the Government servants to continue in service up to the age of 58 years. Since the authority concerned by its order dated 7-5-68 compulsorily retired the petitioner with effect from 30-9-68 before he attained the age of 58 years, the order is bad in law inasmuch as it amounted to removal from service without complying with the provisions of Article 311 (2). This leads us to consider the nature and character of the Government memorandum dated 21-3-1963. The Government memorandum dated 21-3-63 is not in the form of Rules. In para 8 of the memorandum it is stated that necessary amendments to the relevant rules would be issued in due course. The memorandum is a Government decision, copies of which were forwarded to all Administrative Departments, all Heads of Departments, all Deputy Commissioners and Sub-divisional Officers, Accountant General, Secretary, Assam Legislative Assembly and Secretary, A. P. S. C. for information. In para 1 of the memorandum, it is stated as follows:

"It has now been decided that the age of compulsory retirement of the State

Government servants should be 58 years." The very form of these words shows that it conveyed the executive decision of the State Government to Heads of Departments. The memorandum was never published in the Gazette.

38. A similar memorandum was considered by the Supreme Court in the case of AIR 1967 S.C. 1264. Relevant portions of the memorandum of the Madhya Pradesh Government are quoted in the said judgment and it is found that the Madhya Pradesh Government memorandum and the Assam Government memorandum contain similar terms with slight modification here and there. On a consideration of the Madhya Pradesh Government memorandum, the Supreme Court held that the memorandum in question was not a rule under Article 309 of the Constitution and that it was a mere executive instruction of the Government and it contained merely executive instructions. In view of the law laid down by the Supreme Court in this regard in the case of I. N. Saksena, AIR 1967 S.C. 1264, I am clearly of opinion that the Assam Government memorandum dated 21-3-63 was merely executive instructions by the Government to the Heads of all Administrative Departments etc. and it contained merely executive instructions and it is not a rule under Article 309 of the Constitution of India.

39. In the case of I. N. Saksena, AIR 1967 SC 1264, the Madhya Pradesh Government in pursuance of their office memorandum amended F. R. 56 raising the age of superannuation. But in the instant case, F. R. 56 has not been amended by the Government and it is clear from the Government memorandum dated 2-4-68 that the Assam Government dropped the idea of raising the superannuation age by amending F. R. 56. Since F. R. 56 was not amended, the age of superannuation remained at 55 years and the Government servants including the petitioner had no right to continue in service till he attained the age of 58 years under any statutory rule.

40. In the decision of I. N. Saksena, AIR 1967 SC 1264, the Supreme Court further held that the executive instructions contained in the Madhya Pradesh Government memorandum amounted to an order of Government retaining the services of all Government servants up to the age of 58 years subject to the conditions prescribed in the memorandum till an appropriate rule as to the age of superannuation was framed. As has been observed earlier, the Assam Government decided by a subsequent memorandum not to raise the age of superannuation by amending F. R. 56. The Supreme Court also held in that case that under F. R.

56 (a) it was open to the Government to extend the date of retirement of Government servant if it so desired and there was nothing illegal when the Government came to the conclusion generally that the services of all Government servants should be retained till the age of 58 years on public grounds and in that view the Supreme Court held that the Government memorandum in the said case was in the nature of a general order of extension of services of Government servants under F. R. 56 as it existed on that date. On the same reasoning, it must be held that the Assam Government memorandum dated 21-3-63 was in the nature of a general order of extension of services of the Government servants by the Assam Government under F. R. 56 as it existed on 21-3-63. In other words, the Government servants including the petitioner were to retire on their attainment of 55 years of age, but by the memorandum of 1963 their services were retained under the second part of F. R. 56 (a). Thus the petitioner's right to continue in service up to the age of 58 years must be held to be subject to the conditions prescribed in the memorandum which was issued under F. R. 56 (a), as has been laid down in L. N. Saksena's case, AIR 1967 SC 1264. The petitioner has been compulsorily retired with effect from 30-9-68 with three months' notice as provided in para 4 of the Government memorandum. Since the Assam Government memorandum dated 21-3-63 is held to be issued under F. R. 56 (a), which is a statutory rule, it necessarily follows that the memorandum has the force of law and it is 'law' as defined under Article 13 (3) (a) of the Constitution. Thus the order of compulsory retirement of the petitioner after he attained the age of superannuation was under the Government memorandum of 1963 which has the force of law and as such the case did not attract Article 311 of the Constitution.

41. The fourth submission of the learned counsel is that para 4 of the Government memorandum of 1963 is hit by Art. 14 of the Constitution. His submission is that Para 4 gives naked and arbitrary power to the appointing authority to compulsorily retire a Government servant at his sweet will and therefore offends Art. 14 of the Constitution and must be struck down. For a decision of this point, it would be convenient to consider the documents relied on by the parties in the instant case.

42. The Office Memorandum No. AAP. 217/62/15 dated 21-3-63 is Annexure 'B' to the petition and it has been quoted in the judgment of My Lord the Chief Justice and I need not extract it. The order dated 21-12-67, by which the petitioner

was allowed to continue in service beyond the age of 55 years, which is Annexure 'C' to the petition, is as follows:

"In pursuance of the decision contained in Appointment (A) Department Office Memorandum No. AAP. 217/62/15 dated 21-3-63, the Governor of Assam is pleased to allow Shri Premadhar Barooah, Auditor under the Local Audit Department to continue in service beyond the age of 55 years, until further orders with effect from 1-1-68."

This Government letter was from the Under Secretary, Finance Department, Government of Assam, to the Examiner, Local Accounts, Assam, a copy of which was sent to the petitioner.

43. The impugned notice dated 7-5-68 (Annexure 'D' to the petition) is as follows:

" Notice
No VI/1/68-69-13 dated, Gauhati, the 7th May, 1968.

To
Shri Premadhar Barooah,
Designation — Auditor, Local Accounts,
Address — Gauhati.

In pursuance of office Memorandum No. AAP. 217/62/15 dated 21-3-63 read with O. M. No. AAP. 126/67/54 dated 2-4-68 you are hereby requested to take notice that you shall not be retained in service beyond 30-9-68.

This may be treated as notice under para 4 of O. M. No. AAP. 217/62/15 dt. 21-3-63.

Sd. J. Sarmah,
Designation: Examiner of Local Accounts
Gauhati
Address: Gauhati."

44. The relevant paragraphs of the Government Memorandum No. AAP. 126/67/54 dated 2-4-68 (Annexure 'E' to the petition) are as follows:

Government of Assam
Appointment (A) Department: Appointment Branch.

No. AAP. 126/67/54
Dated, Shillong the 2nd April, 1968

OFFICE MEMORANDUM
Sub. : Retirement of State Government Employees at age of 55.

In view of the serious unemployment situation in the State, Government have been considering for sometime past the question of discontinuing the present policy of extension of service of the State Government employees beyond 55 years as envisaged in the Government office Memorandum No. AAP. 217/62/15 dated 21-3-63 as amended from time to time. It has now been decided that the age of compulsory retirement of State

Government servants should be 55 years as laid down in F. R. 56 (a), discontinuing the present benefit of raising the age of superannuation to 58 years of age as laid down in the aforesaid office Memorandum.

2. In order to give enough time to the appointing authorities and to the individual Government servant, affected by Government's decision on principle, to apply for leave due to them, which normally assumed as four months, and to ensure that each person affected has the necessary three months' notice it is intended that the decision be made effective from the afternoon of 30th September, 1968.

3. This decision will apply to all Government servants who will retire on or after 30th September, 1968. Government servants who are already on extension beyond 55 years of age should be served with a 3 months' notice without assigning any reason as envisaged in Government O. M. No. AAP. 217/62/15 dated 21-3-63 to retire on 30-9-68. The respective appointing authorities should immediately serve the notices on each individual Government servant separately to retire on 30-9-68.

x	x	x
x	x	x

A. N. Kidwai,

Chief Secretary to the Govt. of Assam."

45. Since the Government memorandum dated 21-3-63 must be held to be a law, Dr. Medhi, the learned counsel for the petitioner, has submitted that para 4 of the memorandum is hit by Article 14 of the Constitution inasmuch as it is germane with discrimination and it gives unguided and naked discretion to the authority concerned.

46. Accepting the position that the Government memorandum dated 21-3-63 has the force of law and it comes within the definition of 'law' given under Article 13 (3) (a) of the Constitution, we have to consider whether para 4 of the memorandum is discriminatory or otherwise hit by Article 14 of the Constitution. F. R. 56 (a) confers a discretion on the Government to retain a Government servant after he attains the age of 55 years on public grounds to be recorded in writing. The Government servant has no fundamental or legal right to continue in service beyond the age of superannuation but he may be retained beyond the age of superannuation on public grounds to be recorded in writing by the Government. This discretion has been vested in the Government and the policy, the principle and the procedure under which this discretion has to be exercised have been laid down in F. R. 56 (a) itself, and therefore F. R. 56 (a) cannot be said in any way to offend Article 14 of the Con-

stitution. Since the Government has a discretion to retain a Government servant after he attains the age of superannuation on public grounds to be recorded in writing, it necessarily follows that the Government has also the discretion not to retain and/or when retained, to put an end to such retention in service on public grounds to be recorded in writing. Para 4 of the memorandum empowers the authority to require a Government servant, who has been retained after he has attained the age of 55 years, to compulsorily retire. In my opinion, this reservation of power in the authority concerned is inherent in the second part of F. R. 56 (a). That being the legal position, the discretion conferred on the authority under para 4 of the memorandum has its source in F. R. 56 (a) itself and this discretion can be exercised only on public grounds to be recorded in writing. The policy and principle for exercise of this discretion vested in the authority under para 4 of the memorandum are found in F. R. 56 (a) itself. In this connection, it would be apposite to refer to the following passages in the case of Ram Krishna Dalmia v. Justice Tendolkar, reported in AIR 1958 SC 538:

"A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification; the Court will uphold the law as constitutional, as it did in Kathi Raning Rawat v. The State of Saurashtra.

"A statute may not make a classification of the persons or things to whom its provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held by this Court, e.g. in Kathi Raning Rawat v. The State of Saurashtra that in such a case the executive action but not the statute should be condemned as unconstitutional."

47. Since the Government memorandum of 1963 is held to be a general order under F. R. 56 (a), and the guidance and principle for exercising the discretion under para 4 of the Government memorandum are found in FR 56 (a) itself, the

submission of the learned counsel that para 4 of the Government memorandum confers unguided and naked discretion has no substance. I therefore hold that para 4 of the Government memorandum of 1963 does not offend Article 14 of the Constitution.

48. The matter may be viewed from another angle. Under the Government memorandum of 1963 the Government servant was entitled to continue in service till the age of 58 years, subject to the conditions mentioned therein. By Government memorandum dated 2-4-68, the age of superannuation was retained as it is laid down in F. R. 56 and the benefits of retention of all Government servants beyond the superannuation age granted under the Government memorandum dated 21-3-63 were withdrawn from all Government servants concerned. The Government memorandum dated 2-4-68 deciding to retire all Government servants by 30-9-68 must be held to be under F. R. 56 (a) which confers the discretion on the Government to retain Government servants beyond the superannuation age on public grounds to be recorded in writing which necessarily includes the discretion to cancel or withdraw such retention in service on public grounds. This withdrawal of the benefits by the Government memorandum of 1968 is clearly on public grounds inasmuch as from the memorandum of 1963 it is found that the Government took decision in this respect in view of the serious unemployment situation in the State, or, in other words, to meet the serious unemployment situation in the State. The notice requiring the petitioner to retire with effect from 30-9-68 was issued not only under para 4 of the memorandum of 1963 but it was also issued in pursuance to the Government memorandum of 1968 which lays down the public grounds under which the petitioner was required to retire on 30-9-68. The Government memorandum of 1963 applied to all Government servants who were retained in service beyond the age of 55 years in pursuance of the Government memorandum of 1963. In this view of the matter also, the order of compulsory retirement in the instant case cannot be said to be in any way illegal.

49. F. R. 56 confers discretion in Government to retain a Government servant in service beyond the age of 55 years though he has no legal right to continue under F. R. 56 beyond the age of superannuation. This discretion must necessarily include discretion not to so retain a Government servant beyond the age of 55 years and such discretion may be exercised at a time when the Government servant attains the age of 55 years or at any time after he is so retained in service. This discretion, no doubt, will have

to be exercised on public grounds to be recorded in writing. The Government memorandum dated 2-4-68 decided not to retain all Government servants who were retained in service beyond 55 years by the Government memorandum dated 21-3-63 in accordance with second part of F. R. 56 (a). Hence the Government memorandum dated 2-4-68 also must be held to be an order under F. R. 56 (a) itself which is a statutory rule and as such the said memorandum dt. 2-4-68 has the force of law and it is a 'law' as defined under Article 13 (3) (a) of the Constitution. It is, therefore, found that both the Government Memoranda dated 21-3-63 and 2-4-68 are orders under the second part of F. R. 56 (a) and both have the force of law. By the memorandum dated 21-3-63, all Government servants were retained up to 58 years after they attained the age of superannuation and by the Government memorandum dated 2-4-68 such retention beyond 55 years up to 58 years was terminated with effect from 30-9-68.

50. The question therefore arises whether a Government servant who acquires the right to continue in service till 58 years of age by virtue of the Government memorandum dated 21-3-63 may be compulsorily retired in pursuance of the Government memorandum dated 2-4-68 before he attains the age of 58 years. In other words, whether the benefit of the increased age of superannuation conferred by some rule or law may be curtailed or taken away by another rule or law. The same question arose in the case of Bishnu Narain Misra v. State of Uttar Pradesh, AIR 1965 SC 1567. The facts of that case were as follows : By a notification dated November 27, 1957 the Government of Uttar Pradesh raised the age of superannuation for members of its service from 55 to 58 years. On May 25, 1961 by a notification under Art. 309 the Government again reduced the age to 55 years. By a proviso to the later notification it was laid down that those who owing to the earlier notification had continued in employment beyond the age of 55 years will be deemed to have been retained in service beyond the date of compulsory retirement. Another order was issued by the Government the same day directing that all those who were between the age of 55 years and 58 years and had been retained in service in the above manner would be retired on December 31, 1961. The appellant in that case who attained the age of 55 years on December 11, 1960 and was continued in service when the age of retirement was raised to 58 years was one of those who were retired on December 31, 1961. Aggrieved, he filed a writ petition before the High Court which was dismissed and an appeal to the Division Bench also

failed. Appeal was filed before the Supreme Court by special leave.

It was submitted on behalf of the appellant in that case as follows:

(1) The change in the rule of retirement made by the notification of May 25, 1961, was hit by Art. 311 as it amounted to removal of public servants from service without complying with the requirements of Art. 311 (2).

(2) The rule in question being retrospective was bad as no notification could be made retrospectively; and

(3) The rule was hit by Art. 14 inasmuch as it resulted in inequality between public servants in the matter of retirement.

On the facts of that case and in answer to the questions raised on behalf of the appellant in that case, the Supreme Court held as follows:

(i) There is no provision which takes away the power of Government to increase or reduce the age of superannuation and therefore as the rule in question only dealt with the age of superannuation and the appellant had to retire because of the reduction in the age of superannuation it cannot be said that the termination of his service which thus came about was removal within the meaning of Art. 311.

(ii) There was no retrospectivity in the rule. All that it provided was that from the date it came into force the age of retirement would be 55 years. The rule would operate only for the period after it came into force. Nor did the proviso make it retrospective. It only provided as to how the period of service beyond 55 years should be treated in view of the earlier rule of 1957 which was being changed by the rule of 1961. The second order issued on the same day clearly showed that there was no retrospective operation of the rule for in actual fact no Government servant below 58 years was retired before the date of the new rule i.e. May 25, 1961. Thus the new rule reducing the age of retirement from 58 years to 55 years could not be held to be retrospective.

(iii) There was no force in the contention that the new rule was discriminatory inasmuch as different Government servants were retired on December 31, 1961 at different ages. The rule treated alike all those who were between the age of 55 and 58 years. Those who were retired on December 31, 1961 certainly retired at different ages but that was so because their services were retained for different periods beyond the age of 55. Government was not obliged to retain the services of every public servant for the same length of time. The retention of public servants after the period of retirement depended upon their efficiency and the exigencies of public service, and

in the present case the difference in the period of retention had arisen on account of the exigencies of public service.

51. The order of retirement dated 7-5-68 in the instant case was issued in pursuance of the Government memorandum dated 21-3-63 and the Government memorandum dated 2-4-68.

52. Following the law laid down by the Supreme Court in that case, I hold that the order of compulsory retirement of the petitioner with effect from 30-9-68 in pursuance of the Government memorandum dated 2-4-68 does not offend Article 311 (2) nor Article 14 of the Constitution of India.

53. Considering the law and facts in the case, I am clearly of opinion that para 4 of the Government memorandum does not offend Article 14 of the Constitution and the order of compulsory retirement dated 7-5-68 is valid in law. I therefore hold that the petitioner in Civil Rule No. 308/68 is not entitled to any remedy and I would dismiss his petition.

54. The petitioner in Civil Rule No. 316/68 was holding the post of an Office Assistant in the establishment of the District Registrar of Kamrup, Gauhati and he was duly confirmed on 1-11-67. He was born on 1-1-1913 and he completed 55 years of age on 1-1-68. The petitioner was allowed to continue in service for further three years from the date of completion of 55 years in pursuance to the Government memorandum dated 21-3-63. On 1-7-68 the petitioner was served with a notice that he would not be retained in service beyond 30-9-68 in pursuance to Government memorandum dated 21-3-63 read with Government memorandum dated 2-4-68. The petitioner has challenged this order in this writ petition. The points raised and argued in this case on behalf of the petitioner are identical with those raised and argued in Civil Rule No. 308/68 and this case is covered by my decision in Civil Rule No. 308/68. I would, therefore, dismiss the petition in Civil Rule No. 316/68.

55. The petitioner in Civil Rule No. 323/68 was holding the post of a Mohurrir in Class III category in the public Works Department. His date of birth was 15-5-1911 and he would have retired on 15-5-1966. The petitioner was found medically fit and also efficient and he was retained in service beyond the age of 55 years up to the date when he would attain the age of 58 years by a specific order. Thereafter, by letter dated 30-4-68, the petitioner was intimated that he was to retire on 30-9-68. The petitioner has challenged this order by this writ petition. The points raised and argued in this case on behalf of the petitioner are identical with those raised and argued in

Civil Rule No. 308/68 and this case is covered by my decision in Civil Rule No. 308/68. I would, therefore, dismiss the petition in Civil Rule No. 323/68.
Petitions allowed.

AIR 1970 ASSAM & NAGALAND 14
(V 57 C 2)
P. K. GOSWAMI, J.

Union of India and others, Appellants
v. Karam Ali and others, Respondents.

Second Appeal No 58 of 1966, D/- 20-1-1969, against decision of Addl. Dist. J. Lower Assam Dist. at Nowgong, D/- 16-11-1965.

Constitution of India, Arts. 5 and 6—
"Migration" can only be from a territory which is not India, into the territory of India — Hence, there can be no migration into India from a place now in Pakistan prior to 15-8-47 — Case, held, attracted Art. 5.

Plaintiff's family originally residing in the District of Sylhet now included in East Pakistan came to a village in the District of Nowgong in Assam in the year 1922. They were living there as permanent residents since then and since about 40 years the family was doing business in dry fish at that place. On 22-5-63 they were served with a quit-India notice to leave India. The plaintiffs filed this suit for a declaration that they were citizens of India and not liable to be deported.

Held, that the case attracted Art. 5 and not Art. 6 of the Constitution. All that Art. 5 required was that at the commencement of the Constitution they must prove their domicile in the territory of India and they must be ordinarily residents in the territory of India for not less than five years immediately preceding such commencement. As they had been residing at Nowgong (India) since 1922, for so many years, and after the creation of the two Dominions had not elected to leave this country, but, on the other hand, had acquired landed property thereafter, they must be held to have established their intention to reside in India by making it their permanent home. They had, therefore, established their domicile in India within the meaning of Art. 5 of the Constitution. They were therefore citizens of India, not liable to be deported.

(Para 4)

Article 6 had no application because the migration in the context of the Constitution, must be from a territory which was outside India to India and not from one place to another within the same territory. When the plaintiffs moved

from Habiganj to Nowgong in 1922 in an undivided India, there was no migration within the meaning of Art. 6 of the Constitution. It was only after 15th August 1947 that the question of migration from India to Pakistan or vice versa might arise under the Constitution. AIR 1961 SC 58 & S. A. No. 63 of 1966 D/- 6-12-1968 (Assam) & AIR 1966 SC 160 Foll.

Cases Referred:	Chronological Paras
(1968) Second Appeal No. 63 of 1966 D/- 6-12-1968 (Assam), Union of India v. Saukat Ali	1
(1966) AIR 1966 SC 160 (V 53) = (1965) 3 SCR 793, Kedar Pandey v. Narain Bikram Sah	4
(1961) AIR 1961 SC 58 (V 48) = (1961) 1 SCR 576, Smt. Shanno Devi v. Mangal Sain	4

P. C. Katak, for Appellants; S. R. Bhattacharjee, for Respondents.

JUDGMENT: This appeal is by the defendants against the judgment and decree of the learned Additional District Judge, Lower Assam Districts, Nowgong, setting aside the judgment and decree of the learned Munsiff, dismissing the plaintiffs' suit for declaration of rights of citizenship and for injunction.

2. The plaintiff's case may briefly be stated. Plaintiff No. 1 Karam Ali is the husband of plaintiff No. 2 Maleka Banoo and plaintiff No. 3 is their dependent son. They were originally residents of Habiganj in the district of Sylhet now included in East Pakistan. They came to Thiatangon village in Juria Mouza in the district of Nowgong, Assam, in the year 1922 and have been living there as permanent residents since then. They have been also carrying on business in dry fish there since about 40 years. Plaintiff No. 3 was born at Juria. On 22nd May 1963, the plaintiffs were served with a quit-India notice to leave India within 20th June 1963. The plaintiffs claimed that they are bona fide citizens of India, and, as such, are not liable to be deported. They accordingly served notice on the defendants under S. 80 of the Code of Civil Procedure and in due course instituted this suit wherein they claimed for declaration of their rights as Indian citizens and for injunction against the defendants.

3. The defendants denied the plaintiff's claim. The learned Munsiff dismissed the plaintiffs' suit on the ground that they have failed to make out a case under Article 5 of the Constitution of India, inasmuch as they could not establish domicile in India. He, therefore, held that the plaintiffs are not citizens of India under Article 5 of the Constitution and rejected their claim. The learned Additional District Judge, on the other hand, held that Article 6 was ap-

plicable on the facts and circumstances of the case, and, according to him, acquisition of domicile is not necessary. The learned Judge held as follows:

"Under Article 6 those who migrated before 19-7-48 would be deemed to be citizens of India automatically if they had been ordinarily residents in the territory of India since the date of their migration."

He further held:

"The very fact that plaintiff no. 1 has been living in Nowgong for so many years with his family shows that the plaintiffs are ordinarily residents of this place."

* * * * *

"If one moves to a new place with intention to make it his home for an indefinite period one can be said to be ordinarily a resident of that place. In the present case the plaintiffs have been living in Nowgong for more than twenty years. They have subsequently purchased landed property which shows that they have intention of making it their home. The plaintiffs have been also carrying on business in Nowgong since 1946. From all these I am inclined to hold that the plaintiffs have been ordinarily residents in Nowgong which is in the territory of India. Under provisions of Article 6 of the Constitution the plaintiffs must be called citizens of India."

4. The learned Counsel for the appellants submits that the learned Additional District Judge has committed an error of law in holding that Article 6 of the Constitution is applicable in the instant case. He also draws my attention to an unreported decision of mine in Second Appeal No. 63 of 1966 (Assam) where this Court held that Article 6 is only applicable to a case of migration to India (Bharat) after the creation of the two Dominions on 15th August 1947 by virtue of the Indian Independence Act, 1947. Since the plaintiffs came to India some time in 1922, their case is not covered by Article 6 of the Constitution.

The learned Counsel for the appellants has further drawn my attention to the decision of the Supreme Court in the case of Smt. Shanno Devi v. Mangal Sain, AIR 1961 SC 58, wherefrom he reads the following passage from Paragraph 7:

"The extreme contention raised by Mr. Sastri on behalf of the appellant that migration under Art. 6 must take place after the territory of India came into existence under the Constitution cannot be accepted. It has to be noticed that Art. 6 deals with the question as to who shall be deemed to be a citizen of India at the commencement of the

Constitution. That itself suggests, in the absence of anything to indicate a contrary intention, that the migration which is made an essential requirement for this purpose must have taken place before such commencement. It is also worth noticing that Clause (b) of Article 6 which mentions two conditions, one of which must be satisfied in addition to birth as mentioned in Cl. (a) and "migration" as mentioned in the main portion of the Article being proved, speaks in its first sub-clause of migration "before the 19th day of July 1948" and in sub-clause (ii) migration "after the 19th day of July 1948". The second sub-clause requires that the person must be registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefor to such officer before the commencement of the Constitution. The proviso to that Article says that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application. It is clear from this that the act of migration in Art. 6 must take place before the commencement of the Constitution. It is clear, therefore, that "migrated to the territory of India" means "migrated" at any time before the commencement of the Constitution to a place now in the territory of India."

On a careful examination of the decision, it will be clear that the last few sentences in the paragraph unequivocally refer to "any time before the commencement of the Constitution". The Constitution having commenced on 26th January, 1950, the migration must be before this date. The decision does not show that the migration is referable even to a time prior to the creation of the two Dominions under the provisions of the Indian Independence Act. Before the 15th August 1947, the question of migration from different parts of undivided India would not arise. The migration in the context of the Constitution, as is clearly understood, must be from a territory which is outside India to India (Bharat) and not from one place to another within the same territory.

When the plaintiffs moved from Habiganj to Nowgong in 1922 in an undivided India, there was no migration within the meaning of Article 6 of the Constitution of India. It is only after 15th August, 1947 that the question of migration from India to Pakistan or vice versa may arise under the Constitution. The Supreme Court has repelled the contention that migration under Article 6 is referable to a movement only after the commencement of the Constitution, namely, after 26th January, 1950. Their Lordships were not called upon to decide

in that case from what anterior time prior to the commencement of the Constitution, migration can be said to take place. This very decision of the Supreme Court has noticed the word "migration" and their Lordships observed as follows:

"The only explanation of their not expressly mentioning "domicile" or the "intention to reside permanently" in Art. 6 seems to be that they were confident that in the scheme of this Constitution the word "migration" could only be interpreted to mean "come to the country with the intention of residing there permanently."

I am, therefore, clearly of the opinion that Article 6 is not applicable to the facts of this case and the learned Additional District Judge was not justified in invoking the said Article. Even in applying Article 6 and finding in favour of the plaintiffs, the learned Judge has gone wrong in holding that the question of 'domicile' would not arise in dealing with the case under Article 6 of the Constitution. This case has to be decided in the light of Article 5 and from the finding of the learned Judge that the plaintiffs have been residing in India since 1922 and carrying on business here and have since also purchased landed property showing that they have the intention of making India their home, it is difficult to resist the claim of the plaintiffs to their rights of citizenship. All that Art. 5 requires is that at the commencement of the Constitution the plaintiffs must prove their domicile in the territory of India and they must be ordinarily residents in the territory of India for not less than five years immediately preceding such commencement. On the finding of the court below, the plaintiffs have been residents in the territory of India since 1922, which is more than five years immediately preceding the commencement of the Constitution. They have also proved their domicile at the commencement of the Constitution, on the finding of the court below that they have the intention of making India their home. As their Lordships of the Supreme Court observed in the case of Kedar Pandey v. Narain Bikram Sah, AIR 1966 SC 160:

"If this physical fact "(namely residence)" is accompanied by the required state of mind, neither its character nor its duration is in any way material. The state of mind, or animus manendi, which is required demands that the person whose domicile is the object of the inquiry should have formed a fixed and settled purpose of making his principal or sole permanent home in the country of residence, or, in effect, he should have formed a deliberate intention to settle there."

As the respondents have been residing at Nowgong (India) since 1922, for so many years, and after the creation of the two Dominions have not elected to leave this country, but, on the other hand, have acquired landed property thereafter, the learned Additional District Judge is fully justified in holding that they have established their intention to reside in India by making it their permanent home. They have, therefore, established their domicile in India within the meaning of Article 5 of the Constitution. I am, therefore, clearly of the opinion that the learned Additional District Judge was correct in decreeing the plaintiffs' suit although the reasons I have given are different from those given by the learned Judge.

5. In the result, the appeal fails and is accordingly dismissed; but, in the circumstances of the case, there will be no order as to costs.

Appeal dismissed.

AIR 1970 ASSAM & NAGALAND 16
(V 57 C 3)

K. C. SEN, J.

On Difference of opinion between

S. K. DUTTA C. J. AND M. C.
PATHAK, J.

Shankar Lal Mehra, Petitioner v. Chief Engineer, N. F. Railway and others. Opposite Parties.

Civil Rule No. 46 of 1968, D/- 12-3-1969.

Constitution of India, Art. 311 (2) — Termination of service of a probationer appointed in a temporary post — Petitioner selected for promotion to the post of a senior Draftsman in a temporary post, subsequently appointed as probationer in a clear vacancy on a probationary period of one year — Petitioner continuing to work for 5 years — Termination of service on the ground that the post was temporary attracts Art. 311 (2) — In the absence of a rule period of probation cannot be extended — Petitioner on completion of probation is deemed to have been confirmed — Termination is illegal (Per K. C. Sen J. agreeing with S. K. Dutta C. J., M. C. Pathak J. contra). AIR 1958 SC 36 Rel. on; (1968) XVII Factories and Labour Reports 9 and AIR 1957 SC 886 and AIR 1963 SC 1552 & AIR 1966 SC 1529, Dist.

(Paras 8, 19, 28, 31, 32, 35)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 1210 (V 55) = 1968-17 FLR 9, Director of Public Instructions v. Dev Raj 7, 18, 33

FM/GM/CC697/69/GGM/B

THE All India Reporter

1970

Bombay High Court

AIR 1970 BOMBAY 1 (V 57 C 1)

(NAGPUR BENCH)

DESHMUKH AND NATHWANI, JJ.

Smt. Manjuli, Petitioner v. Civil Judge, Senior Division, Wardha and others, Respondents.

Spl. Civil Appln. No. 759 of 1966, D/- 13-9-1968.

(A) Panchayats — Bombay Village Panchayats Election Rules (1959), R. 34 — Rule 34 is not unreasonable and squarely implements intention of Legislature expressed in S. 10(2) — Bombay Village Panchayats Act — It is a wholesome rule adopted almost word for word from S. 54 (4) Representation of the People Act, 1951 which has received judicial recognition from Supreme Court — (Panchayats — Bombay Village Panchayats Act (3 of 1959), S. 10(2)) — Representation of the People Act (1951), S. 54 — (Constitution of India, Art. 14).

Rule 34 is not unreasonable. It implements the intention of the legislature as expressed in sub-section (2) of Section 10. It is a wholesome rule adopted from similar provisions of S. 54 of the Representation of People Act, 1951 which have received judicial recognition from the highest tribunal of this land. The reservation of seats for women and of the Scheduled Castes and Scheduled Tribes is in the nature of a facility given to them or a concession made to a weaker section of the society in order to offer them reasonable opportunity of being represented in the administration as such. The idea, therefore, is to see that minimum number of seats as contemplated by the legislature are filled in. There is no objection if more members from these weaker sections are elected to the village panchayat or other elected bodies. This result

of guaranteeing minimum seats as required by the statute is properly carried out by the provisions of Rule 34. AIR 1959 SC 1318, Rel. on; (1958) 15 ELR 187 (Bom) & 1965 Mah LJ (Notes) No. 33, Ref. to. Observations regarding R. 34(1) in AIR 1968 Bom 445, held obiter.

(Paras 9, 11, 13 and 17)

(B) Panchayats — Bombay Village Panchayats Act (3 of 1959), S. 15(1) — Election petition — Limitation — "Within 15 days after the date of the declaration of the result of election" — In computing limitation of 15 days, date of declaration of result is to be excluded—Words "within 15 days" do not exclude 15th day and election petition can be filed on the 15th day — (Bombay General Clauses Act (1 of 1904), S. 11 — When certain time is allowed for doing an act last day of time is included for performing that act) — (Words and Phrases — "Within Fifteen days"). (Para 18)

Cases Referred: Chronological Paras

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| (1968) AIR 1968 Bom 445 (V 55)= | |
| 1968 Mah LJ 391, Smt. Shashikala Bai v. Returning Officer Gram Panchayat Election, Umri | 7, 8 |
| (1964) Spl. Civil Appln. No. 127 of 1963, D/- 14-9-1964=1965 Mah LJ Notes No. 33, Dayaram Sadashiv Bante v. Zibal Jago | 16 |
| (1959) AIR 1959 SC 1318 (V 46) = 1960-1 SCR 426, V. V. Giri v. D. Suri Dora | 9, 13 |
| (1958) 15 ELR 187=ILR (1958) Bom 1228, Digambar Rao Bindu v. Dev Rao Kamble | 15 |

D. N. Belekar, for Petitioner; G. S. Kakde, for Respondent (No. 4); C. S. Dharmadhikari, Asst. Govt. Pleader, for Advocate General.

DESHMUKH, J. :- By this petition under Article 227 of the Constitution, the petitioner wants this Court to quash the order passed by the Civil Judge, Senior

Division, as Election Tribunal under the Bombay Village Panchayats Act, 1958, in Miscellaneous Judicial Case No. 33 of 1966, on 8 8 1966.

2. This petition arises out of the elections to the village Panchayat of Sonegaon (Bai), Tahsil and District Wardha, Ward no 2 of that village is a multi-member constituency with two seats in all. Out of them, one is a reserved seat for women and the other is a general seat. The election took place on 30-5-1966 and the votes were counted on 31-5-1966. In that Ward No. 2, there were only 5 candidates. Out of them, two were women, viz., the present petitioner Manjulabai and one Anjanabai opponent No 5. The other three candidates were men who are opponents 4, 6 and 7. The counting disclosed that Anjanabai got 154 votes, Mahadeo got 90 votes, Manjulabai got 30, Govinda got 32 and Rambhau 1. The Returning Officer declared Anjanabai elected to the general seat as she polled the highest votes at the election and the only remaining women candidate Manjulabai who secured 30 votes was declared elected to the reserved seat for women. Against this declaration of result, Mahadeo, who secured 90 votes, filed an election petition before the Civil Judge on 15 6 1966. The only ground raised in the Election Petition was that after counting the votes correctly, the Returning Officer erroneously interpreted provisions of Rule 34 of the Bombay Village Panchayats Election Rules, 1959, and declared the results in a wrong manner. The learned Civil Judge accepted this submission and interpreting the provisions of R 34 of the Bombay Village Panchayats Election Rules, 1959, he declared Anjanabai elected for a reserved seat and out of the remaining candidates, Mahadeo, who secured the next highest number of votes, was declared as elected for the general seat. Being aggrieved by this order, Manjulabai, who was originally declared elected but who lost her seat due to the result of the Election Petition, has filed this petition.

3. Rule 34 of the Bombay Village Panchayats Election Rules, 1959, under which the results have been declared is attacked in this case as being unreasonable and unlawful. The substantive provisions relating to the reservation of seats for women in the Village Panchayat are to be found in sub-section (2) of Section 10 of the Bombay Village Panchayats Act, 1958. The only reference in that section is that in every Panchayat two seats shall be reserved for women. There is no further guidance as to how this intention should be carried out. The general rule making power also does not specifically point out how this intention shall be carried into effect. In

order to implement the provisions of this Act, the State Government has framed rules, called, the Bombay Village Panchayats Election Rules, 1959, as also the Bombay Village Panchayats (Divisions of Village into Wards and Reservation of Seats for Women, Scheduled Castes and Scheduled Tribes) Rules, 1966. The rules of 1966 became operative from 12th April of 1966. The disputed election has taken place when both these sets of rules were in force.

4. The relevant part of rule 34 of the Bombay Village Panchayats Election Rules, 1959, for our purpose, is as follows:—

"34. Returning Officer to declare result of election —

(1) On completion of the statement showing the number of votes recorded, the Returning Officer shall from amongst the candidates qualified to be chosen to fill a reserved seat, if any, declare subject to the provisions of Rule 5 the candidate who has secured the largest number of votes to be elected to fill such reserved seat:

Provided that If in the same Ward there is a reservation of seats for women and for the Scheduled Castes and/or Scheduled Tribes, the result of the seat or seats reserved for Scheduled Castes or Scheduled Tribes shall be declared first and then the result of the seat or seats reserved for women.

(2) The Returning Officer shall then declare from among all other candidates, excluding those who have been declared elected to fill the reserved seats, if any, the candidate or candidates who have secured the largest number of votes to be elected to fill the unreserved seats."

Sub-rule (3) of Rule 34 is not necessary for the purpose of this petition and hence it is not reproduced. The occasion to declare the election of a woman candidate or a Scheduled caste and Scheduled Tribes candidate arises only if the provision of Rule 5 does not apply. Where in a multi member constituency like the present Ward No. 2 one seat is reserved for women out of two and there is only one woman candidate in the field, then under Rule 5, she is to be automatically declared as qualified to be chosen to fill in such seat. When there are more than one woman or more than one Scheduled Caste and Scheduled Tribes candidate in the field, then the election has to be declared under the above rule. Under sub-rule (1) of Rule 34 after a statement showing the number of votes recorded, is prepared by the Returning Officer, he is to consider the candidates who are entitled to be chosen to fill a reserved seat. Out of those candidates, the one who has secured the highest number of votes is to be declared as a successful

candidate elected to fill such reserved seat. The proviso points out that where seats are reserved for women as well as for Scheduled Castes or Scheduled Tribes' candidates, the result of the Scheduled Castes or Scheduled Tribes' candidates is to be declared first and then that of reserved seats for women. There is no occasion for us to implement this provision in this case. Sub-rule (2) then points out that after declaration, the results for the reserved seats barring the candidate who is declared elected, the cases of all other candidates will again be considered and among them the one getting the highest number of votes shall be declared elected for the second seat which is the general seat. The learned counsel appearing for the petitioner has challenged this rule. According to him, this rule is unreasonable and does not implement the intention of the legislature expressed in sub-section (2) of Section 10 of the Bombay Village Panchayats Act, 1958. It is not disputed that the learned Civil Judge, as Election Tribunal, has properly understood the meaning of this rule and has declared the election of the reserved seat for women in the first instance from among the candidates qualified to be elected to that post and thereafter he has also properly declared the candidate getting highest votes among the rest as elected to the general seat. The quarrel is not with the interpretation of the rule. The quarrel is with the rule itself.

5. According to the learned counsel for the petitioner the provisions ought to have been quite reverse. After counting of votes is over and a table is prepared, the candidate getting highest votes ought to have been elected to the general seat in the first instance and out of the remaining candidates, the result of the reserved seats should have been declared. To take up the present case, Anjanabai who secured the highest number of votes viz. 104 should have been elected to the general seat. Out of the remaining candidate Manjulabai, being the only woman candidate in the field now available to fill the reserved seat, should have been declared elected. Such an approach would have given two seats to women in Ward No. 2 in the present case instead of only one which is the result of Rule 34.

6. It is, therefore, argued that the rule is unreasonable and does not implement the intention of the legislature expressed in sub-section (2) of Section 10 of the Bombay Village Panchayats Act.

7. The learned counsel draws considerable support for his argument from a Division Bench Judgment of this Court in the case of Smt. Shashikalabai v. Returning Officer Gram Panchayat Election,

Umri, 1968 Mah LJ 391 = (AIR 1968 Bom 445). In paragraphs 9, 10 and 11, the learned Judges do observe that the provisions of Rule 34, sub-rule (1) seem to be rather peculiar. A faithful implementation of sub-rule (1) of Rule 34, it is observed, might require the Returning Officer to declare a woman candidate or a Scheduled Caste or a Scheduled Tribe candidate polling the highest vote in the election to be declared as elected for the reserved seat. In that case, it is further pointed out that it may be a necessary consequence of a woman who tops the list being declared as elected to the reserved seat, that no other woman can get the chance to be elected to the seat reserved for women because the woman candidate topping the list is to be declared as elected to the reserved seat. It is then stated that in the opinion of the learned Judges, that was not the intention of the legislature in the case of multi-member constituency where a seat is reserved for a woman or Scheduled Caste or Scheduled Tribe's candidate, even though a candidate belonging to any of these categories topped the poll, he should be declared elected to the reserved seat for these categories. It is then observed that the intention of the legislature appears to be quite contrary, viz., to give additional opportunities to the candidates belonging to the weaker section of the society viz., women Scheduled Caste or Scheduled Tribe. That intention is likely to be defeated by the implementation of sub-rule (1) of Rule 34 of the Bombay Village Panchayats Election Rules as it now stands. In paragraph 10, it is then pointed out that the learned Judges examined in some details the provision of these rules as in their view, it required to be suitably amended. They have, therefore, expressed their opinion in paragraph 11 that the appropriate authorities might take up this question and re-examine the provision of sub-rule (1) of Rule 34 of the Bombay Village Panchayats Election Rules, 1959 for the purpose of proper amendment.

8. It is this reasoning which is adopted by the learned Counsel for the petitioner which requires some examination. We might at once point out with utmost respect to the learned Judges who decided Shashikalabai's case, 1968 Mah LJ 391 = (AIR 1968 Bom 445) that the question regarding a reasonableness or validity of Rule 34 of the Bombay Village Panchayats Election Rules, 1959, did not directly arise before them. The facts of that case were that the nomination paper of the petitioner which was properly presented in Form A under Rule 8 of the Village Panchayats Election Rules was rejected by the Returning Officer. He insisted upon requiring the petitioner to indicate whether she was contesting the election

to the reserved seat or to the general seat. The petitioner refused to comply with this direction because there was no provision in the nomination form to indicate whether the election was being fought for a general seat or for a reserved seat. The Returning Officer was told that there is nothing in the rules which requires the petitioner to so indicate her choice and that does not seem to be the intention of any rules framed by the Government. Since her petition came to be rejected on that short ground, she approached the High Court in the absence of any other remedy. The question that squarely fell for consideration before the learned Judges was whether the Returning Officer was right in rejecting the nomination paper of that petitioner which complied with the provisions of the Act and which was in accordance with the specimen form A under Rule 8. Since the nomination paper did not require any choice to be expressed whether the candidate offered herself for the reserved seat for women or for the general seat in the Ward, it was beyond the power of the Returning Officer to insist upon such a declaration in the form. That was the only ambit of the dispute that was taken up to the High Court. We may also point out that though several parties were added as party-respondents including the State, none of the respondents put in appearance except the rival candidates in that Ward. It appears to have been treated as a private dispute between rival candidates relating to the rejection of nomination paper. The learned Judges had not, therefore, the advantage of hearing the point of view of the State in the matter of framing Rule 34. In fact, Rule 34 was not the subject matter of dispute in that petition. Under the circumstances, the observations seem to have been made in the absence of the point of view of the State being put before them.

9. We will presently point out that not only Rule 34 but almost all the provisions relating to the election to the Village Panchayats in the Election Rules framed by the State seem to be copied from the Representation of the People Act, 1951. Section 54 of that Act, which is not only in pari materia with Rule 34 but almost identical in words, was subject-matter of challenge before the Supreme Court. It is obvious from the discussion of the learned Judges that the Judgment of the Supreme Court in *V. V. Giri v. D. Suri Dora*, AIR 1959 SC 1310 was not brought to their notice. We would, therefore, point out, with utmost respect to the learned Judges, that their discussion and observations relating to Rule 34 are obiter and they appear to have been made under the above mentioned circumstances.

10. However, since the petitioner has used that line of reasoning for challenging Rule 34, we must examine the validity of this argument. We have already indicated above that the Election Rules framed by the State Government are, more or less, borrowed from the provisions of the Representation of the People Act 1951. It is true that in the substantive provisions of the Act beyond a declaration in sub-section (2) of Section 10 that in every Panchayat, two seats shall be reserved for women, there is nothing else by way of guidance for implementing this intention. For the purpose of finding out the scheme of reservation, we may first look to the provisions of the Bombay Village Panchayats (Divisions of Village into Wards and Reservation of Seats for Women, Scheduled Castes and Scheduled Tribes) Rules, 1966. Rule 4 of these rules vests the authority to allot the seats reserved for women to different Wards by the Collector. This authority is to be exercised by him subject to the provisions of sub-section (2) of Section 10 and as far as practicable he has to so allot the reserved seats for women, Scheduled Caste or Scheduled Tribe candidates and that at least one more seat, from that Ward, will be a general seat open for competition, by anybody. Going to the provisions of the Bombay Village Panchayats Election Rules, 1959, there are several rules which are parallel or in pari materia with the provisions of the Representation of the People Act, 1951. Rule 10 deals with the amount of deposit to be paid at the Panchayat Election where the nomination form is filled by a woman candidate or a candidate of Scheduled Castes or Scheduled Tribes. If a seat is so reserved, such candidate has to pay the deposit of Rs. 1/- as against Rs. 5/- by other candidates. This provision is similar to the provision contained in section 34 of the Representation of the People Act, 1951. We may point out that in one respect the nomination form under Rule 8 required to be filled in by the candidates is an improvement over the nomination form under Section 33 of the said Act. In the nomination form, under the said Act, a declaration is to be made by the candidate whether he is contesting the reserved seat or not. There is no such provision in Form A framed under Rule 8. This Form A merely provides for the name of the Ward for which the election is being fought, the full name of the candidate, sex, age and address. The next column requires the candidate to mention the name of the Ward in which he is entitled to vote and in which his name appears to be in the voters' list. There is one more important column in which certain information is to be supplied by the candidate concerned. If the

nomination paper relates to a Ward where there is a reserved seat for the Scheduled Castes or Scheduled Tribes, the candidate has to state whether or not he belongs to such castes or tribes for which seat or seats are reserved. If he is such a candidate he must further state the name of the caste or tribe to which he belongs. This is all that is required to be done while filling Form A under Rule 8. Rule 14 then requires the Returning Officer to prepare a list of validly nominated candidates and post it up at the Village Panchayat Office for the purposes of the information of the voters. This list is wardwise and there is no provision that the list is to be prepared seatwise as if there is a separate reserved seat and a separate election for a woman's seat or for the reserved seat of the candidate of the Scheduled Castes and Scheduled Tribes. Rule 17 provides for the preparation of a ballot paper. Only one ballot paper per Ward is to be prepared and the names of the candidates are to be arranged in alphabetical order. Rule 14 of the Election Rules 1959 is parallel to the provisions of Section 36 of the said Act. The method of voting may then be noted which is provided in Rule 23 which is similar to Section 63 of the said Act. A voter has as many votes as there are seats in his ward. He is required to give only one vote per candidate but there is no restriction on him for casting the vote seatwise, in the sense, that one vote for a reserved seat and one for a general seat. He is entitled to cast his two votes in favour of any two candidates of his choice. After voting takes place in this manner, the counting and declaration of results are then provided in Rule 34 which is parallel to Section 54 of the said Act. We have already pointed out how result is to be declared under Rule 34. The result in respect of a reserved seat is to be declared first and then the result to the general seat is to be declared from among all the remaining candidates in order of the votes polled.

11. We may point out that the reservation of seats for women and of the Scheduled Castes and Scheduled Tribes is in the nature of a facility given to them or a concession made to a weaker section of the society in order to offer them reasonable opportunity of being represented in the administration as such. The idea, therefore, is to see that minimum number of seats as contemplated by the legislature are filled in. There is no objection if more members from these weaker sections are elected to the Village Panchayat or other elected bodies. This result of guaranteeing minimum seats as required by the statute is properly carried out by the provisions of Rule 34. We might take up the instance of the

present disputed Ward No. 2 and examine how Rule 34 is, in fact, beneficial and not obstructive of affording proper representation to women. This rule, according to us, fulfils two requirements. It ensures one seat from that ward being allotted to the woman candidate for which class a seat has been declared reserved in this Ward. At the same time, it fulfils another important requirement of the democratic set up of the institution viz., those candidates who are favoured by the electorate and in whose favour highest number of votes are cast must represent the constituency.

12. We might explain how this result is brought about by framing Rule 34. As it is, if in the case of the petitioner Manjulaibai and respondent no. 5 Anjanabai, they were to get 90 and 104 votes respectively and all other candidates were to get less number of votes, how would Rule 34 operate? The Returning Officer after preparing the chart of votes would first consider the election to the reserved seats. He would find that Anjanabai has polled 104 as against 90 of Manjulaibai and must be declared elected to fill the reserved seat for women. Anjanabai is, therefore, taken out of the contest as an elected candidate for the reserved seat. Considering the cases of all the other remaining candidates, the Returning Officer would have found that Manjulaibai secured 90 votes, which is more than the number of votes of any other candidates. Manjulaibai would then be elected to the general seat. Here a woman has certainly been returned in the reserved seat but another candidate, who has secured the next highest number of votes, is properly elected in consonance with the wishes of the electorate. It is of no consequence that the second candidate happens to be a woman. There is no prohibition to elect all women or all members of the Scheduled Castes or Scheduled Tribes to a given elected body. If we now consider that the three men candidates had secured high number of votes and in order of number of votes, Anjanabai was no. 4 and Manjulaibai was no. 5 and if the votes of these two women were paltry votes say 25 and 20, which we may assume are the smallest number of votes polled by candidates, how would Rule 34 operate? The Returning Officer would first take up the reserved seat and finding that out of the two eligible candidates one has secured 25 and the other only 20 votes, he would declare the candidate getting 25 votes as elected to the reserved seat for women. Thereafter when the votes polled by all the remaining candidates in the field are taken into account, it may be that Mahadeo as in the present case, having secured 90 votes would automatically be declared as the

successful candidate filling the general seat. Here Anjanabai has been declared elected even though she had very few votes in her favour. This result is achieved by implementing Rule 34 which assures on the one hand a seat to the weaker section of the society for whom reservation is made and on the other hand it assures the return of a really popular candidate to fill in the general seat.

13. As we have already pointed out, present Rule 34 is almost word to word similar to the provisions of Section 54 sub section (4) of the Representation of the People Act, 1951. In the case of AIR 1959 SC 1318 a dispute relating to the election from the Andhra Pradesh State in respect of a Parliamentary Constituency was taken up to the Supreme Court. The facts in that case show that there were four rival candidates A, B, C and D in a multi-member Parliamentary Constituency of Parvatipuram. There were two seats in that constituency one seat being reserved for Scheduled Tribes. When polling took place what was disclosed was that C polled the highest number of votes, next in order was candidate B, thereafter was the number of candidate A and the last candidate was D. Under the provisions of S. 54(4), the Returning Officer first took up the cases of the Scheduled Tribes' candidates who were eligible to fill the reserved seats B and C were both candidates belonging to the Scheduled Tribes. Among them, C was the highest, as otherwise also he had polled the highest number of votes. C was, therefore, declared elected to the reserved seat. The cases of A, B and C were examined and it was found that among them, B got the highest number of votes. B was, therefore, elected to the general seat in the constituency. Therefore, both the candidates returned were Scheduled Tribes' candidates. So, under that section, a real representative of the people was also chosen to represent the second seat.

14. A who was third in order of polling of votes challenged the election of B to the general seat. An argument which is similar to the one which is made before us was made before the Supreme Court. It was pointed out that B and C were the contestants for the reserved seats and out of them, C, who had secured highest number of votes, is properly elected to the reserved seat. The election to the general seat should have been confined to A and D. B a candidate of the Scheduled Tribes should not have been allowed to enter the contest for the general seat. One additional ground was placed before the Supreme Court in view of the provisions of Section 33 under which nomination form was required to

be filled in. Under the said Act, the candidate had to declare whether he was contesting the election for the reserved seat. Both the candidates B and C had so made the declaration. In view of that declaration, it was urged that both of them are the candidates only for the reserved seats and neither of them had the right to participate in the election to the general seat after having failed in the contest for the reserved seat. The Supreme Court rejected the petition of the petitioner and pointed out that the fact that a seat has been reserved for a weaker section of the society in some of the multi-member constituencies does not change the nature of the election. The election is one from the double-member constituency. By reserving a seat for a multi-member constituency in order to afford representation to a certain class of society the constituency from which the election is being held is not rendered a separate electorate. Provisions of Section 63 are then referred to and it is emphasized that so far as the voter is concerned, he is free to cast his vote in favour of any candidate irrespective of the fact whether the candidate is contesting the election for the reserved seat or for the general seat. The nomination form does not deprive his right to participate in the election to the general seat. The intention is to afford a certain facility to a class of society and to assure them minimum number of seats in the House of People. Section 54 which is a wholesome section implements the intention of the legislature.

15. Several other arguments made before the Supreme Court challenging Section 54 as discriminatory and as such violative of Articles 14 and 33 of the Constitution were negatived by referring to Art. 15 sub-articles (3) and (4). These provisions are in the nature of temporary concessions to be availed of by a certain section of the society for some time and for that purpose the provisions are considered to be not only lawful but necessary for implementing that intention. A similar point arose for decision before a Division Bench of this Court in the case of Digambar Rao Bindu v. Dev Rao Kamble, (1958) 15 Ele. LR 187 (Bom). In that case also in the double-member constituency of Nanded, there were four candidates in the field. The highest number of votes was polled by Kamble, a member of the Scheduled Caste, the next highest by Harihar Sonule who also happened to be a member of Scheduled Caste, the third in order of polling of votes was the petitioner Digambar Rao Bindu and the last was a candidate named Vajendra Kabre. A seat was reserved for the Scheduled Caste candidate in that constituency. After the votes

were counted and the chart was prepared, the Returning Officer took up the case of Scheduled Caste candidates who were eligible to fill the reserved seat. He found among them that Kamble had the highest number of votes and as such declared him elected to fill the reserved seat. The next highest number of votes were obtained by Harihar Sonule and, therefore, he was declared elected to the general seat in the constituency. Digambar Rao Bindu then filed an election petition where the grievances were almost identical with the grievances of petitioner V. V. Giri before the Supreme Court in the above referred case. The learned Judges of the Division Bench pointed out that the electoral-roll of voters is one. The election is one and the reservation of seat in a multi-member constituency does not render the constituency into a separate electorate. The pertinent observations on page 191 of the report are as follows:

"It is not as if the Constitution while setting its face against separate electorates and separate rolls permits a sort of compartmental election in a multi-member constituency where a reservation is made for a member of the Scheduled Caste. The election is not compartmental. The election is general, and it is only when the results are declared that the question arises whether the reservation clause has come into play or not."

It is again emphasised in the further part of the judgment that the election is undoubtedly one and the principle of reservation comes into play in order to confer a privilege upon a member of the Scheduled Caste. The operation of that section or the rule in our case comes into play only at the time of the declaration of the result. Right from the process of preparation of voters list upto the final stage of casting votes in favour of candidates, there is only one election and the label to be attached to the candidate plays no part in that process. In order to secure minimum representation of a certain class, this question of labels comes in only when results are to be declared.

16. We may also point out that as the interpretation of Rule 34 did not squarely arise before the learned Judges of the Division Bench whose judgment has been referred to earlier, their attention was not drawn to a Division Bench judgment of this Court in Special Civil Appln. No. 121 of 1963 D/- 14-9-1964 (MPI). The judgment is not reported as such but a note appears in Dayaram Sadashiv Bante v. Zibal Jago, 1965 Mah LJ Notes No. 33. The facts of that case are rather interesting. The election related to a double-member constituency of a Village Panchayat. There were three candidates in all,

two of them being women. One seat in that constituency was reserved for woman. Out of the two women candidates, one made an endorsement on her nomination paper that she was a candidate for the general seat. The other woman did not make any such endorsement. The Returning Officer, therefore, declared the other woman candidate elected to the reserved seat for women on the basis that she was the only candidate in the field for filling the vacancy of the reserved seat for women. After the election was over one of the candidates challenged the final result of the election by way of an election petition. The entire election of that Ward was set aside by the election Tribunal and when the defeated party approached this Court by way of a Special Civil Application, the order of the Tribunal was upheld. It was pointed out that the fact that an endorsement was made by one of the women candidates on her nomination paper that she was a candidate for the general seat did not disqualify her from being chosen for the reserved seat. The principle on which that election was set aside was that there was more than one candidate eligible to fill the reserved seat. All the three candidates should have, therefore, gone to polls and after the voters exercise their free choice of casting votes in favour of any of the three and when the occasion of counting the votes arose and the result of the election was to be declared, the labelling under Rule 34 would come into play.

17. In our view, therefore, Rule 34 is not unreasonable. It is not a rule which does not implement the intention of the legislature as expressed in sub-section (2) of Section 10. On the contrary, it appears a wholesome rule adopted from similar provisions of Representation of the People Act, 1951 which have received judicial recognition from the highest Tribunal of this land.

18. The only other point raised before us was that the election petition was barred by limitation. The results in this election were declared on 31-5-1966 and the petition was presented by Mahadeo on 15-6-1966. Sub-section (1) of Section 15 of the Village Panchayats Act, 1958, provides that any person who is qualified to vote at the election is entitled to challenge the validity of the election by applying to the Civil Judge, Junior Division, and if there be no Civil Judge Junior Division, to the Civil Judge Senior Division having ordinary jurisdiction in the area within which the elections were held "within 15 days after the date of the declaration of the result of the election". What is argued before us is that the election result having been declared on 31-5-1966, that date should be counted for the purpose of limitation and 15 days

should be counted by including 31st May as one day. Another submission is that the wording 'within 15 days' means not on the 15th day but some time before 15 days. We do not find any substance in either of these arguments. On the plain reading of this section, it appears that the election is permissible to be challenged within 15 days "after" the date of declaration of the election result. The date of the declaration of the result is therefore, to be excluded because 15 days contemplated are after that day. 31st May 1966 must, therefore, be excluded from consideration altogether. If that is done, the petition is presented on the 15th day after the result. There is no specific provision in the Village Panchayats Act as to how 15 days should be counted. Reference, therefore, must be made to Section 11 of the Bombay General Clauses Act, 1904. That section provides that where, by any Bombay Act or Maharashtra Act made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or Office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open. It is, therefore, clearly provided that when a certain time is allowed for doing an act, the last day of that time is included for the purpose of performing that act. If on such last day, the office or Court is closed, then the first day after re-opening will be considered the last day for the purposes of performing that act. It is, therefore, obvious to us that filing the petition on the 15th day after the result amounts to filing it within 15 days as required by law. We, therefore, hold that the petition is in time.

19. This being the view of the matter, the petition fails and is dismissed. The petitioner will have to pay the costs of respondent No. 4 and the Advocate General. No orders as to costs relating to other respondents.

Petition dismissed.

AIR 1970 BOMBAY 8 (V 57 C 2)

K. K. DESAI AND NAIN, JJ.

Shankar Moreshwar Kulkarni Chinchwadkar, Appellant v. State of Maharashtra, Respondent.

Second Appeal No. 984 of 1961, D/- 17-10-1968, against judgment of Extra Asstt. J., Kolhapur in C. A. No. 575 of 1959.

EM/EM/C215/69/LGC/D

Limitation Act (1908), Arts. 120, 145 and 62 — Suit for recovery of amount deposited under a contract which became refundable on completion of contract — Art. 120 and not Art. 62 or 145, applicable, to a suit for refund.

Where money is deposited by way of security for the due performance of a contract or otherwise under the terms of a contract and is refundable after the completion of the contract Art. 62 is not applicable to the suit for refund as the money was not received by the defendant for the plaintiff's use. The right to refund did not arise immediately on receipt by the defendant. The suit not being a suit against a depository or pawnee to recover movable property deposited or pawned, Article 145, also would not be applicable. Such suit would be governed by the residuary Art. 120. Case now discussed. (Paras 7, 8, 9)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 1773 (V 52) —

(1965) 2 SCR 577, A. Venkata

Subba Rao v. State of A. P. 8, 11

(1962) AIR 1962 Guj 14 (V 49) —

(1961) 2 Guj LR 660, Harij Gram

Panchayat v. Thakur Lakhiram

Ramji 10

(1960) AIR 1960 Bom 404 (V 47) —

60 Bom LR 1295, Dhanraj Mills

Ltd. v. Laxmi Cotton Traders,

Bombay 11

(1953) AIR 1953 Bom 79 (V 40) —

ILR 1953 Bom 214, Lingangouda

Marigouda v. Lingangouda Fakir-

gouda 11

V. B. Rege, for Appellant; M. A. Rane,

Asstt. Govt. Pleader, for Respondent.

NAIN, J. :— This is a second appeal from the judgment and decree dated 14th March 1961 of the learned Assistant Judge, Kolhapur, allowing the defendants' appeal and dismissing the suit of the plaintiff on the ground of limitation.

2. The plaintiff had filed the suit from which this appeal arises in the court of the learned Civil Judge, Senior Division, Kolhapur, for recovery of a sum of Rs. 1,319-8-6, interest and costs on the following facts: Messrs. Dhavate and Rote had filled in a tender for supplies with the Director of Civil Supplies, Kolhapur State. The tender was accepted by two letters dated 9th November 1944 and 8th January 1945. Under the terms of the contract, 10% of the amount payable to Messrs. Dhavate and Rote was to be deducted and paid to them on completion of the contract. The contract was completed in the year 1946. Kolhapur State thereafter merged in the then State of Bombay and was later succeeded by the State of Maharashtra. By a letter dated 27th May 1949 the Civil Supplies Department, Kolhapur wrote to

Messrs. Dhavate and Rote informing them that a sum of Rs. 2,079-9-1 was due to them and asking them to send a receipt signed jointly by Dhavate and Rote and to receive the amount. This amount was, however, not drawn by Messrs. Dhavate and Rote.

3. Rote filed a suit against Dhavate on the Original Side of the Bombay High Court and obtained a decree for Rs. 1,039-12-6. In execution of the decree, the amount in the hands of the Director of Civil Supplies Kolhapur was attached. As Collector of Kolhapur disputed the liability, a receiver was appointed to file a suit for recovery of the amount. Accordingly in 1958, Suit No. 443 of 1958 was filed by the plaintiff as receiver against the State of Maharashtra. The defendants inter alia contended that the suit was time barred. The learned trial Judge held that the article 145 of the Indian Limitation Act, 1908, which prescribed a period of thirty years applied and the suit was not time barred. The trial Court accordingly decreed the plaintiff's suit for a sum of Rs. 1,039-78 and costs and interest.

4. Against the said decision, the defendants filed an appeal in the District Court at Kolhapur. The learned Assistant Judge who heard the appeal held that Art. 145 of the Limitation Act was not applicable, but in the opinion of the learned Assistant Judge, Article 62 was applicable which prescribed a period of three years. He held that the suit of the plaintiff was time barred. He allowed the appeal, set aside the judgment and decree of the trial Court and dismissed the suit. Against the said decision, the present appeal has been filed.

5. The only point argued in this appeal before us is as to which of the Articles 62, 120 and 145 of the Indian Limitation Act, 1908 was applicable to the suit. The contention of the plaintiff is that Article 145 or in the alternative Article 120 is applicable while the defendants contend that Article 62 is applicable.

6. Article 62 of the Indian Limitation Act 1908, prescribes a period of three years for a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. The time from which the period begins to run is when the money is received. Article 145 prescribes a period of thirty years for a suit against a depositary or pawnee to recover movable property deposited or pawned. The time from which the period begins to run is the date of the deposit or pawn. Article 120 is the residuary article and prescribes a period of six years for suits for which no period of limitation is provided elsewhere in the first schedule to the

Indian Limitation Act, 1908. The time from which the period begins to run is when the right to sue accrues.

7. In our opinion, Article 145 has no application to the facts of this case. The suit is for recovery of an amount deposited under a contract which became payable when the contract was completed. It is not a suit against a depositary or pawnee to recover movable property deposited or pawned. The amount was deposited with the State of Kolhapur as and by way of security for the performance of a contract to supply materials or in any case under the terms of the contract and became due on completion of the contract.

8. In our opinion, Article 62 will also have no application. Article 62 will have no application if the money when received by the defendant is not either in fact or in point of law received for plaintiff's use and the circumstance that by reason of subsequent events the money has become money received to plaintiff's use will not render Article 62 applicable. The plaintiff must have a right of action at the date of the receipt of money. If when the defendant receives the money, plaintiff is not entitled to it, Article 62 will have no application. This point is directly covered by a judgment of the Supreme Court in the case of A. Venkata Subba Rao v. State of Andhra Pradesh, (1965) 2 SCR 577=(AIR 1965 SC 1773). The observations in the judgment of Ayyangar J. at p. 620 (of SCR)=(at p. 1794 of AIR) read as under :—

"Where the defendant occupies a fiduciary relationship towards the plaintiff, it is clear that Article 62 is inapplicable. Next even if the claim could have been comprehended under the omnibus caption of the English 'action for money had and received', still if there are other more specific Articles in the Limitation Act, e. g. Article 96 (mistake), Article 97 (consideration which fails) Article 62 would be inapplicable. Lastly, if the right to refund does not arise immediately on receipt by the defendant but arises by reason of facts transpiring subsequently, Article 62 cannot apply, for it proceeds on the basis that the plaintiff has a cause of action for instituting the suit at the very moment of the receipt."

In the present case, according to the terms of the contract, the amount was to become due on completion of the contract. It was to become due by reason of subsequent events. The right to refund did not arise immediately on receipt by the defendant. Accordingly, Article 62 will have no application to the facts of the present case. We have also stated hereinabove that Article 145 would not be applicable. The only article that would appear to us to be applicable is

Article 120, which is the residuary article.

9. Where money is deposited by way of security for the due performance of a contract or otherwise under the terms of a contract and is refundable after the completion of the contract in our opinion, Article 62 is not applicable to the suit for refund as the money was not received by the defendant for the plaintiff's use. Such suit would be governed by the residuary Article 120 of the Indian Limitation Act, 1908.

10. This point arose for decision in the case of Harij Gram Panchayat v. Thakkar Lakhiram Ramji, AIR 1962 Guj 14, and Mr Justice Bhagwati held that the cause of action envisaged by Article 62 was not the same as that for money had and received under English law and that Article 60 or Article 97 was not applicable and in the absence of any specific article, Article 120 would apply. In that case, money was received by way of security for due performance of a contract and a suit was filed for recovery of the same on completion of the contract.

11. Our attention was invited to the judgment of a Division Bench of this Court in the case of Dhanraj Mills Ltd. v. Laxmi Cotton Traders, Bombay, 60 Bom LR 1295=(AIR 1960 Bom 404). In that case it was merely held that Article 145 was not applicable to the facts which were similar to the facts of this case, but it was not decided as to which of the articles in the first schedule of the Indian Limitation Act was applicable. In an earlier Bombay case, namely, Lingangouda v. Lingangouda, ILR (1953) Bom 214=(AIR 1953 Bom 79)—Chagla C. J. had taken the view that Article 120 was applicable in a similar matter. The reason given in the judgment was that Article 62 should not apply to a case where the terms of the article were not literally complied with. It was observed that such a construction would result in plaintiffs losing a large number of cases on the ground of limitation whereas if Article 120 was held to be applicable, the plaintiffs would be safe. The reasoning of this decision was not approved of by the Supreme Court in (1965) 2 SCR 577=(AIR 1965 SC 1773) referred to hereinabove. We are however concluded by the judgment of the Supreme Court on the point that Article 62 was not applicable. The only article with which we are left is Article 120. In our opinion, Article 120 is applicable being the residuary article.

12. In this case the contractors were informed by the letter Exh 27 written on behalf of the defendants on 27th May 1949 that the sum of Rs. 2,079-9-1 was due to them and that the amount could

be withdrawn against joint receipt of Dhavate and Rote. In our opinion, this will be the date when the right to sue accrued. The contract had already been completed in 1946. This suit was filed in 1958 and but for the acknowledgments of the defendants, it would have been time-barred even under Article 120. But in letters Ex. 28 dated 17th December 1951, Exh. 29 dated 11th June 1955 and Exh. 30 dated 3rd February 1956, the claim in the suit has been acknowledged and Dhavate and Rote have been informed that the amount could be received against joint receipt of Dhavate and Rote. In the last two letters, the amount has been described as 'Anamat' amount held on behalf of Dhavate and Rote. By virtue of these acknowledgments, the limitation is saved and, in our opinion, the suit of the plaintiff is within time.

13. Accordingly, we allow this appeal, set aside the judgment and decree of the District Court, Kolhapur, and restore the judgment and decree of the trial Court. The defendants will pay the costs throughout.

Appeal allowed.

AIR 1970 BOMBAY 10 (V 57 C 3)

TARKUNDE AND DESHPANDE, JJ.

Kumari Rukmani, Applicant v. Appellate Authority under Maharashtra Medical Practitioners Act XXVIII of 1961, Bombay and another, Respondents.

Spl. Civil Appln. No. 82 of 1966 with Spl. Civil Appln. No. 2066 of 1966, D/-2-8-1968.

(A) Maharashtra Medical Practitioners Act (28 of 1961), S. 18(2)(b)(ii) — Bombay area of the State of Bombay — Baroda not being part of Maharashtra, is not part of Bombay area — (Bombay General Clauses Act (1 of 1904), S. 3(6)).

The expression "Bombay area of the State" in S. 18(2)(b)(ii) clearly means the Bombay area of the State of Maharashtra and that expression, according to section 3(6) of the Bombay General Clauses Act, means 'the area of the State of Maharashtra excluding the Vidarbha region and the Hyderabad area of that state'. Since Baroda is not a part of the State of Maharashtra, it is not a part of the Bombay area of the State of Maharashtra.

(Para 4)

(B) Maharashtra Medical Practitioners Act (28 of 1961), Ss. 18(2)(b)(ii), 33 — Provision violates Art. 14 of the Constitution—There is no rational nexus between provision that medical practitioners must have been practising on the 4th Nov. 1951 in Bombay area of State and the object

GM/GM/C825/69/RGD/B

of legislation — Since provision cannot be severed from S. 33, both S. 18(2)(b)(ii) and S. 33 must be struck down — (Constitution of India, Art. 14).

The main object of the Act was to unify the law relating to Ayurvedic and Unani Practitioners in the different areas of the State of Maharashtra and to prohibit medical practice by those who were neither registered nor enlisted under this or any existing Act. (Para 7)

The intention of the Legislature in dividing medical practitioners into two categories—those who were entitled to registration and those who were entitled to have their names entered in the list can be easily deduced from the legislative history of the Act. Registration is confirmed to those whom the legislature regards as being qualified for medical practice. They are so qualified either because they have passed one of the qualifying examinations or because they had practised for a minimum number of years prior to 23rd November 1960, on which date the Bill was published. The list, on the other hand, is intended to comprise those practitioners who do not fully qualify for registration but whom the Legislature did not intend to be deprived of practice. (Para 12)

Clause (b) of Section 18(2) of the Maharashtra Medical Practitioners' Act, 1961, differentiates between medical practitioners in the Vidarbha region and the Hyderabad areas of the State on the one hand and medical practitioners in the Bombay area of the State on the other. The medical practitioners in the Bombay area of the State have to be in practice for a much longer period for being entitled to have their names included in the list. This difference between the Vidarbha region and the Hyderabad area on the one hand and the Bombay area on the other is based on historical factors leading to a geographical classification and is free from the taint of discrimination. (Para 14)

However, as regards medical practitioners practising in the Bombay area, it is difficult to appreciate why the right of enlistment should have been restricted to those who were regularly practising on 4th November 1951, "In the Bombay area of the State". Since the object of the Legislature was to allow medical practice by those less qualified persons who were too old to choose alternative means of livelihood, it was clearly open to the Legislature to provide that a person must have been practising for a certain number of years, or from before a particular date, in order that his name may be included in the list. It was thus open to the Legislature to provide that, out of unregistered and unlisted medical practitioners who were practising in the Bombay area of the State, only those

would be entitled to have their names included in the list who were practising regularly from before the 4th of November 1951. It is, however not possible to find any rational basis for the provision that medical practitioners in the Bombay area of the State, in order to be entitled to enlistment, must not only have been practising regularly from 4th November 1951, but must have been practising on that day "in the Bombay area of the State." The provision that medical practitioners must have been practising on the 4th November 1951 in the Bombay area of the State has no rational nexus with the object of the Legislature which was to ensure that medical practitioners, who were not fully qualified but who were too old to choose alternative means of livelihood should not be deprived of their practice. Accordingly the provisions contained in Section 18(2)(b)(ii) of the Act violates Article 14 of the Constitution. There would have been no fault with the provision if it had laid down that practitioners in the Bombay area of the State are entitled to have their names included in the list if they have been regularly practising from before 4th November 1951 in any part of the country. (Paras 15, 17)

S. 18(2)(b)(ii) cannot be interpreted to cover only those practitioners who were regularly practising in the Bombay area of the State on 4th November 1951 but not thereafter. Section 18(2) must be read with Section 18(1). It is thus clear from Section 18(1) that the list is confined to those persons who were practising any system of medicine when the Act came into force (i. e. on 23rd October 1961). It follows that for being qualified for enlistment under Section 18(2)(b)(ii), a person must have been practising medicine when the Act came into force and must also have been regularly practising medicine in the Bombay area of the State on the 4th November 1951. The Legislature had obviously no reason to authorise the preparation and maintenance of a list of medical practitioners who had ceased to practice after 4th November 1951, i. e. for a period of nearly ten years before the Act was passed. It was not the intention of the Legislature to refuse the facility of enlistment to those persons who had been practising in the Bombay area of the State contrary to the provisions of Section 32 of the Bombay Medical Practitioners' Act, 1938. (Para 18)

If section 18(2)(b)(ii) is struck down and Section 33 retained intact, the result will be that even those practitioners who were regularly practising in the Bombay area of the State on 4th November 1951, and whose names may have been already included in the list, would be prohibited from practising by virtue of section 33.

It was clearly not the intention of the Legislature to prohibit the medical practice of these persons. Thus the deletion of the provision contained in Section 18 (2)(b) would result in expanding the scope of the penal provision of Section 33 beyond what the Legislature intended. It follows that Section 18(2)(b)(ii) cannot be severed from Section 33. Section 18(2)(b)(ii) and Section 33 form a part of a single scheme and that the former provision cannot be severed from the latter. Hence, having come to the conclusion that Section 18(2)(b)(ii) is violative of Article 14 of the Constitution, there is no alternative but to declare that that provision as well as Section 33 of the Act are ultra vires the Constitution. AIR 1957 SC 628, Rel. on.

(Paras 19, 20)

Cases Referred: Chronological Paras
(1957) AIR 1957 SC 628 (V 44)=

59 Bom LR 973, Chamarbaugwala
v. Union of India 19

In Spl. Civil Appln. No. 82 of 1966:

G. L. Bhatia, for Petitioner: S. C. Pratap Asst. Govt. Pleader, for Respondents (Nos. 1 to 3).

In Special Civil Appln. No. 2068 of 1966:

G. L. Bhatia, for Petitioner, S. C. Pratap Asst. Govt. Pleader, for Respondents (Nos. 1 and 2); G. N. Joshi with R. J. Joshi instructed by Little and Co., Attorneys for Respondent No. 3.

TARKUNDE, J. :- These two petitions under Articles 228 and 227 of the Constitution seek to challenge the constitutional validity of Section 18(2)(b)(ii) of the Maharashtra Medical Practitioners' Act, 1961.

2. The petitioner in Special Civil Application No. 2066 of 1966 comes from Sind which now forms part of West Pakistan. He claims that his grand-father and his father were well known physicians practising Ayurvedic and Unani Systems of Medicine. After the partition of the country, the family migrated to Harni camp at Baroda. The petitioner says that he started an independent dispensary at Baroda for practice in Unani and Ayurvedic Systems of Medicine and that he was practising in Baroda from 1950 to 1954. In 1954 he shifted to Ulhasnagar near Bombay, where he has been practising since then. After the passing of the Maharashtra Medical Practitioners' Act, 1961, he applied to the Board of Ayurvedic and Unani Systems of Medicine set up by the Act for inclusion of his name in the list maintained under Section 18 thereof. Section 18(2)(b)(ii) of the Act requires that the applicant should satisfy the Committee of the Board "that on the 4th

November 1951 he was regularly practising any such system of medicine (i. e. any system other than the Homoeopathic or the Biochemic System of Medicine) in the Bombay area of the State". In Section 3(6) of the Bombay General Clauses Act, the expression "Bombay area of the State of Maharashtra" has been defined to mean "the area of the State of Maharashtra excluding the Vidarbha region and the Hyderabad area of that State". According to the petitioner, he was practising on 4th November 1951 at Baroda, which was then included in the Bombay State but is not now a part of the State of Maharashtra. His application for having his name included in the list was rejected by the Committee of the Board on the ground that on 4th November 1951 he was not practising any system of medicine in the Bombay area of the State. An appeal filed by the petitioner to the Appellate Authority under the Act was also rejected for the same reason. The petitioner has approached this Court under Articles 226 and 227 of the Constitution for having these orders of the Committee and the Appellate Authority quashed and set aside.

3. The petitioner in Special Civil Application No. 82 of 1966 also comes from Sind which is now a part of West Pakistan. The petitioner says that her father was a medical graduate of the Bombay University, that he was practising allopathic system of medicine in Sind, and that she (the petitioner) started helping him in practice from about 1937 when she was about 16 years of age. After the partition of the country, the family migrated to Akbar Camps at Thana in 1948. In October 1948 the petitioner's father was appointed a Medical Officer at Bhavnagar in Saurashtra and the petitioner also shifted there. The petitioner claimed that she had an independent practice in allopathic medicine at Bhavnagar from 1948 to 1958. In 1958 the petitioner shifted to Poona, where she started a maternity home which is still being run by her. On 12th August 1963 she applied to the Board of Ayurvedic and Unani Systems of Medicine to have her name included in the list maintained under Section 18 of the Maharashtra Medical Practitioners' Act, 1961. Her application was rejected by the Committee of the Board, and in appeal by the Appellate Authority, on the ground that on 4th November 1951 she was practising, according to her case, at Bhavnagar which is not a part of the Bombay area of the State of Maharashtra. In her petition she prays that the said orders of the Committee and the Appellate Authority be quashed and set aside or, in the alternative, that Section 18(2)(b) of the Maharashtra Medical Practitioners' Act,

1961, be struck down as violative of the fundamental rights of the petitioner.

4. Before proceeding further it would be convenient to dispose of one submission made by Mr. Bhatia for the petitioner in Special Civil Application No. 2066 of 1966. As noticed above, this petitioner claims that from 1950 to 1954 he was practising Ayurvedic and Unani Systems of Medicine at Baroda, which was then a part of the Bombay State, and thereafter at Ulhasnagar which was in the then Bombay State and is now in the Maharashtra State. Mr. Bhatia argued that since the petitioner was practising at Baroda in the Bombay State on 4th November 1951, he should be held to have satisfied the provision of Section 18(2)(b)(ii) which requires that the applicant should have been regularly practising on that day "in the Bombay area of the State". We do not find any substance in this argument. "Bombay area of the State" in the above provision clearly means the Bombay area of the State of Maharashtra and that expression, according to Section 3(6) of the Bombay General Clauses Act, means "the area of the State of Maharashtra excluding the Vidarbha region and the Hyderabad area of that State." Since Baroda is not a part of the State of Maharashtra, it is not a part of the Bombay area of the State of Maharashtra.

5. Section 18(2) (b) (ii) of the Act has been attacked on behalf of the petitioners on the ground that it violates Article 14 of the Constitution. It will be noticed that at the time of their applications under Section 18 of the Act, both the petitioners claimed to have been regularly practising in the Bombay area of the State of Maharashtra, one of them at Ulhasnagar and the other at Poona. Both claimed to have been practising their respective systems of medicines from before the 4th November 1951. The fact that they were practising outside the Bombay area of the State on 4th November 1951 cannot, it is argued, provide any rational basis for denying to them the facility of enlistment which is available to those who were practising on 4th November 1951 in the Bombay area of the State. It is urged that the basis of the classification of medical practitioners between those who were practising in the Bombay area of the State on 4th November 1951 and those who were practising outside that area on that day can have no rational nexus with the object of the Legislature in providing for the maintenance of a list under Section 18 of the Act.

6. In order to appreciate the object of the Legislature in providing for the maintenance of a list of medical practitioners, it is necessary to examine in some detail

the history of the legislation and some of the provisions of the Maharashtra Medical Practitioners' Act, 1961. The history of the legislation is as follows:—

(a) In the Bombay Province the Bombay Medical Act, 1912 provided for the registration of allopathic medical practitioners. Only those who held any of the scheduled medical qualifications were entitled to have their names registered. Unregistered persons were debarred from holding certain appointments (Section 11). The Act, however, did not prohibit medical practice by unregistered person. The Act did not deal with persons practising other than the allopathic system of medicine.

(b) The Bombay Medical Practitioners' Act, 1938, was passed with the dual object of (i) regulating the qualifications and providing for the registration of practitioners of Indian (Ayurvedic and Unani) Systems of Medicine and (ii) of preventing practice of any system of medicine by persons who were not registered under any of the Medical Acts. Section 16(1) of the Act provided that every person who passed a qualifying examination shall be entitled to have his name entered in the register of medical practitioners maintained under the Act. Qualifying examinations were examinations in Indian systems of medicine held by institutions which were to be approved by the Government on the recommendation of the Board of Indian Systems of Medicine set up by the Act. Section 16 also provided for the registration of some persons who had not passed a qualifying examination. It was laid down that those who had been in regular practice for a period of not less than ten years preceding the date on which they applied for registration were entitled to be registered. The last date for making such applications was 4th November 1941. It was further provided that every person who had not been in practice for period of ten years but had worked as an apprentice under a practitioner or had received training in an institution or had passed an examination should if such apprenticeship or training or examination was, in the opinion of the Board, sufficient to qualify him to practise as a practitioner, be entitled to have his name entered in the register. Thus, apart from this last category, registration was confined to those who passed a qualifying examination and those who had practised for more than ten years before 4th November 1941. Apart from the registration of medical practitioners, however, the Act provided by Section 18 for the preparation and maintenance of "a list of persons in practice on the 10th March 1938". Every person who was not qualified for registration under this Act or under the Bombay Medical Act, 1912,

but who was in regular practice of any system of medicine in the province on 10th March 1938 was entitled to have his name entered in the list, provided he applied for the inclusion of his name on or before 4th November 1941 S. 21 of the Act provided that after the expiry of two years from the date on which the Act came into force (i.e. after 4th November 1941), no person shall be entitled to have his name registered unless he has passed a qualifying examination. Section 32 prohibited medical practice by unregistered and unlisted persons. It laid down that no person other than a practitioner registered under this Act or a practitioner registered under the Bombay Medical Act, 1912 or a person whose name is entered in the list mentioned in Section 18 of the Act, shall practise medicine in any manner. Section 33 of the Act laid down that no person other than a practitioner registered under the Act or under the Bombay Medical Act, 1912 shall be entitled to sign or authenticate a birth or death certificate, or to sign or authenticate a medical or fitness certificate or be qualified to give evidence as an expert at any inquest or in any Court of Law. Section 37 made an exception in the case of a medical practitioner in any rural area who had commenced his practice prior to the date on which any practitioner registered either under the Bombay Medical Act of 1912 or of this Act had commenced his practice. Such medical practitioner could continue practice in the same rural area without registration or enlistment.

(c) The Bombay Medical Practitioners' Act, 1938, was amended by the Bombay Medical Practitioners' (Amendment) Act, 1949. The main purpose of the amendments was to regulate the practice of those practitioners of Indian systems of medicine who came to the Bombay Province either as refugees on the partition of the country or because of the inclusion in the Province of some areas of princely States. The amendments provided for registration or enlistment of (1) refugees (2) persons from princely States or areas included in the Province of Bombay, and (3) other persons whether residing in the Province or elsewhere who were in regular practice on 4th November 1941 but whose names could not be entered in the register or the list for sufficient and adequate reasons. Section 31B was added to the parent Act to provide for a fresh date before which applications for registration or enlistment of persons of the above categories could be entertained. Section 31C was added to lay down the qualifications for fresh registration or inclusion in the list. Section 31C provided that refugees and persons from princely States were entitled to registration if they had passed any of the examinations which

were specified in a Schedule which was added to the parent Act by the Amending Act. In the case of refugees and persons from princely States who were not entitled to registration, it was provided that their names shall be entered in the list if they had been in regular practice for not less than five years before the date of their applications. It was further laid down that an applicant who had been in regular practice for a period of not less than two years may have his name provisionally entered in the list, but that the name shall be removed from list if he did not pass a qualifying examination within five years from the date of his application. In the case of persons other than refugees and those coming from princely States, S. 31C laid down that where such persons were in regular practice on 4th November 1941 their names will be directed to be entered in the register or the list provided such persons proved that for sufficient and adequate reasons their names could not be entered in the register or the list.

(d) With effect from 1st November 1956 the Bombay State was re-organised with the addition of Vidarbha and Marathwada regions. In the Vidarbha area the Central Provinces and Berar Ayurvedic and Unani Practitioners' Act, 1947, was in force. The Act provided for the registration of Ayurvedic and Unani practitioners who had certain qualifications. The Act, however, did not contain any provision prohibiting medical practice by unregistered persons. In the Marathwada area the Medical Act of 1912 was in force. That Act provided for the registration of Ayurvedic, Unani and Homoeopathic practitioners. That Act also did not prohibit medical practice by unregistered persons. No list separate from the Register, as in the Bombay area, was maintained under the Acts in force in the Vidarbha and Marathwada areas.

7. It was on this background that Maharashtra Medical Practitioners' Act, 1961, was passed after the formation of the Maharashtra State. It appears that the main object of the Act was to unify the law relating to Ayurvedic and Unani practitioners in the different areas of the State of Maharashtra and to prohibit medical practice by those who were neither registered nor enlisted under this or any existing Act. The Bill which eventually resulted in the Act was published on 23rd November 1960. Some of the provisions of the Bill were materially altered by a Joint Committee of both Houses of the Maharashtra Legislature to which the Bill was referred. It is necessary to notice some of the alterations in order to understand the object of the provision impugned in these petitions.

It was proposed in the Bill that registration of Ayurvedic and Unani practitioners in the State should be open to (1) all those who possessed the scheduled qualifications, (2) all those who were included in the existing registrations under the Acts prevailing in the Bombay, Vidarbha and Marathwada areas, and (3) all those who were practising Ayurvedic or Unani Systems of Medicine for over ten years on 23rd November 1960, i. e. the date of the publication of the Bill. The list under the proposed Act was to consist of (1) all those whose names were included in the list kept under the Bombay Medical Practitioners' Act, 1938, and (2) all those who were regularly practising on 23rd November 1960 (i.e. on the date of publication of the Bill) in any area of the State. These proposals contained in the Bill were modified by the Joint Committee. The following observations from the report of the Joint Committee explain the reason for the modifications with which we are concerned :

"As the practitioners in the Bombay area of the State already had chances to get registered or enlisted and practice without such registration or enlistment was ordinarily prohibited, it is considered undesirable to throw open the register and list again to all practitioners in that area, except that registration is kept open in these areas only to persons who were practising on the 4th day of November 1941 (i. e. the date from which practice without registration or enlistment was prohibited except in rural areas, or under other exceptions) and who for some reason or the other could not be registered. Enlistment is proposed to be allowed to persons who were practising ten years thereafter, i. e. on the 4th November 1951."

8. Section 17 of the Maharashtra Medical Practitioners' Act, 1961, deals with the practitioners' right of registration. Sub-section (3) of Section 17 provides that every person who possesses any of the qualifications specified in the Schedule to the Act shall be entitled to have his name entered in the register. Sub-section (4) lays down that the register will also include the names of all persons who were registered either under the Bombay Medical Practitioners' Act, 1938, or the Central Provinces and Berar Ayurvedic and Unani Practitioners' Act, 1947, or the Medical Act (Hyderabad Act I of 1312 Fasli) as in force in the Hyderabad area of the State. Sub-section (5) initially provided that registration shall also be open to two other categories (1) those who were regularly practising the Ayurvedic or the Unani Systems of Medicine in the Vidarbha region or the Marathwada region for Unani Systems of Medicine in the Vidarbha region or the Marath-

wada region for a period of not less than ten years before 23rd November 1960 (the day on which the Bill was published), and (2) those who were on 4th November 1941 regularly practising the Ayurvedic or the Unani Systems of Medicine in the Bombay area of the State but whose names were not entered in the register maintained under the Bombay Medical Practitioners Act, 1938. By subsequent amendment a third category was added to sub-section (5). It consisted of those practitioners from among refugees and inhabitants of princely States whose names were put in the list by virtue of Section 31C inserted in the Bombay Medical Practitioners' Act, 1938, by the amending Act of 1949. Persons qualified for registration under clause (6) of Section 17 had to apply for the purpose before 31st March 1965.

9. Preparation of a list of practitioners is provided by Section 18 of the Maharashtra Medical Practitioners Act, 1961. Sub-section (2) of Section 18 runs as follows:

"The list shall contain —

(a) the name of every person who on the day immediately preceding the appointed day, continued to be included in the list kept under Section 18 of the Bombay Medical Practitioners' Act, 1938, as in force in the Bombay area of the State and whose name is not entered in the register under sub-section (5) of Section 17:

(b) the name of every person whose case is not covered by clause (a) but who makes an application to the Registrar in the form prescribed by rules accompanied by a fee of ten rupees and such documents as may be prescribed by rules, on or before 31st March 1965 and who proves to the satisfaction of the Committee appointed under sub-section (6) of Section 17 —

(i) that on the 23rd day of November 1960 he was regularly practising any system of medicine (other than the Homoeopathic or the Biochemic system of medicine) in the Vidarbha region or the Hyderabad area of the State; or

(ii) that on the 4th November 1951 he was regularly practising any such system of medicine in the Bombay area of the State."

10. Section 33 prohibits medical practice by any person whose name is not registered or listed under this Act or under other Acts dealing with Homoeopathic, Biochemic and Allopathic practice. Section 33A lays down that persons who are not practitioners registered under this Act or under the other Acts mentioned in Section 33 shall not be eligible to hold certain appointments. Section 34 provides that a birth or a death certificate or a fitness certificate shall not be valid unless it is signed or authenticated

by a registered practitioner and that no unregistered practitioner shall be qualified to give expert evidence at any inquest or in any Court of Law.

11. By Section 40, the Bombay Medical Practitioners' Act, 1933, the Central Provinces and Berar Ayurvedic and Unani Practitioners Act, 1947, and the Hyderabad Act No. I of 1312 Fasli were repealed as from the 'appointed day', which by definition was the date on which the whole Act except Chapter VI thereof came into force. The whole Act, except Chapter VI, was brought into force from 23rd October 1961. Chapter VI came into force on 1st November 1966. S. 33, which prohibits medical practice by unregistered and unlisted persons, falls in Chapter VI. It appears, therefore, that medical practice by unregistered and unlisted persons was not unlawful even in the Bombay area of the State between 23rd October 1961 and 1st November 1966.

12. The intention of the Legislature in dividing medical practitioners into two categories—those who were entitled to registration and those who were entitled to have their names entered in the list can be easily deduced from this legislative history. Registration is confined to those whom the Legislature regards as being qualified for medical practice. They are so qualified either because they have passed one of the qualifying examinations or because they had practised for a minimum number of years prior to 23rd November 1960, on which date the Bill was published. The list, on the other hand, is intended to comprise those practitioners who do not fully qualify for registration but whom the Legislature did not intend to be deprived of practice. In an affidavit in reply to one of these petitions filed by the Under Secretary to the Government of Maharashtra in the Urban Development, Public Health and Housing Department, it has been claimed that "the intention behind preparing the said list was that these practitioners should not be deprived of the only means of their livelihood, because it was found that such practitioners were large in number and were too old to choose alternative means of livelihood." It appears to us that that was clearly the intention of the Legislature in providing for a list under Section 15 of the Bombay Medical Practitioners' Act, 1933, and that the same intention animated the Legislature in providing for a list under Section 18 of the Maharashtra Medical Practitioners' Act, 1961.

13. On behalf of the State of Maharashtra Mr. G. N. Joshi argued that since the enlistment of medical practitioners under Section 18 of the Maharashtra Medical Practitioners' Act, 1961, was itself a concession based on humani-

tarian considerations, no objection under Article 14 of the Constitution can be taken if the concession is granted to some persons and not to others. It appears to us that even in cases where the Legislature decides to make a concession on humanitarian grounds, the concession must be made impartially and without discrimination. A concession cannot be given to some persons and denied to others who are similarly situated.

14. Clause (b) of Section 18(2) of the Maharashtra Medical Practitioners' Act, 1961, differentiates between medical practitioners in the Vidarbha region and the Hyderabad area of the State on the one hand and medical practitioners in the Bombay area of the State on the other. In the Vidarbha region and the Hyderabad area medical practitioners are entitled to have their names included in the list if they were regularly practising any system of medicine, other than the Homoeopathic or the Biochemic system, on 23rd November 1960. In the Bombay area of the State, however, medical practitioners are entitled to have their names included in the list only if they were regularly practising on the 4th November 1951. This means that medical practitioners in the Bombay area of the State have to be in practice for a much longer period for being entitled to have their names included in the list. We are of the view that this difference between the Vidarbha region and the Hyderabad area on the one hand and the Bombay area on the other is based on historical factors leading to a geographical classification and is free from the taint of discrimination.

15. Confining our attention, however, to medical practitioners practising in the Bombay area of the State, we find it difficult to appreciate why the right of enlistment should have been restricted to those who were regularly practising on 4th November 1951. "In the Bombay area of the State". Since the object of the Legislature was to allow medical practice by those less qualified persons who were too old to choose alternative means of livelihood, it was clearly open to the Legislature to provide that a person must have been practising for a certain number of years, or from before a particular date, in order that his name may be included in the list. It was thus open to the Legislature to provide that, out of unregistered and unlisted medical practitioners who were practising in the Bombay area of the State, only those would be entitled to have their names included in the list who were practising regularly from before the 4th of November 1951. It is, however, not possible to find any rational basis for the provision that medical practitioners in the Bombay area of the State, in order to be entitled

to enlistment, must not only have been practising regularly from 4th November 1951, but must have been practising on that day "in the Bombay area of the State". The provision that medical practitioners must have been practising on 4th November 1951 in the Bombay area of the State has no rational nexus with the object of the Legislature which was to ensure that medical practitioners, who were not fully qualified but who were too old to choose alternative means of livelihood should not be deprived of their practice.

16. In order to illustrate the discriminatory nature of the provision contained in Section 18(2)(ii), we shall take imaginary instances of five persons who were all practising in the Bombay area of the State at the time of their applications under Section 18 (i. e. on or before 31st March 1965) and who were not already enlisted and were not entitled to registration under the Act. Let us suppose that one of them, A, was practising continuously in Bombay City from 1950 to 1963, when he applied under Section 18 of the Act. Since on 4th November 1951 he was practising regularly "in the Bombay area of the State", he is clearly entitled to have his name included in the list. Let us take another person B who practised in Poona from 1950 to 1954 and in Bombay City from 1954 to 1963 when he applied under Section 18. He is also entitled to enlistment because Poona falls in the Bombay area of the State. We may then take the instance of C who practised in Nagpur from 1950 to 1954 and in Bombay City from 1954 to 1963. He would not be entitled to have his name included in the list, because on 4th November 1951 he was regularly practising in Nagpur which, though situated in Maharashtra, is not included in the Bombay area of the State. We will next take the instance of D who practised in Baroda, then a part of the Bombay State, from 1950 to 1954 and thereafter in Bombay City from 1954 to 1963. He is also not included to enlistment, since Baroda is outside the State of Maharashtra. Similar would be the position of another person E who practised in Bhopal from 1952 to 1954 and then in Bombay City from 1954 to 1963. No rational explanation can be given of why A and B should receive the said concession from the Legislature and should be able to continue their practice and why C, D and E should not receive the concession and should be deprived of their practice.

17. We are accordingly of the view that the provision contained in Section 18 (2)(b)(ii) of the Act violates Article 14 of the Constitution. We would not have found fault with the provision if it

had laid down that practitioners in the Bombay area of the State are entitled to have their names included in the list if they have been regularly practising from before 4th November 1951 in any part of the country.

18. At one stage of his argument Mr. G. N. Joshi suggested that Section 18(2)(b)(ii), properly interpreted, covered only those practitioners who were regularly practising in the Bombay area of the State on 4th November 1951 but not thereafter. Mr. Joshi urged that Section 18(2)(b)(ii) should not be held to cover persons practising in the Bombay area after 4th November 1951, because such practice had been prohibited by Section 32 of the Bombay Medical Practitioners' Act, 1938. We are satisfied that this is not the correct interpretation of that provision. Section 18(2) must be read with Section 18(1), and Section 18(1) provides that as soon as may be after the appointed day, the Registrar shall prepare and maintain in accordance with the provisions of the Act a list of persons who are not entitled to registration, but "who have been practising any system of medicine (other than the Homoeopathic or the Biochemic system of medicine)". It is thus clear from Section 18(1) that the list is confined to those persons who were practising any system of medicine when the Act came into force (i. e. on 23rd October 1961). It follows that for being qualified for enlistment under Section 18(2)(b)(ii), a person must have been practising medicine when the Act came into force and must also have been regularly practising medicine in the Bombay area of the State on the 4th November 1951. The Legislature had obviously no reason to authorise the preparation and maintenance of a list of medical practitioners who had ceased to practise after 4th November 1951, i. e. for a period of nearly ten years before the Act was passed. We further find that it was not the intention of the Legislature to refuse the facility of enlistment to those persons who had been practising in the Bombay area of the State contrary to the provisions of Section 32 of the Bombay Medical Practitioners' Act, 1938. This follows from the fact that those unlisted and unregistered persons who were regularly practising medicine on 4th November 1951 in the Bombay area of the State were doing so contrary to law. Mr. Joshi suggested that Section 18(2)(b)(ii) of the present Act was perhaps meant to authorise the enlistment of those practitioners who were permitted to practise in rural areas without registration or enlistment by Section 37 of the Bombay Medical Practitioners' Act, 1938. We are unable to accept this suggestion, because we find that the liberty which was given to the

very limited class of unregistered and unlisted practitioners to practise in rural areas by Section 37 of the Bombay Medical Practitioners' Act, 1938, has been re-granted by Section 37 of the Maharashtra Medical Practitioners' Act, 1961. Section 18(2)(b)(ii) of the present Act is by its terms not confined to persons practising medicine in rural areas; it extends to all those who were regularly practising medicine in the Bombay area of the State on 4th November 1951 and were in practice when the Act came into force.

19. We have held above that Section 18(2)(b)(ii) violates Article 14 of the Constitution. We have carefully considered whether it would be possible for us to strike down section 18(2)(b)(ii) of the Act without touching any of the other provision of the Act. The purpose of the list prepared under Section 18 is that persons whose names are included therein should be entitled to practise even though their names are not entered in the register maintained under this Act or in any of the registers specified in Section 33 of the Act. Section 33 prohibits medical practice by persons who are neither registered nor enlisted. If we strike down Section 18(2)(b)(ii) and retain Section 33 intact, the result will be that even those practitioners who were regularly practising in the Bombay area of the State on 4th November 1951, and whose names may have been already included in the list, would be prohibited from practice by virtue of Section 33. It was clearly not the intention of the Legislature to prohibit the medical practice of these persons. Thus the deletion of the provision contained in Section 18(2)(b)(ii) would result in expanding the scope of the penal provision of Section 33 beyond what the Legislature intended. It follows that Section 18(2)(b)(ii) cannot be severed from Section 33. In *Chamara-baugwala v. Union of India*, 59 Bom LR 973 = (AIR 1957 SC 628), the Supreme Court formulated seven rules for determining the severability of legislative provisions. Out of these, rule 3 is in these terms:

"Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole."

It appears to us that Section 18(2)(b)(ii) and Section 33 form a part of a single scheme and that the former provision cannot be severed from the latter.

20. Moreover, the grievance of the petitioners is that their names are not included in the list, although the names of similarly situated persons are so included, with the result that the petitioners

would now be deprived of their medical practice. We will not be granting any relief to them if we were merely to strike down Section 18(2)(b)(ii). The consequence of striking down Section 18(2)(b)(ii) and retaining Section 33 will be that persons who are similarly situated when compared to the petitioners, and who are at present entitled to practise, will also be deprived of their practice. Hence, having come to the conclusion that Section 18(2)(b)(ii) is violative of Article 14 of the Constitution, we have no alternative but to declare that that provision as well as Section 33 of the Act are ultra vires the Constitution.

21. In the result we declare that Section 18(2)(b)(ii) and Section 33 of the Maharashtra Medical Practitioners' Act, 1961, are ultra vires the Constitution. The result will be that Section 33 will not be enforced against the petitioners. In each petition, the costs of the petitioner will be paid by the third respondent the State of Maharashtra.

Order accordingly.

AIR 1970 BOMBAY 18 (V 57 C 4)

PATEL AND CHITALE, JJ.

Chatushshakhiya Brahmavinda Gayaran Trust and others, Appellants v. Union of India, Respondent.

First Appeals Nos. 15 of 1966 (with 114, 301, 115, 302, 303, 116, 117, 304, 118, 119, 305, 308, 307, 306 of 1965) D/- 23-10-1967 from original decree of Civil J., Senior Division and Arbitrator, at Nasik in Arbitration Case No. 7 of 1961.

Requisitioning and Acquisition of Immovable Property Act (1952), S. 8(3) — Acquired land already under requisition for nearly twelve years — Land round about being developed as building land — Compensation for acquired land — Building and development potentiality of acquired land would also increase resulting in rise in market value — This is not "some distant building potentiality", but will be a factor to be taken into account in determining market value of land on date of acquisition, for purposes of compensation.

Where the lands were requisitioned in the year 1943 under R. 75(a), Defence of India Rules, 1939 and remained under requisition right upto the date of their acquisition in the year 1955 under S. 7 of the Requisitioning and Acquisition of Immovable Property Act (30 of 1952), they would no doubt remain in the same condition as they were on the date of requisition. What sub-section (3)(a) of S. 8 of the Act contemplates is that the amount of compensation should not be determined on the assumption that the

GM/GM/C831/69/RGD/B

building activity of which the acquired lands were capable should be deemed to have been carried out. From this, it does not, however, necessarily follow that potential building capacity of the acquired lands in view of the development and building activity around or near the acquired lands and consequent rise in the market-price of acquired lands should not be taken into account. The fact that there has been a general rise in prices of lands is recognised by sub-sec. (3)(b) of S. 8 itself. There can also be no doubt that if building activity and consequent development goes on, on the lands near or round about the acquired lands, the building and development potentiality of the requisitioned and subsequently acquired lands in question would also increase and there would be a consequent rise in the market-price thereof in spite of the fact that they remain unbuilt or undeveloped because of continued requisition. It would not, therefore, be correct to say that the acquired lands in this case have merely "some distant building potentiality." Whether they have acquired building potentiality or not would depend upon their situation and the building activity and consequent development of other lands near-about.

(Para 14)

When sale-instances are not much helpful, while determining the amount of compensation, due importance must be given to situation of each land, whether it is prominent or otherwise, must be considered taking into account the building activity and consequent development near or round about the acquired lands. This would certainly be relevant while considering building potentiality of the acquired lands.

(Para 27)

Cases Referred: Chronological Paras
(1966) AIR 1966 Bom 36 (V 53)=

67 Bom LR 85, Kamalabai Harjivandas v. T. B. Desai

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V. M. Limaye (in No. 15/66); Govt. Pleader (in Nos. 114 to 119/65) and R. R. Jahagirdar (in Nos. 301,303 to 308/65), for Appellants; V. H. Gumaste (in No. 15/66); R. R. Jahagirdar (in Nos. 114 & 117/65; Govt. Pleader (in Nos. 301 & 303 to 308/65); M. A. Rane, (in No. 116/65) and V. M. Limaye (in Nos. 118 & 119/65), for Respondents.

CHITALE, J.— This is a group of appeals preferred by the claimants, as well as by the Union of India against the decision of the learned Arbitrator appointed under the provisions of the Requisitioning and Acquisition of Immovable Property Act, (Central Act No. XXX of 1952), awarding compensation for several lands that were acquired by the Union of India.

2. The lands that are acquired are out of Survey Nos. 35, 44, 45, 46, 51, 52, 55, 56,

58, 61, 62, 73 and 118 at Wadala, Taluka and District Nasik. These lands were requisitioned under Rule 75(a) of the Defence of India Rules, 1959 by notifications issued on 12-1-1943, 8th February 1943, on 2nd December 1943 and on 20th April 1944 for military purposes. By a notification dated 24-8-1955 published in the Government Gazette on 8-9-1955, these lands were acquired under Section 7 of the abovementioned Act. The owners of these lands were informed about the amounts of compensation offered by the Union of India, as per Rule 9(3) of the Rules framed under the abovementioned Act. The owners of these lands, however, did not find the compensation offered to be adequate and they required the Government to have the amount of compensation fixed by an Arbitrator. In exercise of the powers of the Central Government under S. 8(1)(b) of the abovementioned Act, the Central Government delegated to the State of Maharashtra, the power to appoint an Arbitrator by a Notification dated 10-10-1960. Accordingly the State of Maharashtra appointed the Civil Judge, Senior Division, Nasik as the Arbitrator in this case to determine the amount of compensation.

3. Some of the lands acquired are Kharif, some are Rabi and some of them are Bagait i. e. garden lands also. The compensation offered by the Union of India was at the rate of Rs. 400 per acre for Kharif land, Rs. 600 per acre for Rabi and Rs. 900 per acre for Bagait land. No compensation was offered for Kharaba i. e. uncultivable portion of the land.

4. The various claimants claimed compensation at much higher rates before the Arbitrator. The learned Arbitrator in view of the provisions of S. 8 (3) of the abovementioned Act determined the market price of the lands in question on the date of acquisition and also the price which the lands would have fetched in the open market on the date of the requisition. On consideration of the evidence led before him, the learned Arbitrator found that the compensation calculated at double the market price at the time of requisition was less, hence in view of Section 8(3) of the abovementioned Act, he awarded compensation at that rate.

5. In view of the decision in 67 Bom LR 85=(AIR 1966 Bom 36), it is unnecessary for us to consider the market price on the date of the requisition and we shall proceed to consider the market price of the acquired lands on the date of acquisition.

6. We shall deal with the sale instances that are relied upon before us. On behalf of the Union of India, reliance is placed mainly on two sale instances, the relevant

sale deeds being at Exhs. 54 and 74. By the sale-deed Exh. 54, 37 gunthas out of S. No. 45/4 at Deolali village were sold for Rs. 2,200 on 14-3-1955 by Tukaram Sakhararam Jachak and his two brothers to Ramchandra Bhavaji Khole. The rate works out at Rs. 2,378 per acre. The recitals in the sale-deed, Exh. 54, show that the land covered by that sale-deed was Bagayat land, it was assessed at Rs. 3-11-0. Before the Arbitrator this sale-deed was produced and relied upon by the claimants. The claimants have examined the purchaser Ramchandra Bhavaji Khole. His evidence is at Exh. 52. The evidence of Khole shows that the land was in his possession as a tenant before he purchased the same. He, however, says that it was not purchased in his capacity as a tenant, but as a relation of the vendors. The price paid was according to the market-rate then prevailing. He further says that the land purchased by him has the right to take water from a well in other land, the water from that well was sufficient to water two pands of land. In the cross-examination, it is brought out that the land purchased is half a mile away from Deolali village, it adjoins Deolali-Nasik Road. Deolali is about four miles away from village, Vadala. There is an aerodrome near Vadala. Khole admits that he had other land close to the land purchased, hence it was convenient to him. The sketch showing situation of the various acquired lands with reference to village Vadala, Deolali, Nasik City, Nasik-Poona Road, Deolali-Nasik Road etc. is at Exh. 118. From that sketch it will be seen that Survey No. 45 is to the west of and just behind Survey No. 44. Survey No. 43A adjoins Nasik-Poona Road. Behind Survey No. 43A to the west is Survey No. 44. Thus from the sketch it is clear that Survey No. 45 is about half a mile away from Nasik-Poona Road. The learned Arbitrator was in our opinion, right in holding this Sale (Exh. 54) as a comparable instance. We may further mention that considering the situation of this land — S. No. 45 — it can be said that has some building potentiality — though not as much as the lands adjoining Nasik-Poona Road.

7. Exh. No. 72 is a sale-deed dated 7-7-1954 by which 7 acres and 10 gunthas of land from S. No. 113/1 of Vadala were sold by Shankar Mohanraji Patil to Shivram Laxman Tidke for Rs. 7,000. The rate works out roughly at Rs. 1,000 per acre. The lands covered by the sale-deed are partly Bagayat and partly Jirayat. The recitals in the sale-deed show that the purchaser was the tenant in possession. In consideration of this sale, the purchaser-tenant surrendered a portion on the side of the village-site in favour of the landlord-vendor. The evidence of

vendee Shivram Laxman Tidke is at Exh. 71. His evidence shows that he was in possession of 5 acres and 8 gunthas as a protected tenant. His cross-examination shows that the land purchased is inferior. It is $1\frac{1}{2}$ miles away from Nasik-Poona Road. The assessment of the land purchased is roughly Rs. 2 per acre. The sketch Exh. 118 shows that Survey No. 113 is at a considerable distance — more than $1\frac{1}{2}$ miles from Nasik-Poona Road. Although it is near the village-site of Vadala, it is surrounded by lands of others and it does not seem to have any direct access to the road. In view of the circumstances mentioned above, the sale-deed Exh. 72, does not furnish a comparable instance. The finding of the learned Arbitrator in this respect seems to be correct.

8. On behalf of the claimants, reliance is placed upon the sale instances furnished by the sale-deeds, which are at Exhs. 62, 67, 86 and 57. Exh. 57 is a sale-deed dated 3-10-1959 by which 1 acre and 35 gunthas out of Survey No. 849, which is within Municipal limits of Nasik, were sold by Babre Vibhag Jungle Kamgar Sahakari Sangh Ltd. to Vedu Vaman Kashmire-Mall for Rs. 3,750. The rate works out roughly at Rs. 2,000 per acre. The evidence shows that there was a timber depot in this land and other timber depots in the adjoining land Survey No. 850. The land purchased by the sale-deed was grass land. The vendee Vedu Vaman Kashmire-Mall is examined. His evidence is at Exh. 55. In the cross-examination, it is brought out that the land purchased by the sale-deed is about 2 furlongs away from Ambedkar Colony. It further shows that there is an approach road to the land from Nasik-Poona Road. There were two mango trees, a tamarind tree and some small limb trees in the land. The sketch Exh. 118 shows the situation of Survey No. 849. It is much nearer to Nasik City than the lands, acquired in this case. It is also much nearer to Nasik-Poona Road. Thus the land sold by Exh. 57 viz. Survey No. 849 enjoys much more advantageous situation than that of the lands acquired. Moreover the sale is of 1959 i. e. nearly four years after the date of the acquisition in this case. Hence the rate indicated by this instance will not be of much use while considering the question of compensation for the lands in question.

9. Exh. 62 is a sale-deed dated 19-10-1953, by which 760 sq. yards out of Survey No. 119/A2/2-B of Vadala were purchased for Rs. 2,000 by Shridhar Narayan Joshi from Chiman Shankar Shelke. The rate works out roughly at Rs. 12,736 per acre. The sketch Exh. 118 shows

that Survey No. 119 is more prominently situated than the lands in question. Part of it adjoins Nasik-Poona Road. Even its rear part is hardly a furlong away from that road. It is also nearer to Nasik City than the lands in question. The recitals in the sale-deed Exh. 62 indicate that the land covered by this sale-deed is a developed land divided into plots. The sale-deed relates only to one plot measuring 760 sq. yards. The evidence of the vendee Shridhar Narayan Joshi is at Exh. 59. His evidence further shows that the land was a developed land, divided into several plots and the plot purchased by him was the plot of land adjoining to and to the west of Nasik-Poona Road. These plots are situated on Nasik side of Ambedkar Colony. The lands acquired in this case are agricultural lands and while determining compensation for the same, the sale-deed, Exh. 62, which relates to a plot in a developed land divided into plots, would not be a proper guide to determine the amount of compensation for the acquired lands.

10. Exh. 67 is a sale-deed dated 11-6-1954 by which Mohammad Hussain Bohari sold to Fakruddin Bohari 35 gunthas out of Survey No. 39-A/7 of Vadala for Rs. 6,000. The rate works out roughly at Rs. 6,867 per acre. What we have observed about the sale-deed Exh. 62 applies with greater force to the sale-deed Exh. 67. The sketch Exh. 118 shows that Survey No. 39 adjoins Nasik-Poona Road. The evidence of the purchaser Fakruddin Kikabhai, which is at Exh. 66, shows that the vendor was indebted to him and the land was purchased only for the amount due from the vendor. This seems to be a forced sale. Although this sale relates to the year 1954, considering the situation of the land covered by Exh. 67, which is not comparable to the lands acquired, we do not think that this instance will be useful in determining the amount of compensation for the acquired lands.

11. The next sale instance relied upon is the one furnished by the sale-deed, Exh. 86. It is a sale-deed dated 9-8-1954 by which Madhavrao Krishnaji Sagale sold to Sirajoddin Mohiuddin Kokir land S. No. 43-A/2 admeasuring 1 acre 15 gunthas for Rs. 6,500. The rate works out roughly at Rs. 4,727 per acre. The sale-deed Ex. 86 shows that the land purchased was assessed at Re. 00-12-6. The sketch Exh. 118 shows that Survey No. 43-A/2 adjoins Nasik-Poona Road. The prominent situation of this Survey number cannot be compared with the situation of all the lands acquired in this case. Hence this instance will not be of much use in determining the amount of compensation for the acquired lands except those that are situated near S. No. 43.

12. On behalf of the claimants our attention was further invited to the sale-deed Exh. 65 which shows that the land purchased by Fakruddin Kikabhai Bohari by Exh. 67, was sold by him on 11th January 1963 for Rs. 16,000. Relying on this sale-deed, Mr. Jahagirdar contends that it shows that the prices were steadily rising and within 9 years the price was more than 2½ times. That may be so, but as already pointed out, the situation of the land covered by Exhs. 65 and 67 being entirely different from the situation of the lands in question, the sale-deed Ex. 65 also will not be a proper guide in determining the amount of compensation for the acquired lands. There is no warrant for the assumption that prices of lands less favourably situated also rose in the same proportion.

13. These are the only instances relied upon by the parties before us. With regard to the rest of the instances, the observations of the learned Arbitrator in that respect are not challenged before us. We find these observations to be substantially correct so far as the quality and situation of the lands covered by the instances are concerned. The learned Arbitrator in para 54 of his judgment observes:

"It was, however, urged on behalf of the claimants that even the sale instances of lands having building potentiality would be required to be taken into account for assessing the market value of the acquired lands, because there had been much development and building activity in the nearabout locality by the year 1955. It was tried to be argued that though the acquired lands could have continued to be in the same condition in which they were at the time of requisition, that is to say, even if they had continued to be only jirait lands used for agriculture, still then they would have acquired some building potentiality in view of the fact that sufficient building activity had come into existence in the surrounding locality by the year 1955. It is, however, doubtful whether this argument adduced on behalf of the claimants can be wholly accepted. If the acquired lands had continued to remain in the same condition and would have been used in the year 1943, when they were requisitioned, it does not seem possible that they would have fetched in the year 1955 the same rate of price, which a developed land or a land possessing sufficient building potentiality would have fetched. At the most it can be said that the lands because of the subsequent development in the nearby locality would have been considered to possess some distant building potentiality. The instances of lands, which are got converted to non-agricultural use or, which are developed and in which plots have been laid,

cannot, therefore, be considered as comparable instances for assessing the land value of the acquired lands in the year 1955."

14. We are unable to accept wholly the reasoning adopted by the learned Arbitrator, as indicated by the above observation. On behalf of the Union of India reliance is placed on sub-section (3)(a) of S. 8 of Central Act XXX of 1952. The lands being under requisition right up to the date of acquisition would no doubt remain in the same condition as they were on the date of requisition. What sub-section (3)(a) contemplates is that the amount of compensation should not be determined on the assumption that the building activity of which the acquired lands were capable should be deemed to have been carried out. From this, it does not, however, necessarily follow that potential building capacity of the acquired lands in view of the development and building activity around or near the acquired lands and consequent rise in the market-price of acquired lands should not be taken into account. The fact that there has been a general rise in prices of lands is recognised by sub-section (3)(b) of S. 8 itself. There can also be no doubt that if building activity and consequent development goes on on the lands near or round about the acquired lands, the building and development potentiality of the requisitioned and subsequently acquired lands in question would also increase and there would be a consequent rise in the market-price thereof in spite of the fact that they remain unbuilt or undeveloped because of continued requisition. It would not,

therefore, be correct to say that the acquired lands in this case have merely "some distant building potentiality." Whether they have acquired building potentiality or not would depend upon their situation and the building activity and consequent development of other lands near-about. We shall examine the claims of the claimants in these appeals from this point of view, bearing in mind the sale-instances relied upon by either side with the comments in that respect by either side.

15-26. We shall now proceed to consider the claims in each of these first appeals:—

(After considering the evidence in this regard his Lordship proceeded).

27. As indicated above, the learned Arbitrator took the view that all the lands in question have only a distant building potentiality, in our opinion this view is not wholly correct. When sale-instances are not much helpful, while determining the amount of compensation, due importance must be given to situation of each land, whether it is prominent or otherwise, must be considered taking into account the building activity and consequent development near or round about the acquired lands. This would certainly be relevant while considering building potentiality of the acquired lands.

28. For reasons indicated above, we pass the following order:—

29. First Appeals Nos. 114 to 119 of 1965 preferred by the Union of India fail and they are dismissed with costs.

30. We modify the award passed by the learned Arbitrator as follows:—

Appeal No.	Arbitration Case No.	Amount awarded by the Arbitrator Rs.	Amount awarded by this Court Rs.
First Appeal No. 301 of 1965	A. C. No. 23/61	12,987-50	17,537-50
First Appeal No. 302 of 1965	A. C. No. 23/61	7,012-50	10,005-00
First Appeal No. 303 of 1965	No. 4/61	12,987-50	17,537-50
First Appeal No. 305 of 1965	No. 33/61		
First Appeal No. 304 of 1965	No. 14/61	13,832-50	15,870-00
First Appeal No. 306 of 1965	No. 11/61	9,012-50	12,875-00
First Appeal No. 307 of 1965	No. 36/61	6,512-50	6,512-50
First Appeal No. 15 of 1966	No. 7/61	59,500-00	1,40,930-50

The amounts awarded in First Appeals Nos. 303 and 305 of 1965 shall be paid to the claimants according to the final

decision of the Arbitrator as mentioned above. The balance shall be returned to the Collector. There will be some

balance because the claimants in Arbitration Case No. 1 of 1961 did not prefer an appeal and they would not be entitled to the enhanced rate awarded by us. The claimants whose appeals are partially allowed shall get proportionate costs.

Award modified.

AIR 1970 BOMBAY 23 (V 57 C 5)

TARKUNDE AND DESHPANDE, JJ.

Laxminarayan Temple, Kothure, through its Trustees, Petitioners v. Laxman Mahadu Chandore deceased by his legal representatives and others, Respondents.

Spl. Civil Appln. No. 1129 of 1964 (with Spl. Civil Appln. No. 1023 of 1964, Civil Appln. No. 2376 of 1964, Spl. Civil Appln. No. 1418 of 1964 and Spl. Civil Appln. No. 1890 of 1964), D/- 23-8-1968.

(A) Civil P. C. (1908), Pre. — Interpretation of Statutes — Sub-section and proviso — Ambiguity in clause and proviso — Reference to rules under Act is permissible for ascertaining correct meaning — Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 88B(1)(b) and proviso — Word "trust" in Clause (b) and proviso is not confined to trust for educational purposes — It covers trusts for other purposes including one for public religious worship — (Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 88B(1)(b) proviso) — (Tenancy Laws — Bombay Tenancy and Agricultural Lands Rules (1956), R. 52).

(Para 4)

(B) Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (67 of 1948), Ss. 88B, 32 to 32R (as added in 1956) — Exemption under S. 88B — Fact that trust was created after S. 88B came into force, would not disentitle it to claim exemption — Trust in question owning agricultural land was registered under Bombay Public Trusts Act on 28-3-1958 — Before that date, tenant of land became owner by virtue of Ss. 32 to 32R — Trust, held could not get exemption under S. 88B.

(Paras 5, 6)

(C) Constitution of India, Arts. 25, 26 — Scope — Bombay Tenancy and Agricultural Lands Act (67 of 1948), Ss. 32 to 32R — Sections do not fall within clause (2)(a) of Art. 25 — There being no conflict between Art. 26(c) and Art. 25(2), there is no question of one being subordinate to another — (Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (67 of 1948), Ss. 32 to 32R).

Clause (1) of Article 25 guarantees equally to all persons the right freely to profess, practise and propagate religion, and clause (2)(a) of that Article provides that the right so guaranteed will not

affect a law which regulates or restricts any secular activity associated with religious practice. Ownership of agricultural lands can hardly be regarded as an "activity", secular or otherwise, and in any case, supposing it were an activity, it is clearly not associated with any religious practice. Sections 32 to 32R of the Bombay Tenancy Act do not fall within the ambit of clause (2)(a) of Article 25. The right to own and acquire movable and immovable property guaranteed to religious denominations by Article 26(c) has no direct connection with religious practice and it is with religious practice that clause (2) of Article 25 is concerned. There being no conflict between Article 26(c) and Article 25(2), there is no question of one being subordinate to the other. AIR 1958 SC 255, Expld.

(Para 11)

(D) Constitution of India, Arts. 26(c), 19(1)(f), 19(5) — Scope — Bombay Tenancy and Agricultural Lands Act (67 of 1948), Ss. 32 to 32R, 88B(1) Proviso — Sections do not violate Art. 26(c) — (Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (67 of 1948), Ss. 32 to 32R, 88B(1) Proviso).

The right to own and acquire property which has been guaranteed to every religious denomination by Article 26(c) is not violated by Sections 32 to 32R and the proviso to Section 88B(1) of the Bombay Tenancy Act.

(Paras 13, 21)

The scope and the meaning of Article 26(c) are determined by the context in which Article 26 appears in Part III of the Constitution and the purpose which that Article is intended to subserve. Every religious denomination in the country or any section thereof would be composed mostly, if not wholly, of citizens of India. The right of a religious denomination to acquire, hold and dispose of property is, therefore, guaranteed by Article 19(1)(f) of the Constitution. The right to own and acquire movable and immovable property guaranteed by Article 26(c) is a different right, being a part of the freedom to manage religious affairs which is guaranteed by Article 26. Every restriction which is in the interests of public order, morality or health is necessarily in the interests of the general public. But every restriction which is in the interests of the general public is not necessarily in the interests of public order, morality and health.

(Paras 13, 14)

Article 26(c) means that every religious denomination or any section thereof shall have the same rights in respect of the ownership and acquisition of movable and immovable property as are available to other members of the public, and that if those rights are to be curtailed, they can be curtailed only in the interest

of public order, morality and health. Article 26(c) is not violated by those provisions of law which are of general application and which do not specifically relate to the property rights of religious denominations. Sections 32 to 32R of the Bombay Tenancy Act extinguish or modify the rights of landlords in general in respect of their agricultural lands, and since these provisions do not impose any additional restrictions on the property rights of religious denominations, they are not violative of Article 26(c). Consequently nothing in the proviso to Section 88B(1) of the Bombay Tenancy Act is violative of that Article.

(Para 21)

Cases Referred: Chronological Paras

- (1959) AIR 1959 SC 459 (V 46) =
61 Bom LR 811, Shri Ram Ram
Narain v. State of Bombay 8
- (1958) AIR 1958 SC 255 (V 45) =
1958 SCR 895, Sri Venkataramana
Devaru v. State of Mysore 12
- (1958) AIR 1958 Ori 18 (V 45) =
ILR (1957) Cut 328, Chintamani
Prathihari v. State of Orissa 19
- (1954) AIR 1954 SC 282 (V 41) =
1954 SCR 1005, Commr., Hindu
Religious Endowments, Madras
v. Lakshminidra Tirtha Swamiar
of Sri Shirur Mutt 9
- (1954) AIR 1954 Cal 241 (V 41) =
58 Cal WN 73, Pran Krishna
Kamar v. Junior Assessor Sib-
rampore 19
- (1952) AIR 1952 SC 252 (V 39) =
ILR 31 Pat 565, State of Bihar
v. Kameshwar Singh 18
- (1951) AIR 1951 All 674 (V 38) =
ILR (1952) 2 All 48 (FB), Surya-
pal Singh v. U. P. Government 17
- In Spl. Civil Appln. No. 1129 of 1964:
G. H. Guttal, for Petitioners; N. S.
Shastri, for Respondents Nos. 1(a) to 1(e);
S. C. Pratap, Asst. Govt. Pleader, for
Respondent No. 3; V. H. Gumaste, Govt.
Pleader, for Advocate General.
- In Spl. Civil Appln. No. 1023 of 1964:
V. M. Limaye, for Petitioners; P. E.
Mulay for V. V. Divekar, for Respondents
Nos. 1 and 2;

In Civil Appln. No. 2376 of 1964:—
V. M. Limaye, for Petitioners; P. E.
Mulay for V. V. Divekar, for Respondents
Nos. 1 and 2;

In Spl. Civil Appln. No. 1418 of 1964:
V. M. Limaye, for Petitioners; J. G.
Pradhan, for Respondents Nos. 1 and 2;
S. C. Pratap, Asst. Govt. Pleader, for
Respondent No. 4.

In Spl. Civil Appln. No. 1890 of 1964:
V. M. Limaye, for Petitioners; S. C.
Pratap, Asst. Govt. Pleader as per Notice.

TARKUNDE, J.:— These four petitions have given rise to common questions relating to the interpretation of the proviso to sub-section (1) of Section 88B

of the Bombay Tenancy and Agricultural Lands Act, 1948 and the constitutional validity of the said proviso and of Sections 32 to 32R of the said Act in so far as these provisions affect agricultural lands belonging to religious denominations. In order to appreciate the questions raised and the arguments advanced on either side, it would be enough to notice the facts involved in one of these petitions.

2. In Special Civil Application No. 1129 of 1964 the petitioners are the trustees of a public trust whose object is to maintain a Hindu temple and to continue the worship of the deity installed therein. The trust was created as early as in 1845. The trust owned an agricultural land in a village in the Nasik District. The first respondent was the tenant of the land from before 1957. The Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as "the Bombay Tenancy Act") which applied to this land was extensively amended by Bombay Act XIII of 1956. The amending Act added Sections 32 to 32R to the parent Act with the object of transferring the ownership of agricultural lands from landlords to tenants. Subject to certain exceptions with which we are not concerned, tenants became owners of the lands in their possession from the tillers' day, which was the 1st of April 1957. By the same amending Act Section 88B was also added to the parent Act. CL (b) of sub-sec. (1) of S. 88B, along with the proviso to that sub-section, is in the following terms:

"Section 88B(1). — Nothing in the foregoing provisions except Sections 3, 4B, 8, 9, 9A, 9B, 9C, 10, 10A, 11, 13 and 27 and the provisions of Chapters VI and VIII in so far as the provisions of the said Chapters are applicable to any of the matters referred to in the sections mentioned above, shall apply —

(b) to lands which are the property of a trust for an educational purpose, a hospital, Panjarapole, Gaushala or an institution for public religious worship;

Provided that —

(i) such trust is or is deemed to be registered under the Bombay Public Trusts Act, 1950, and

(ii) the entire income of such lands is appropriated for the purposes of such trust"

Sub-section (2) of Section 88B, which was added by a subsequent amendment in 1961, runs as follows:—

"Section 88B(2). — For the purposes of this section, a certificate granted by the Collector, after holding an enquiry, that the conditions in the proviso to sub-section (1) are satisfied by any trust shall be conclusive evidence in that behalf."

The public religious trust in the present case was registered under the Bom-

bay Public Trusts Act, 1950, on 28th March 1958. Thereafter the petitioners applied in 1962 to the Assistant Collector for an exemption certificate under sub-section (1)(b) and sub-section (2) of Section 88B. The application was opposed by the present respondent No. 1 on the ground that he had become owner of the land on the tillers' day (1st April 1957) prior to the date on which the trust was registered under the Bombay Public Trusts Act and that the land was, therefore, not entitled to the exemption claimed by the petitioners. The Assistant Collector upheld this contention and rejected the application filed by the petitioners. From this order the petitioners approached the Maharashtra Revenue Tribunal in revision. The Revenue Tribunal rejected the revision application, but on a different ground. It held that the trust was not registered on 1st August 1956 when section 88B came into force and that the land was, therefore, not entitled to the exemption claimed by the petitioners. The petitioners have approached this Court for a writ or direction under Articles 226 and 227 of the Constitution for quashing the above orders of the Assistant Collector and the Maharashtra Revenue Tribunal.

3. In support of the petition two submissions were made by Mr. Guttal who appeared on behalf of the petitioners. Mr. Guttal argued, in the first place, that the aforesaid proviso to sub-section (1) of Section 88B, according to its correct interpretation, does not require that the trust in question should have been registered either on the 1st of August 1956 when Section 88B came into force or on the day on which the tenant of the land was to become the owner thereof and that the requirement of the proviso is fulfilled if the trust was, or was deemed to be, registered under the Bombay Public Trusts Act at any time before the application for exemption was filed. If this argument is not accepted, Mr. Guttal submitted in the alternative that Sections 32 to 32R of the Bombay Tenancy Act, in so far as they apply to agricultural lands belonging to public religious trusts, are invalid as they violate the fundamental right guaranteed by Article 26(c) of the Constitution.

4. Before dealing with the first of these submissions, we must observe that we had initially some doubt on whether the word "trust" in clause (b) of Section 88B(1) of the said Act and in the proviso to that sub-section is confined to trusts for educational purposes or whether it extends to trusts for a hospital, a Panjarapole, a Gaushala or an institution for public religious worship. It is possible to construe clause (b) of Section 88B(1) so as to confine the word "trust" to a trust

for an educational purpose. So interpreted, clause (b) of Section 88B(1) would apply to lands which are (i) the property of a trust for an educational purpose, (ii) the property of a hospital, (iii) the property of a Panjarapole, (iv) the property of a Gaushala and (v) the property of an institution for public religious worship. If clause (b) is so interpreted, the word "trust" in the proviso would also be restricted to a trust for an educational purpose. Such an interpretation, however, conflicts with Rule 52 of the Bombay Tenancy and Agricultural Lands Rules, 1956, made under the Act, which says that "A trustee in charge of a trust for an educational purpose, a hospital, Panjarapole, Gaushala or an institution for public religious worship claiming exemption under sub-section (1) of Section 88B may make an application in writing to the Collector within whose jurisdiction all or most of the pieces of land belonging to the trust are situated for the grant of a certificate for the purpose of Section 88B." Since there is an ambiguity in the meaning of clause (b) of Section 88B(1) and the proviso thereto, it is permissible to refer to the rules made under the Act for ascertaining the correct meaning of these provisions. We accordingly find that the word "trust" in the said provisions is not confined to a trust for an educational purpose and that it covers trusts for other purposes mentioned in clause (b), including a trust for an institution for public religious worship.

5. In support of his first submission Mr. Guttal argued that the requirement of registration under the Bombay Public Trusts Act, which is found in the said proviso to sub-section (1) of Section 88B, is merely a procedural requirement and that, therefore, the proviso should not be so interpreted as to render that requirement a pre-condition for acquiring the right of exemption which has been granted by Clause (b) of Section 88B(1). We would have readily accepted this argument of Mr. Guttal if it were consistent with the terms of clause (b) of Section 88B(1) read with the proviso. Clause (b) grants exemption to the properties of certain types of trusts and the proviso lays down two conditions for the acquisition of the exemption, the conditions being firstly, that the trust must be or must be deemed to be registered under the Bombay Public Trusts Act and, secondly, that the entire income of the property is appropriated for the purposes of the trust. A trust is not entitled to the exemption till it fulfils the two requirements mentioned in the proviso. It must follow that the trust in the present case was not entitled to exemption under Section 88B till 28th March 1958 when it was registered under the Bombay Public Trusts Act. Before that date, however,

respondent No. 1 had already become the owner of the land by virtue of the provisions contained in Sections 32 to 32R of the Act. It must follow that the petitioners cannot get exemption in respect of a land which had ceased to be the property of the trust on the date on which the trust became entitled to claim that exemption.

6. We are, however, unable to accept the view of the Maharashtra Revenue Tribunal that the trust ought to have been a registered trust on 1st August 1956, on which date Section 88B came into force, in order that its land may be entitled to exemption under that section. There is nothing in the terms of clause (b) of Section 88B(1) which requires its operation to be confined to the properties of those trusts which were already in existence when Section 88B came into force. The exemption granted by Section 88B is not confined to the operation of Sections 32 to 32R of the Act, but extends to the operation of several other provisions of the Act. A trust may be created after Section 88B came into effect and still the lands of the trust would be entitled to the exemption given by that section. A trust, however, cannot claim an exemption under that section in respect of lands which had already become the property of its tenants before the right of exemption was acquired by the trust. That is why the trust in the present case, having become entitled to claim exemption under Section 88B for the first time on 28th March 1958, cannot get exemption in respect of a land which had gone into the ownership of respondent No. 1 on 1st April 1957.

7. The second and more substantial submission of Mr. Guttal was based on the fundamental right guaranteed by clause (c) of Article 26 of the Constitution. Article 26 of the Constitution is as follows:

"Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law."

Mr. Guttal argued that Sections 32 to 32R of the Bombay Tenancy Act, in so far as they purported to deprive any religious denomination or any section of a religious denomination of its ownership of agricultural land, violated the fundamental right guaranteed by Article 26(c) and were invalid to that extent. When this argument was advanced by Mr. Guttal, we pointed out to him that since

clause (b) of Section 88B(1) of the Act exempts the properties of institutions for public religious worship from the operation of Sections 32 to 32R, it may not be open to the petitioners to challenge the validity of Sections 32 to 32R on the ground that they violate the petitioners' fundamental right guaranteed by Article 26(c) of the Constitution. Mr. Guttal then submitted that, if clause (b) of Section 88B(1) of the Bombay Tenancy Act is looked upon as a provision which carries into effect the intention of Article 26(c) of the Constitution, then the proviso to section 88B(1) must be held to be violative of Article 26(c). We are thus concerned in these petitions with the constitutional validity of Sections 32 to 32R and the proviso to sub-section (1) of Section 88B of the Bombay Tenancy Act in so far as they affect lands belonging to religious denominations.

8. The Bombay Tenancy Act, 1948, before its amendment by Bombay Act No. XIII of 1956, was included in the Ninth Schedule of the Constitution and is protected by Article 31B from any challenge on the ground that it violates any of the fundamental rights guaranteed in part III of the Constitution. No such protection, however, is available to the provisions which were introduced in the said Act by the amending Act No. XIII of 1956. In *Shri Ram Ram Narain v. State of Bombay*, 61 Bom LR 611 = (AIR 1959 SC 459), the Supreme Court accepted this position but held that the amending Act No. XIII of 1956 was covered by Article 31A of the Constitution and could not be challenged on the ground of violation of the fundamental rights enshrined in Arts. 14, 19 and 31 of the Constitution. Art. 31A, however, does not protect a legislation from challenge on the ground of inconsistency with Article 26 of the Constitution. Sections 32 to 32R, as well as Section 88B were introduced in the Bombay Tenancy Act, 1948, by the amending Bombay Act No. XIII of 1956. Mr. Guttal, therefore, argued that, although an ordinary landlord is unable to challenge the provisions contained in Sections 32 to 32R on the ground that they violate his fundamental right to acquire, hold and dispose of property guaranteed to all citizens by Article 19(1)(f) of the Constitution, it is open to any religious denomination or a section of any religious denomination to challenge the said provisions on the ground that they violate its fundamental right to own and acquire movable and immovable property guaranteed by Article 26(c) of the Constitution.

9. In the *Sri Shirur Mutt* case, Commissioner, Hindu Religious Endowments, Madras v. *Lakshmindra Tirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282,

the Supreme Court considered the connotation of the expression "religious denomination" in Article 26 and pointed out that the word "denomination" has been defined in the Oxford Dictionary to mean "a collection of individuals classed together under the same name: a religious sector body having a common faith and organisation and designated by a distinctive name". Mr. Guttal argued that by this definition the Hindu community is a religious denomination, and since the trust in the present case is a Hindu religious trust, the property of the trust is entitled to the right guaranteed by Article 26(c) of the Constitution. Under Article 26(c) the right of a religious denomination to own and acquire movable and immovable property can only be restricted in the interest of public order, morality and health. The provisions of Sections 32 to 32R of the Bombay Tenancy Act, which transfer the ownership of agricultural lands from landlords to tenants, cannot be said to have been passed in the interest of public order, morality or health. The same is true of the proviso to sub-section (1) of Section 88B which requires that a trust must be registered or be deemed to be registered under the Bombay Public Trusts Act before it can claim exemption in respect of its properties from the operation of Sections 32 to 32R of the Act. Mr. Guttal, therefore, urged that Sections 32 to 32R and the proviso to Section 88B(1) should be struck down as violative of Article 26(c) in so far as they apply to lands of religious denominations.

10. The learned Government Pleader, who appeared for the Advocate General (to whom notice had been issued under Order XXVII-A of the Civil Procedure Code), argued that the fundamental rights guaranteed by Article 26 are subordinate to the provisions contained in clause (2) of Article 25, that sections 32 to 32R of the Bombay Tenancy Act fall within the scope of sub-clause (a) of clause (2) of Article 25, and that these sections of the Bombay Tenancy Act cannot therefore be held to be violative of Article 26(c). In order to appreciate this argument, it is necessary to notice the relevant part of Article 25, which is as follows:

"25(1) Subject to public order, morality and health and to other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law —

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus." According to the learned Government Pleader, Sections 32 to 32R of the Bombay Tenancy Act regulate or restrict a secular activity and are, therefore, immune from challenge on the ground that they violate the right to own and acquire movable and immovable property guaranteed to religious denominations by Article 26(c).

11. We do not see any merit in this argument. Clause (1) of Article 25 guarantees equally to all persons the right freely to profess, practise and propagate religion, and clause (2)(a) of that Article provides that the right so guaranteed will not affect a law which regulates or restricts any secular activity associated with religious practice. Ownership of agricultural lands can hardly be regarded as an "activity", secular or otherwise, and in any case, supposing it were an activity, it is clearly not associated with any religious practice. Sections 32 to 32R of the Bombay Tenancy Act cannot, therefore, be held to fall within the ambit of clause (2)(a) of Article 25. Moreover, there is no reason to suppose that Article 26(c) is subordinate to the provisions of Article 25(2) or vice versa. The right to own and acquire movable and immovable property guaranteed to religious denominations by Article 26(c) has no direct connection with religious practice and it is with religious practice that clause (2) of Article 25 is concerned. There being no conflict between Article 26(c) and Article 25(2), there is no question of one being subordinate to the other.

12. In support of his argument mentioned above, the learned Government Pleader placed reliance on certain observations of the Supreme Court in *Sri Venkataramana Devaru v. State of Mysore*, AIR 1958 SC 255. In that case the Supreme Court held that Article 26(b) of the Constitution must be read subject to Article 25(2)(b). Article 26(b) guarantees to every religious denomination the right "to manage its own affairs in matter of religion". Article 25(2)(b), on the other hand, allows a law to be made for "the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus." There is a clear conflict between these two provisions and it was in respect of this conflict that the Supreme Court observed that Article 26(b) must be read subject to Article 25(2)(b). There is, however, no conflict between Article 26(c) and any part of Article 25, and, as stated above, there is no reason to hold that either of them is subordinate to the other.

13. There is, however, another ground which has persuaded us to hold that the right to own and acquire property which has been guaranteed to every religious denomination by Article 26(c) is not violated by Sections 32 to 32R and the proviso to Section 88B(1) of the Bombay Tenancy Act. It appears to us that the scope and the meaning of Article 26(c) are determined by the context in which Article 26 appears in Part III of the Constitution and the purpose which that Article is intended to subserve. Whereas Articles 19 to 22 appear in Part III of the Constitution under the heading "Right to Freedom", Articles 25 to 28 have been given the heading "Right to Freedom of Religion". Moreover, the particular heading of Article 26 is "Freedom to manage religious affairs." Article 19(1)(f) guarantees to all citizens the right to acquire, hold and dispose of property. Every religious denomination in the country or any section thereof would be composed mostly, if not wholly, of citizens of India. The right of a religious denomination to acquire, hold and dispose of property is, therefore, guaranteed by Article 19(1)(f) of the Constitution. The right to own and acquire movable and immovable property guaranteed by Article 26(c) is a different right, being a part of the freedom to manage religious affairs which is guaranteed by Article 26. In our judgment, Article 26(c) means that every religious denomination or any section thereof shall enjoy the same right in respect of ownership and acquisition of property as is available to members of the general public and that this right of religious denominations or sections thereof shall not be restricted except in the interests of public order, morality and health. In other words, Article 26(c) ensures that the State shall not deny to any religious denomination or any section thereof the right which is available to other individuals or groups of individuals to own and acquire property, except where that right is required to be restricted for safeguarding or promoting public order, morality or health.

14. Not to accept the above interpretation of Article 26(c) would lead to several anomalies. Article 19(5) provides that the property rights guaranteed by Article 19(1)(f) may be subjected by law to reasonable restrictions "in the interests of the general public or for the protection of the interests of any Scheduled Tribe". On the other hand, the property rights guaranteed by Article 26(c) are subject only to "public order, morality and health". Now, every restriction which is in the interests of public order, morality or health is necessarily in the interest of the general public. But every restriction which is in the interests of the general public is not necessarily

in the interests of public order, morality and health. In other words, the expression "the interests of the general public" includes, but is not confined to, the interests of public order, morality and health. If we were to hold that Art. 26(c) guarantees to religious denominations, independently of Art. 19(1)(f), the right to own and acquire property, and that the said right can only be restricted in the interests of public order, morality and health, it would follow that the right of religious denominations to own and acquire property cannot be subjected to those restrictions in the interests of the general public which do not fall within the ambit of "public order, morality and health". Several instances can be given of the absurdities which would result from this interpretation.

15. Let us first consider restrictions on the acquisition of property. Parliament may, for the purpose of stabilizing the country's currency, authorise the Central Government to put restrictions on the acquisition of gold by any individual or group of individuals. Stability of the currency of the country, although undoubtedly in the interests of the general public, is not in the interests of "public order, morality and health". It would follow, if our interpretation of Article 26(c) is incorrect, that Parliament cannot make a law authorising the Central Government to restrict the acquisition of gold by any religious denominations or any section thereof. To take a simpler example, it is provided by law that immovable property exceeding a certain value cannot be acquired except by a registered instrument. This requirement is a restriction on the right to acquire immovable property and is clearly in the interests of the general public. Since the restriction cannot be said to be in the interests of public order, morality or health, it cannot be imposed on the right of religious denominations to acquire immovable property. Similar instances can be given of restrictions which are imposed on the ownership of property. Municipalities are usually authorised by law to call upon the owners of dilapidated buildings to repair them or to pull them down. Such a restriction is in the interests of the general public, but is not necessarily in the interests of public order, morality and health. If our interpretation of Article 26(c) is not correct, municipalities would be unable to call upon religious denominations to repair or pull down dilapidated buildings owned by them. Again, land legislation often authorises State Governments to take over the management of agricultural lands which are allowed to remain fallow for a number of years or to impose a regulation that a certain proportion of agricultural lands shall be utilised for the

production of foodgrains. It could not have been the intention of the makers of the Constitution that the right of religious denominations to own and acquire property should not be subjected to such reasonable restrictions in the interests of the general public.

16. The interpretation which we are inclined to place on Article 26(c) finds support in the legislative history of that Article. In the Draft Constitution of India, which had been prepared by the Drafting Committee of the Constituent Assembly, the present Article 26 figured as Article 20. Article 20 in the Draft Constitution had the heading "Freedom to manage religious affairs and to own, acquire and administer properties for religious or charitable purposes," and it ran as follows:

"20. Every religious denomination or any section thereof shall have the right—

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law."

It will be noticed that the clause "subject to public order, morality and health" was not found in Article 20 of the Draft Constitution. Now, Article 20(c) of the Draft Constitution could not possibly have been intended to mean that every religious denomination or any section thereof should have an absolute right to own and acquire movable and immovable property a right which could not be subjected to any restriction whatsoever. Clearly the intention of Art. 20(c) of the Draft Constitution was that religious denominations and sections of religious denominations should not be denied the rights which were available to members of the general public in respect of ownership and acquisition of immovable property. It must follow that the addition of the clause "Subject to public order, morality and health", which now occurs in Article 26 of the Constitution, was intended to secure, in its application to clause (c) of that Article, that no restrictions can be imposed on the right which religious denominations and sections of religious denominations have, in common with other individuals, of owning and acquiring property, except such restrictions as are in the interests of public order, morality and health.

17. We are aware that Article 26(c) has not been interpreted in any reported case in the manner we have done. But this was probably because a question like the one which we are called upon to de-

cide did not fall for determination in any reported case. In *Suryapalsingh v. U. P. Government*, AIR 1951 All 674, a Full Bench of the Allahabad High Court examined the constitutional validity of the U. P. Zamindari Abolition and Land Reforms Act, 1950. An argument was advanced on behalf of certain Waqfs and Hindu religious institutions in that case that their right to own property guaranteed by Article 26(c) was contravened by the provisions of the impugned Act. Rejecting the argument the Allahabad Full Bench observed:

"Article 26 clause (c) confers on every religious denomination the right to own and acquire property but it does no more than this, and we can see no ground for holding that it prevents, or was intended to prevent, property belonging to a religious body being acquired by authority of law."

In appreciating these remarks, it must be remembered that the U. P. Zamindari Abolition and Land Reforms Act, 1950 provided for the acquisition by the State of the property rights of Zamindars. Earlier in its judgment the Allahabad Full Bench had held that acquisition of property by the State was the subject of Article 31 of the Constitution and not of Article 19(1)(f). An argument on the basis of Article 26(c) was advanced before the Full Bench on the ground that ownership of property was guaranteed under Article 26(c) but not under Article 19(1)(f). The remarks quoted above were made by the Full Bench in rejecting this argument.

18. An appeal from the above decision of the Allahabad High Court was heard by the Supreme Court along with appeals from decisions of the Patna and Madhya Pradesh High Courts in regard to the validity of the Zamindari Abolition Laws passed by the Bihar and Madhya Pradesh Legislatures. By the time these appeals (*State of Bihar v. Sir Kameshwar Singh* and other appeals, AIR 1952 SC 252) came for the decision of the Supreme Court, however, the Constitution (First Amendment) Act, 1951, had come into force, Articles 31A and 31B had been inserted in the Constitution, and the Zamindari Abolition Acts passed by the Legislatures of the three States had been included in the Ninth Schedule of the Constitution. Consequently, the provisions of the impugned Acts could not be challenged before the Supreme Court on the ground of any fundamental right guaranteed by the Constitution. What was urged before the Supreme Court on behalf of the said Waqfs and Hindu religious institutions was that the properties of these institutions were already dedicated to public purposes and could not, therefore, be acquired for a public

purpose by the State. In rejecting this argument Justice Mahajan said:

"The argument is fallacious. A charity created by a private individual is not immune from the sovereign's power to compulsorily acquire that property for public purposes. It is incorrect to say that the vesting of these properties in the State under the provisions of the Act in any way affects the charity adversely because the net income that the institutions are deriving from the properties has been made the basis for compensation awarded to them."

It is likely that the remark in the last sentence has a reference to the fact that in the impugned Acts compensation which was awarded to religious institutions for the acquisition of their property rights was at a higher rate than the compensation awarded to ordinary Zamindars. With reference to the same contention Justice Das said in his judgment:

"I see no substance in this contention. The property belonging to the religious institutions will only change its form, namely, from immovable property into money."

19. The above decisions were followed in *Pran Krishna Kamar v. Junior Assessor, Sibramore*, AIR 1954 Cal 241 and in *Chuntamani Prathihari v. State of Orissa*, AIR 1958 Orissa 18, where the Courts held that acquisition by the State of property dedicated to religious endowments did not violate Article 26 of the Constitution.

20. As noticed above, the Supreme Court was not called upon to consider the scope of Article 26(c) of the Constitution while pronouncing on the validity of the Zamindari Abolition Laws. The Allahabad, Calcutta and Orissa High Courts did consider the effect of Article 26(c) in the above cases, but they did so with reference to acquisition of properties by the State, the rights in respect of which are governed by Article 31 of the Constitution. None of the Courts were called upon to consider the general scope of the right guaranteed by Article 26(c) in the context in which that provision appears in the Constitution.

21. As held by us above, Article 26(c) means that every religious denomination or any section thereof shall have the same rights in respect of the ownership and acquisition of movable and immovable property as are available to other members of the public, and that if those rights are to be curtailed, they can be curtailed only in the interest of public order, morality and health. This interpretation necessarily implies that Article 26(c) is not violated by those provisions of law which are of general application and which do not specifically relate to

the property rights of religious denominations. Sections 32 to 32R of the Bombay Tenancy Act extinguish or modify the rights of landlords in general in respect of their agricultural lands, and since these provisions do not impose any additional restrictions on the property rights of religious denominations, they cannot be held to be violative of Article 26(c). If Sections 32 to 32R of the Bombay Tenancy Act do not violate Article 26(c), it must follow that nothing in the proviso to Section 88B(1) of the Bombay Tenancy Act can be held to be violative of that Article. We accordingly reject the challenge made on behalf of the petitioners to the constitutional validity of Sections 32 to 32R as well as the proviso to Section 88B(1) of the Bombay Tenancy Act.

22. In the result Special Civil Application No. 1129 of 1954 is dismissed. On the same grounds Special Civil Applications Nos. 1023 of 1964, 1418 of 1964 and 1890 of 1964 are also dismissed.

23. Since the questions raised by the petitioners were of considerable complexity and were not covered by any precedent, we direct that there will be no order as to costs in these Special Civil Applications.

24. Civil Application No. 2376 of 1964 is also rejected. No order as to costs.

Appeal and applications dismissed.

AIR 1970 BOMBAY 30 (V 57 C 6)
(AT NAGPUR)

PADHYE AND VIMADALAL, JJ.
Ramkrishna Ramnath, Firm, Kamptee,
Petitioners v. G. Lakshmi Narsimhan,
I. T. O., Nagpur, Respondent.

Spl. Civil Appln. No. 508 of 1967, D/-
27-2-1969.

(A) Income-tax Act (1922), S. 34(3), 2nd proviso — Vires — Proviso is ultra vires as violative of Art. 14 of the Constitution only so far as strangers who are not parties to the proceedings are concerned — As regards parties intimately connected with assessment proceedings provisions are not ultra vires — Word "any person" means a person intimately connected with the assessment under appeal. AIR 1963 SC 342 & AIR 1963 SC 1394, Rel. on; AIR 1964 Bom 170 held no longer good law in view of (1969) 71 ITR 51 (Bom) & AIR 1965 SC 342; AIR 1954 SC 545 & (1968) 69 ITR 432 (Mad); (1969) 71 ITR 333 (MP), Rel. (Paras 18 and 30)

(B) Income-tax Act (1922), S. 34 (3) proviso — Scope — Bar of limitation of 4 years applies only to assessments to be made by the Income-tax Officer — Ap-

FM/GM/C646/69/GGM/B

peals by the appellate Commissioner and the Tribunal are not covered by the limitation.

The bar of limitation of 4 years applies only to assessments made by the Income-tax Officer. It cannot be said that not only the assessment by the Income-tax Officer, but the appeals by the Appellate Assistant Commissioner and the Appellate Tribunal must also be decided within a period of 4 years from the end of the assessment year in question. However, where the Appellate Assistant Commissioner or the Tribunal were to enhance the assessment made on the assessee by the Income-tax Officer, different considerations may arise in such cases. AIR 1964 SC 1413, Dist.

(Paras 9 and 29)

(C) Income-tax Act (1922), S. 34(1), (3) 2nd proviso — Assessment made by Income-tax Officer in pursuance of a direction or remand constitutes "information" — Second proviso is a proviso to Ss. 34(1) (a), (b), 34(1A) to 34(1D).

If a finding or a direction has been given by the appellate authority which directs the Income-tax Officer to make fresh assessment as per that finding or direction, that would constitute an information under Section 34(1)(b) of the Act. The information in Section 34(1)(b) includes information as to facts as well as information as to state of law and the finding or direction given by an appellate authority either on the question of fact or law would be an information to the Income-tax Officer under the provisions of Section 34(1)(b). The second proviso is a proviso to the whole of Section 34 though put below sub-section (3) of Section 34 and applies to all cases whether falling under Sec. 34(1)(a) or (1)(b) or (1A) to (1D) of Sec. 34, provided that the assessment or re-assessment is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under Sections 31, 33, 33A, 33B, 66 and 66A. (1963) 48 ITR 837 (All) & AIR 1961 SC 182 & AIR 1959 SC 257 & (1960) 39 ITR 522 (Bom), Rel. on.

(Paras 12 & 27)

Cases Referred: Chronological Paras

- (1969) 1969-71 ITR 51=(1969) 1 ITJ 176 (Bom), Onkarmal Meghraj v. Commr. of Income Tax, Bombay 18, 21
- (1969) 1969-71 ITR 333=1968 MP LJ 680, Shyam Sunder Govindram v. Income Tax Officer 27
- (1968) 1968-69 ITR 432=ILR (1968) 3 Mad 450, M. C. T. Muthuraman v. Second Income Tax Officer 17
- (1967) 1967-66 ITR 586 (SC), N. K. T. Sivalingam Chettiar v. Commr. of Income Tax 27

- (1965) AIR 1965 SC 342 (V 52)= 1964-52 ITR 335, Income Tax Officer v. Murlidhar Bhagwandas 16, 18, 21, 26, 27
- (1964) AIR 1964 SC 1034 (V 51)= 1964-52 ITR 328, Thomas v. Vasant Hiralal Shah 26
- (1964) AIR 1964 SC 1190 (V 51)= 1964-52 ITR 355, K. S. Rashid and Son v. Income Tax Officer 27
- (1964) AIR 1964 SC 1413 (V 51)= 1964-15 STC 153, State of Orissa v. Debaki Debi 10, 25
- (1964) AIR 1964 Bom 170 (V 51)= 65 Bom LR 674=56 ITR 522, Mahendra Bhawanji Thakar v. S. P. Pandey 16, 18, 21
- (1963) AIR 1963 SC 1356 (V 50)= 1963-49 ITR 1, S. C. Prashar v. Vasantsen Dwarkadas 15, 16, 17, 18, 21
- (1963) AIR 1963 SC 1394 (V 50)= (1964) 1 SCR 148, Commr. of Income Tax B & O v. Sardar Lakhmir Singh 15, 16, 17, 18
- (1963) AIR 1963 All 172 (V 50)= 1963-48 ITR 705 (FB), Lakshman Prakash v. Commr. of Income Tax U. P. 13
- (1963) 1963-48 ITR 837 (All), Jawahar Lal Maniram v. Commr. of Income Tax, U. P. 21
- (1961) AIR 1961 SC 182 (V 48)= 1960-40 ITR 618, Bhopal Sugar Industries Ltd. v. Income Tax Officer, Bhopal 21
- (1961) 1961-43 ITR 387 (SC), Lalji Haridas v. Income Tax Officer 31
- (1960) 1960-39 ITR 522=ILR (1960) Bom 1021, Commr. of Income Tax v. Kishore Singh Kalyansingh 11, 26
- (1959) AIR 1959 SC 257 (V 46)= ILR 38 Pat 369, Maharaj Kumar Kamal Singh v. Commr. of Income Tax B. & O. 12
- (1958) AIR 1958 SC 795 (V 45)= 1958-34 ITR 275, A. N. Lakshman Shenoy v. Income Tax Officer 25, 29
- (1954) AIR 1954 SC 545 (V 41)= 1955-1 SCR 448, Suraj Mall Mohita & Co. v. A. V. Vishwanatha Sastri 16
- (1949) AIR 1949 Pat 418 (V 36)= 1949-17 ITR 286, Province of Bihar v. Khetro Mohan 26
- (1944) AIR 1944 Bom 153 (V 31)= ILR (1944) Bom 172, Income Tax Commr. Bombay v. Mangaldas Motilal & Co. 26
- (1938) AIR 1938 PC 175 (V 25)= ILR (1938) Bom 487, Income Tax Commr. v. Khemchand Ramdas 26
- A. S. Bobde, for Petitioner; S. V. Natu, for Respondent.
- PADHYE, J. :—** This petition concerns the tax liability of the petitioner during the assessment years 1951-52 to 1957-58 that is, Diwali ending 1950 to Diwali

ending 1956. During the said period, the petitioner was being assessed as a Joint Hindu Family Firm. With respect to the assessment years 1951-52, 1952-53 and 1953-54 the Income Tax officer made the assessment orders on 30th March 1956, 9th March 1957 and 7th March 1958 respectively. These orders were challenged by the assessee in appeal before the Appellate Assistant Commissioner of Income-tax and were disposed of by him by orders dated 20-10-1958, 23-10-1958 and 31-10-1958 respectively. Further appeals were taken by the petitioner before the Income-tax Appellate Tribunal, which decided all these three appeals by order dated 22-1-1960. All the three appeals were consolidated as they related to the same assessee and involved common contentions. Before the Tribunal, the Department had also filed appeals relating to the assessment years 1952-53 and 1953-54 and they were also disposed of by the same order.

2. One Ramnath son of Ramkrishna Agarwal of Kamptee was doing business of manufacture and sale of bidis. He died on 23rd of February 1948. On 10th of February 1948 he had executed a will disposing of the property and the business. In that will he made certain arrangement for his wife and also for his son-in-law and other relations of his. According to this arrangement made in the will, an amount of Rs. 6971/- each was paid to Chandabai and Madan Mohan Jaipuria, Rupees 3485/- to Pushkarraj Dharmashala, Rs. 3900/- to Chhugribai during the year 1951-52. These sums were disallowed by the Income-tax Officer as being merely an appropriation of income after it had accrued to the family. This was upheld by the Appellate Assistant Commissioner in appeal. The Appellate Asst. Commissioner seems to have taken the view that Ramnath was assessed in his lifetime in the status of Hindu Undivided Family and, therefore, he had no right to execute the will. The Income-Tax Officer further applied the proviso to Section 13 of the Income-tax Act, 1961. In the view he took, the manner of accounting was such that the income, profits and gains could not properly be deducted therefrom and the Income-tax Officer accordingly made an ad hoc addition to the income of the assessee. This decision of the Income-tax Officer was also confirmed. There were other objections taken before the Income-tax Officer, but we are concerned presently with these two points only as before the Appellate Tribunal these two grounds were put. It was argued before the Appellate Tribunal that the status of Ramnath was not fully appreciated by the Department. It was urged that Ramnath was an individual who could bequeath his property by the will. On the other hand, it was

contended on behalf of the Department that the status of Ramnath must be taken to be that of a Hindu Undivided Family as he was assessed as such during his lifetime and acquiesced in such assessment. As regards the applicability of the proviso to Section 13, the Appellate Tribunal seems to have taken the view that the production register was such as could be reasonably maintained by the producer for the control of his production and that it might be that there were defects in this register, but it was for the Income-tax Officer to find out and establish such defects so that adjustments could be made therefor. The Tribunal took the view that it was a case where the cumulative effect of the facts and the nature of accounts were not properly appreciated by the Income-tax Officer. In dealing with the nature of the account-books and the applicability of the proviso to Section 13, the Tribunal stated as under:

"From the above summary of the case it would be seen that the cumulative effect of the facts and the nature of accounts were not properly appreciated by the Income-tax Officer. Where the quantitative details are maintained there is a very good check on the account books which should not be lightly brushed aside. If there is any inherent defect in the maintenance of such day-to-day stock books by virtue of which they are proved to be worthless, only then should they be rejected altogether. If, on the other hand, quantitative tally is possible out of them, then the books should, by and large, be accepted; if there are defects in these quantitative day-to-day stock books or in the cash book, then such defects should be catalogued and an effort made to value (in terms of money) the effect of such defects which can then be added back to the income. In other words, in such a case the proviso to section 13 should not be applied by way of an application of a flat rate over the turnover but reasonable additions made in respect of specific defects noticed."

In this view, the Appellate Tribunal set aside the assessments and the Income-tax Officer was directed to make specific additions to the book profits in terms of the defects noticed after giving the assessee a proper opportunity to state and prove his case. Since the assessment orders were set aside by the Appellate Tribunal, the Tribunal also directed the Income-tax Officer to give an opportunity to the assessee to prove his case that Ramnath was an individual who was competent to execute the will which he did not subject to the verification of such claim it was directed that the payment (to the four persons aforementioned) be allowed. The operative part

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1970

Calcutta High Court

AIR 1970 CALCUTTA 1 (V 57 C 1)

A. N. RAY

AND S. K. MUKHERJEA, JJ.

Dr. Nanigopal Ghose, Appellant v.
State of West Bengal and others, Respondents.

A. F. O. O. No. 42 of 1966, D/- 6-12-1968.

Constitution of India, Arts. 311, 39, 41 and 47 — Applicability—Insurance Medical Officer under Employees' State Insurance Scheme — He is not an employee of State Government.

Section 58 of the Employees' State Insurance Act (1948) making provision of medical treatment is not to be equated with the power of appointing medical practitioners as employees of the State of West Bengal. This position is manifest from the Regulations made by the Corporation under S. 97 of the Act. R. 4 read with S. 58 and R. 8 puts the matter beyond any measure of doubt that a medical practitioner is one who has not only undertaken to provide services but is one who is approved by the Allocation Committee. The Allocation Committee is neither the State nor the Central Government but it is an independent Committee set up by the State Government to consist of various representatives. These terms of service indicate that a medical practitioner will make arrangements at his clinic for giving services to the insured persons. The medical practitioner employs his own staff, serves in his own clinic and the remuneration he is paid is what is described as the capitation fee, that is to say, fee per person for whom he renders services. (Para 21)

The removal of such a person is not removal from service but removal from medical list.

The State Government and the medical practitioner have reciprocal rights to have the name removed. The word 'appoint' has been used in R. 13 and again in R. 14, but that will not be decisive of the question for the obvious reason that the work which is done speaks of the undertaking given by a medical practitioner with regard to the treatment of persons. The position in such a case is one of contract for services and it is not an appointment by the State.

(Paras 22, 23)

Para. 6 of Sch. 3 to the Rules which relates to the limitation of Practitioners' list has no relevance to the method of doing the work nor has it any control over the work. (Para 24)

The remuneration which is payable to the insurance medical practitioner is paid not by the State Government or out of the fund of the State but is paid out of the contribution of the employers of the insured persons and of the Corporation. There is no doubt some amount of superintendence and control of the work of the medical practitioners under R. 6 of Sch. I of the West Bengal Employees' State Insurance Rules, 1955 but the Government does not seem to have any power to direct the doing of the work or power to direct the manner in which the work is to be done.

(Para 25)

Articles 39, 41 and 47 do not assist in any manner in establishing the case that the medical practitioner is a civil post under the Government. (Para 28)

The medical practitioner gives nothing more than a voluntary undertaking to offer services in lieu of fees for professional service rendered and the inclusion of names in the list and the preparation of the list does not have the effect of making the medical practitioner an employee of the State: Case law Ref.

(Para 29)

Cases Referred:	Chronological Paras
(1967) AIR 1967 SC 884 (V 54)=	
(1967) 1 SCR 679, State of Assam v Kanak Chandra Dutta	12, 17
(1965) AIR 1965 SC 360 (V 52)=	
(1964) 7 SCR 89, State of Uttar Pradesh v. Audh Narain Singh	12, 16
(1963) AIR 1963 Cal 421 (V 50)=	
(1963) 2 Lab LJ 569, M. Verghese v Union of India	25
(1962) AIR 1962 Cal 420 (V 49)=	
66 Cal WN 931, Ena Ghosh v. State of West Bengal	12, 19
(1961) AIR 1961 SC 564 (V 48)=	
(1961) 1 SCJ 310, Gazula Dasaratha Rama Rao v. State of Andhra Pradesh	12, 15
(1959) AIR 1959 SC 589 (V 46)=	
(1959) Supp (1) SCR 952, K C. Deo Bhanj v. Raghunath Misra	27
(1958) AIR 1958 SC 52 (V 45)=	
1958 SCA 279, Abdul Shakur v. Rikhab Chand	12, 14
(1957) AIR 1957 SC 264 (V 44) =	
1957 SCA 216, Dharangadhra Chemical Works Ltd. v. State of Saurashtra	12, 13
(1955) AIR 1955 Cal 556 (V 32)=	
59 Cal WN 628, Brojo Gopal Sarkar v. Commr of Police	12, 18
(1953) 1953-1 All ER 226 = 1953-1 WLR 187, Pauley v. Kenaldo	26
(1952) AIR 1952 Ori 42 (V 39), Lokanath Misra v. State of Orissa	28
(1951) 1951-1 KB 731=1951-1 All ER 368, Gould v. Minister of National Insurance	23, 26
(1946) 174 LT 417=115 LJ PC 41, Short v. J. and W. Henderson Ltd.	20, 23

Nirmal Ch Sen and K. Mukherjee, for Appellant; Advocate General with Jr. Standing Counsel Rathindra Nath Das, for Respondents.

RAY, J: This appeal is from the judgment and order of Mitter, J. dated 27 July and 24 August 1965 discharging the Rule obtained by the appellant.

2. The appellant obtained the Rules requiring the respondent to show cause as to why a writ of Mandamus should not go to recall, rescind and withdraw the order dated 9 October, 1963 and why a writ of Certiorari should not be issued quashing the order dated 9 October, 1963.

3. The appellant's case in short is that the appellant was appointed an insurance medical practitioner under the State of West Bengal by virtue of provisions contained in Employees' State Insurance Act, 1948. The appellant further contended that it was a permanent post under the State Government. On 9 October 1963 a letter was written by the Deputy Secretary to the Government of West Bengal addressed to the appellant that "in exercise of the powers conferr-

ed by sub-clause (1) of Clause 11 of Schedule I to the West Bengal Employees' State Insurance (Medical Benefit) Rules, 1965, the Governor has been pleased to direct that the services of Dr. N. G. Ghose under the Employees' State Insurance Scheme, West Bengal, will not be required by the Government after the expiry of three months from the date of receipt of the order by the Insurance Medical practitioner concerned."

4. The appellant impeached the order dated 9 October, 1963 to be first, a violation of the provisions contained in Article 311 of the Constitution and secondly, that the termination of service was in infraction of Rules 21 to 25 contained in the West Bengal Employees' State Insurance Medical Benefit Rules. The second ground was allowed to be added pursuant to an application of the appellant dated 27 May, 1964 to be found at page 106 of the paper book. The second contention was based on the allegations that in the month of May, 1963 some complaint was made by an insured person and the termination of service was on the ground of misconduct or negligence because of those complaints and therefore, Rules 21 to 25 should have been followed.

5. The learned Judge was pleased to arrive at two conclusions. First, on an analysis of the Act and the Rules the appellant was not in the employment of the State Government and was not holding a post under the State Government. Secondly Art. 311 of the Constitution was not applicable.

6. The contentions on behalf of the appellant with regard to the appellant holding a civil post were based on sections 3, 4, 21, 57, 58, 92, 95 and 96 of the Employees' State Insurance Act, 1948 and Rules 4, 8 and 9 of the West Bengal Employees' State Insurance Rules and paragraphs 7 and 11 of the first schedule to the Rules and paragraph 6 of Schedule 3 to the Rules. It is not out of place to mention here that the Employees' State Insurance Act contemplated in sections 95, 96 and 97 Rule making power. Section 95 conferred power on the Central Government to make Rules. Section 96 conferred power on the State Government to make Rules. Section 97 conferred power on the Corporation to make regulations. The Corporation is called the Employees' State Insurance Corporation and section 3 of the Employees' State Insurance Act, 1948 hereinafter referred to as the said Act enacted the establishment of the Corporation and further enacted that the Corporation shall be a body corporate known by the name of Employees' State Insurance Corporation having perpetual succession and a common seal and shall by the said name sue and be sued. The constituents

of the Corporation are nominees of the Central Government, representatives of the State Government and other representatives to be nominated by the Central Government or the State Government and the Director General of the Corporation is the ex-officio member of the Corporation.

7. The appellant became an Insurance Medical Practitioner. The system of insurance medical practitioners is to be found in the Rules made by the State Government under section 96 of the said Act. The Rules are in several parts. Part I is general, part II relates to provisions relating to medical benefits, part III relates to disputes and appeals and part IV contains miscellaneous provisions. The three Schedules to the Rules are as follows:— The first schedule contains terms of service for insurance medical practitioners, the second schedule contains the prescribed form of application for inclusion in medical list and the third schedule refers to what is known as the allocation scheme.

8. It will appear from the Rules that the medical benefit that is contemplated is that the State Government shall arrange to provide general medical services to insured persons at clinics of medical practitioners. The terms of service of the medical practitioners shall include the provisions contained in the first schedule of the Rules. The Allocation Committee which is contemplated in the Rules is a committee to be set up by the State Government consisting of not more than two persons appointed on the recommendation of the Director of Health Services, West Bengal and certain other representatives. It will appear in Rule 7 sub-r. (6) that the Allocation Committee shall discharge the duties and responsibilities placed on it by these rules or by the State Government in accordance with the allocation scheme in Schedule III. The Rules contemplate a medical list containing the names of medical practitioners who have undertaken to provide general medical services under these Rules and in accordance with the terms of service and who have been approved by the Allocation Committee. The Rules further contemplate a practitioners' list and provision of temporary arrangements and alternative arrangements. Rules in part III which relate to investigation and disposal of appeal contemplate investigation of disputes by the medical service committee. The procedure of the committee is regulated there and the Rules also contemplate action on behalf of the medical Committee.

9. The first schedule which deals with medical practitioners generally relates to the persons for whose treatment the medical practitioner is responsible, right

of the medical practitioners to have a patient removed from the list, the range of service and duties of medical practitioners, arrangements for their practice, removal and withdrawal of names from medical list, casual absence of an insurance medical practitioner, remuneration of insurance medical practitioner. The allocation scheme in schedule III refers to the clinics of the practitioner, assignment of persons to practitioners and limitations of practitioners list namely the number of persons who will be within the list of the medical practitioners.

10. The two sections which are relied on in support of the contention that the appointment is by the State Government are 58 and 96 of the Act. Section 58 inter alia states that the State Government shall provide for insured persons and (where such benefit is extended to their families) their families in the State, reasonable medical, surgical and obstetric treatment. Section 96 which speaks of rule-making power refers to the power of the State Government to make rules and it is contended on the strength of the said rules under section 96 that in particular Rules 8, 9 and 14 have the effect of making a medical practitioner an employee of the State Government. Rule 4 states that an insurance medical practitioner shall be deemed to be appointed as an insurance medical officer for the purposes of the Employees' State Insurance (General) Regulations. Rule 4 also states the State Government shall arrange to provide general medical services to insured persons at clinics of medical practitioners. It is contended that since the State Government is to provide general medical services as will appear from section 58 and Rule 4 the persons who are appointed as medical practitioners are employees of the State Government. Rules 8 and 9 on which Counsel for the appellant relied relate to the medical list. Both the Rules which refer to the medical list speak of an application by a medical practitioner for inclusion in the medical list and further enact that the Director of Health Services West Bengal, shall prepare a list to be called the Medical List of Insurance Medical practitioners who have undertaken to provide general medical services under the rules and in accordance with the terms of service and who have been approved by the Allocation Committee. Rules 8 and 9 were said by Counsel for the appellant to be the method of appointment. Rule 14 which was also relied on by Counsel for the appellant relates to practitioners' list and the Director of Health Services West Bengal prepares and maintains an up-to-date list of insured persons for whose treatment each insurance medical practitioner is for the time being responsible and any deletion,

otherwise than by reason of death, shall take effect as from the date on which the notice of deletion is sent by the Director of Health Services.

11. The other provision on which Counsel for the appellant relied namely, schedule I to the Rules states in Rule 11 that the State Government may have the name of the insurance medical practitioner removed from the medical list within a period of less than three months. Rule 16 of the first schedule was also relied on by Counsel for the appellant to contend that the rate of payment of remuneration of insurance medical practitioners was to be fixed by the State Government and therefore, it was said that there was an appointment under the State Government.

12. In short, it was said that the appointment was by the State Government, payment was by the State Government, termination was by the State Government and there was control by the State Government over the services of the medical practitioners. These four tests which were said by Counsel for the appellant to be indicia for determining whether there was an appointment by the State Government or not are extracted from various decisions of the Supreme Court as also of this Court on which Counsel for the appellant relied. The decisions of the Supreme Court are the cases of Dharangadhra Chemical Works Ltd. v. State of Saurashtra, reported in AIR 1957 SC 264, Abdul Shakur v. Rikhab Chand, reported in AIR 1958 SC 52, Gazula Dasaratha Rama Rao v. State of Andhra Pradesh, reported in AIR 1961 SC 564, State of Uttar Pradesh v. Audh Narain Singh, reported in AIR 1965 SC 360 and the case of the State of Assam v. Kanak Chandra Dutta, reported in AIR 1967 SC 884. The decisions of this Court on which Counsel for the appellant relied are Brojo Gopal Sarkar's case, reported in 59 Cal WN 628 (also reported in AIR 1955 Cal 556) and the case of Ena Ghosh v. State of West Bengal, reported in 66 Cal WN 931 : (AIR 1962 Cal 420).

13. In Dharangadhra Chemical Works Ltd. case, 1957 SCA 216 = AIR 1957 SC 264, a question for consideration was whether certain persons working in the salt works were workmen within the meaning of the word workmen in the Industrial Disputes Act. The Supreme Court referred to the statement of law in Halsbury's Laws of England that determination of the relation of master and servant was a question of fact and in all cases the relation imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done. The Supreme Court further said in that case that the nature

or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition. It follows therefore that there should be control and supervision by the employer in relation to the work.

14. The decision in Abdul Shakur's case, (1958 SCA 279 = AIR 1958 SC 52) was on the question whether the office of manager of the Madras Durgah Khwaja was an office of profit of Government of India. The Supreme Court reiterated that the committee of the Durgah was a body acting within the four corners of the Act and merely because the members of the Committee were removable by the Government of India it could not be said that they were holders of office of profit. The appointment in that case was said not to come within the test of appointment by the Government of India; and it was found that the appellant there was neither appointed by the Government nor was he paid out of the revenue of the Government.

15. In Gazula Dasaratha Rama Rao's case, AIR 1961 SC 564 the Supreme Court considered whether the office of Village Munsif under the Madras State was an office under the State. At page 569 of the report the Supreme Court said that the provisions showed that the office was an office under the State because the appointment was made by the Collector, the emoluments were paid by the State and the Collector had disciplinary powers including the power to remove, suspend or dismiss and that the office was not a private office under a private employer but was one under the State.

16. In Audh Narain Singh's case, AIR 1965 SC 360 the Supreme Court considered the position of the Tahsildars in cash department of the Government Treasury. The Supreme Court reiterated the proposition that the existence of the relationship of master and servant was a question of fact which must be determined on a consideration of all material and relevant circumstances coupled with the payment of remuneration or the right to control the method of work and power to suspend and removal and the co-existence of all the factors could not be predicated to make the relation one of master and servant. In that case the Tahsildars were found to perform the duties of cashier, the payment was made by the Government Treasury and it was made for the purpose of public duties and the remuneration was paid by the State directly.

17. In Kanak Chandra Dutta's case, AIR 1967 SC 884 the Supreme Court considered the question whether a Mauzadar in the State of Assam held a civil

post. The civil post is distinguished from a post connected with defence and the Supreme Court said that a post was a service or employment and a relation of master and servant might be established by the indicia of selection, appointment, suspension, dismissal, control over the manner and method of doing the work and payment of remuneration.

18. The decision of this Court on which Counsel for the appellant relied is the case of *Brojo Gopal Sarkar v. Commissioner of Police*, reported in 59 Cal WN 628 (also in AIR 1955 Cal 556). The question for consideration there was the status of a Special Constable. It was said that mere fact that the holder of an office under the Government does not get any remuneration, does not make him any the less a holder of a 'Civil Post' under the Government and Counsel for the appellant relied on that decision. It was found there that the removal or dismissal of a special Constable would have the effect on the character of that person and that the discharge of such a Constable was held to be an infraction of Article 311 of the Constitution.

19. The other decision on which Counsel for the appellant relied is the case of *Ena Ghosh*, 66 Cal WN 931 (AIR 1962 Cal 420) which dealt with the question of termination of the services of the petitioner there who was a Vice-principal of a Government Sponsored College. It was said there that no governmental functions were discharged by the Vice Principal and the Government did not exercise control over day to day administration.

20. The four tests which have been applied to these cases were stated by Lord Thankerton in the case of *Short v. J. and W. Henderson, Limited*, reported in (1946) 174 L T 417. These four tests are:— (a) the master's power of selection of his servant, (b) the payment of wages or other remuneration, (c) the master's right to control the method of doing the work, and (d) the master's right of suspension or dismissal. Lord Thankerton referred to the observation of Lord Justice Clerk in the judgment under appeal in that case that a contract of service may still exist if some of these elements are absent altogether, or present only in an unusual form, and that the principal requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, and that this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship.

21. In the present case section 58 of the Act enacts that the Government shall provide for insured persons reasonable

medical, surgical and obstetric treatment. Such provision cannot be said to be synonymous with appointment of medical practitioners as employees of the State. The Proviso to section 58 sub-sec. (1) makes it clear that the State Government may with the approval of the Corporation arrange for medical treatment clinics of medical practitioners on such scale and subject to such terms and conditions as may be agreed upon. In other words, the State Government with the approval of the Corporation may arrange for medical treatment. The arrangement of medical treatment is not to be equated with the power of appointing medical practitioners as employees of the State of West Bengal. This position is manifest from the Regulations made by the Corporation under sec. 97 of the Act. Regulation no. 2 (n) defines 'Insurance Medical Officer' meaning a medical practitioner appointed as such to provide medical benefit and to perform such other functions as may be assigned to him and shall be deemed to be a duly appointed medical practitioner for the purposes of Chapter V of the Act. Chapter V of the Act of 1948 deals with benefits in relation to medical services. Chapter V contains sections 46 to 59A. Counsel for the appellant relied on the provisions contained in section 59-A under the heading 'benefits' to contend that the provisions of medical benefit by the Corporation in lieu of the State Government suggested that employees would be under the State. This contention is not supported either by the Act or by the Rules. Rule 4 read with sec. 58 indicates that a medical practitioner is one who has undertaken to provide general medical services under the Rules and who has also agreed in accordance with the terms of service to act as medical practitioner. Again Rule 8 puts the matter beyond any measure of doubt that a medical practitioner is one who has not only undertaken to provide services but is one who is approved by the Allocation Committee. The Allocation Committee is neither the State nor the Central Government but it is an independent committee set up by the State Government to consist of various representatives. The Allocation Committee is a part of the Corporation. The Corporation is a body-corporate and is not the same as the State Government. The prescribed application form for inclusion in medical list indicates that a candidate for inclusion in the medical list agrees to abide by the terms of service if included in the medical list. These terms of service indicate that a medical practitioner will make arrangements at his clinic for giving services to the insured persons. The medical practitioner employs his own staff, serves in his own

clinic and the remuneration he is paid is what is described as the capitation fee, that is to say, fee per person for whom he renders services.

22. As regards appointment of medical practitioner the provisions of the Act and in particular section 58 and Rules 4, 8, 9, 15, 16 and Regulation no. 2 and Regulation 3 (2) indicate that a medical practitioner is included in the medical list on his application to undertake to provide general medical services under the Rules and in accordance with the terms of service when he is approved by the Allocation Committee. The removal of such a person is not removal from service but removal from medical list. Paragraph 11 in the first schedule to the Rules enacts that the State Government may have the name of any individual medical practitioner removed from the medical list after giving due notice of not less than three months to the insurance medical practitioner, except in case of gross negligence and misconduct when the period of notice need be only one month. Similarly, an insurance medical practitioner at any time may cease to be insurance medical practitioner by giving notice of 3 months or in some cases a shorter notice. These provisions indicate that the State Government and the medical practitioner have reciprocal rights to have the name removed. The services rendered by the medical practitioner are as a result of the undertaking that he himself gives in his application form and he has the right to withdraw his name on giving notice. The temporary arrangements as will appear from Rule 13 are that the State Government may appoint one or more medical practitioner or practitioners to undertake the treatment of insured persons. The word 'appoint' has been used in Rule 13 and again in Rule 14 and Counsel for the appellant emphasised on the user of the word 'appoint' but that in my opinion, will not be decisive of the question for the obvious reason that the work which is done speaks of the undertaking given by a medical practitioner with regard to the treatment of persons.

23. Mr. Advocate General, in my opinion, rightly contended that the medical practitioners were really undertaking and offering services and if the undertaking was treated as a contract between the medical practitioner and the persons in charge of preparation of medical list, namely, the State or the Corporation it was a mere contract for services and not a contract of services. This proposition was extracted from the decision in *Gould v. Minister of National Insurance*, reported in (1951) 1 K. B. 731 and also in (1951) 1 All E. R. 368. That case was on the construction of the provisions of the National Insurance Act, 1946 and the

question was whether the appellant in that case who was a music-hall artist and who had entered into a written contract with the second respondent acting on behalf of several companies, under which he undertook to appear in a variety "act" at a theatre for one week from September 6, 1948 was an employed person within the meaning of the Act. The first respondent, the Minister of National Insurance, had decided that during that week the appellant was not an "employed person" within the meaning of the Act. It was held that the question would turn on the particular facts of each case and the authority of cases based on different statutes would not always be of assistance. It was said that it would be easy in some cases to say that the contract was a contract of service and in others that it was a contract for services, but between these two extremes there was a large number of cases where the line was much more difficult to draw. In *Gould's* case it was said with reference to the observations of Lord Thankerton in the case of (1946) 174 LT 417 to which I have already referred and is particular the test of master's right to control the method of doing the work that there was nothing in the contract which imposed on the appellant any control over the method in which he performed his act. It was said in the case of *Gould*, (1951) 1951-1 KB 731 : 1951-1 All ER 368 that the management had the right to prohibit any part of the performance which they thought might offend the audience, and that the right was reserved to require the appellant to produce a new song or sing on old one, and so on, but the performing of the act depended entirely on the skill, the personality and the artistry of the appellant, and this was a matter with which the contract gave the management no right to interfere. In the present case the undertaking that the appellant medical practitioner gave was for treatment of the insured persons and that undertaking was making an offer to give services of medical treatment to the insured persons. It was, therefore, rightly said by Mr. Advocate General that the position in the present case is one of contract for services and it was not an appointment by the State of West Bengal.

24. With regard to the method of doing the work it was said by Counsel for the appellant that there was some restriction on the work to be done by the medical practitioner and reference was made to paragraph 6 of schedule 3 to the Rules which relates to the limitation of practitioners' list. That limitation, in my opinion, has no relevance to the method of doing the work nor has it any control over the work.

25. The question of removal which was said by Counsel for the appellant to be within the province of the State was a matter within the reciprocal rights of the medical practitioner and of the State or the Corporation. The remuneration which was payable to the insurance medical practitioner was paid not by the State Government or out of the fund of the State but was paid out of the contribution of the employers of the insured persons and of the Corporation. In this connection reference may be made to two sections to which the learned Judge also referred. They are section 3 which enacts that the Corporation shall be a body-corporate and section 26 which says that all contributions paid under this Act and all other monies received on behalf of the Corporation shall be paid into a fund called Employees' State Insurance Fund which shall be held and administered by the Corporation for the purposes of this Act. The learned Judge in dealing with the contention of the appellant said that the fund out of which the medical practitioner received his remuneration was a fund belonging not to the Government but to the Corporation. There was no doubt some amount of superintendence and control of the work of the medical practitioners under Rule 6 of Schedule I of the West Bengal Employees' State Insurance Rules, 1955 but the Government did not seem to have any power to direct the doing of the work or power to direct the manner in which the work is to be done. It will also appear from section 28 in the Act of 1948 that the purposes for which the fund might be spent were inter alia on account of payment of fees and allowances to members of the corporation and the payment of salaries, leave and joining allowances and also the payment to the medical practitioners in connection with the provision of medical treatment and attendance of insured persons. Therefore these provisions indicate beyond any measure of doubt that the fund is not of the State and the expenses are made out of a fund which does not vest in the State.

26. Mr. Advocate General also relied on the decision in Pauley's case, reported in 1953 (1) All E. R. 226 in support of the proposition that a contract of service was distinct from a contract for service and the observations in 1951-1 KB 731 = 1951-1 All ER 368 were referred to in Pauley's case.

27. Mr. Advocate General rightly relied on the decision of the Supreme Court in the Gram Panchayat case, reported in AIR 1959 SC 589 and the observation at page 595 of the report in support of the contention that the services rendered by the medical practitioner in the present case in the scheme were not exercise of

functions in the service of the State or the Government.

28. It was contended by Counsel for the appellant that the directive principles adumbrated in Articles 39, 41 and 47 of the Constitution contemplated that the Government had to make contribution towards securing health and education of workers and further that the State was to make an effective provision for, securing the public assistance in case of old age, sickness and disablement and the State was under the duty to raise the level of nutrition and standard of living. In the context of the directive principles the Act was contended to be an expression of the directive principles in the Constitution and as a pattern of one of the forms and norms of multifarious activities of the Government in a welfare State. But these Articles in my opinion do not assist the appellant in any manner whatever in establishing the case that the medical practitioner is a civil post under the Government. A contention was advanced relying on the decision in the case of Lokanath Misra v State of Orissa, reported in AIR 1952 Ori 42 where it was said that the functions of the Government were to be considered in the light of the principles of welfare State in finding out whether the nature of control exercised by the Government authorities was constitutional or not. I am unable to see that this decision can give any support to the appellant's case.

29. It was also contended by Counsel for the appellant relying on the decision of M. Verghese v. Union of India reported in AIR 1963 Cal 421 that the welfare State in setting up the system of medical practitioners was exercising governmental function. In the case of Verghese the question arose as to whether a person who was in the employment of Durgapur Steel Project came within the provisions of Art. 311 of the Constitution. A corporation set up under the statute has its own authority as embodied in the statute and one cannot go beyond the four corners of the Statute. In the present case the statute and the Rules contemplate a system of making a panel of medical practitioners for giving services to the insured persons. These medical practitioners apply themselves for inclusion in the medical list. Their payment is not out of the government revenue but out of a special fund consisting of contribution made by the employers. Therefore such a fund over which the government has no legal title and which is vested in the corporation under the combined effect of sections 3 and 26 of the Act to which I have already referred indicates beyond any doubt that the remuneration of medical practitioners is paid not out of the public exchequer. The conten-

tion of Mr. Advocate General is correct that medical practitioner in the present case gave nothing more than a voluntary undertaking to offer services in lieu of fees for professional service rendered and the inclusion of names in the list and the preparation of the list did not have the effect of making the medical practitioner an employee of the State.

30. The second contention which was advanced in the present case is not discussed in the judgment of the trial court. The contention was based on paragraph 14 in schedule I to the Rules which states that the terms of service relating to the matters mentioned in paragraph 1 of the Schedule to the Rules attract rules 21 to 25. Paragraph 14 states that rules 21 to 25 will apply first in matters of investigation between insurance medical practitioners and their patients and other investigations to be made by the Medical Service Committee and the action which may be taken by the Director of Health Services West Bengal, as the result of such including the withholding of remuneration from the insurance medical practitioner where there has been a breach of the terms of service and secondly in investigation in respect of prescribing treatment, thirdly in investigation of certification and finally in investigation of record-keeping. Rules 21 to 25 contemplate provision for setting up of a Medical Service Committee and investigation by Medical Service Committee of any question between insurance medical practitioners and the persons who claim to be entitled to treatment from that practitioner in respect of treatment rendered by the medical practitioner or alleged failure to render treatment. The Committee gives a hearing and thereafter there is a report and the rules contemplate action on the report. Counsel for the appellant contended that after complaints had been made by Karuna there should have been an investigation. The authorities have not proceeded on the basis of any investigation as contemplated in these rules. Paragraph 11 in the first schedule which speaks of removal from medical list is a provision independent of any investigation as contemplated in the rules. It may be that it was open to the authorities to make an investigation but Mr. Advocate General was right in his contention that if there was any investigation by the Medical Service Committee the appellant would have been given opportunities in that behalf. In view of the fact that there was no such investigation by the Medical Service Committee the rules have no application in the present case. The removal of the name in the present case was by virtue of paragraph 11 of the first schedule and such a removal of name from the list does not contemplate giving any reason.

As I have already indicated, it is open to the medical practitioner as also to the State Government, to have the names removed by giving notice as contemplated in paragraph 11. Paragraph 11 also contemplates that in the case of gross negligence and misconduct there will be one month's notice and it is further said in the said paragraph that if there is any representation that the inclusion of a practitioner would be prejudicial to the efficiency of State Insurance Scheme then he shall not, except with the consent of the corporation and subject to such condition as the corporation may propose, be entitled to have his name removed from the list pending the termination of the proceedings on such representations. In the present case there was neither any allegation of gross negligence or misconduct which occasioned the removal nor was there any case which made the inclusion of the name of the practitioner prejudicial to the efficiency of State Insurance Scheme.

31. Both the contentions of the appellant fail. The Judgment is affirmed. The appeal is dismissed for the reasons given above. Each party will pay and bear its own costs.

32. S. K. MUKHERJEA, J.: I agree.
Appeal dismissed.

AIR 1970 CALCUTTA 8 (V 57 C 2)

A. N. RAY

AND S. K. MUKHERJEA, JJ.

Seth Nanak Chand Shadiram Appellant v. Amin Chand Pyarilal, Respondent.

A. F. O. D. No. 132 of 1967, D/- 4-6-1968, in Suit No. 821 of 1960 by A. K. Mukherjea J., D/- 7-2-1968.

(A) Civil P. C. (1908), Ss. 105, 11 and O. 6, R. 17 — Interlocutory orders — Correctness of, could be challenged in an appeal against the whole cause.

Though an appeal could have been taken from the order refusing the application for amendment on the ground of limitation, yet the question could be agitated in appeal from the decree inasmuch as the order affects the decision from which an appeal has been preferred. It is the duty of the court to correct erroneous interlocutory orders though not brought under their consideration until the whole cause had been decided and brought by appeal for adjudication. AIR 1960 SC 941 and (1859) 7 Moo Ind App 283, foll.

(Paras 11 and 12)

(B) Civil P. C. (1908), O. 6, R. 17 — Amendments in elucidation or amplification of plaint averments allowable. Original Decree in Suit No. 821 of 1960 D-

CM/GM/B21/69/TVN/D

7-2-1966 by A. K. Mukherjea J. reversed.

The plaintiff's claim arose out of a written contract dated 5-1-1956 whereby the defendant sold and/or delivered to the plaintiff certain quantities of steel rails at rates mentioned in the plaint and delivery was immediate. The plaintiff alleged that the defendant was unable to effect delivery in terms of the contract and that pursuant to the defendant's request time for delivery was extended. In the proposed amendment the plaintiff alleged that time for delivery was extended till a reasonable time after 24th July 1957 which was a period of three weeks from 24th July that is to say, 16th August 1957 in the facts and circumstances of the case. In paragraph 20 (a) of the plaint the proposed amendment was that the defendant by letter dated 24 July 1957 acknowledged its liability to deliver the balance quantity of goods and also acknowledged that time for delivery and/or performance had not expired. The other proposed amendments sought for were in paragraphs 9, 12 and 20 of the plaint. As far as the amendment sought for in para 20 (a) of the plaint was concerned, the defendant had denied having written any such letter and the plaintiff too had not even produced a copy thereof.

Held, that as regards the amendment based on the alleged letter dated 24-7-57 from the defendant was concerned, the plaintiff had not established the claim and the amendment in that regard ought not to be allowed. But, as far as the proposed amendments in other parts of the plaint were concerned they were with a view to perfect the plaintiff's claim of extension which had already been pleaded and all that the plaintiff was doing was to give the relevant dates upto which there was extension. Hence those amendments having no reference to the above letter should be allowed. They were merely averments in elucidation or amplification of the plaint allegations. Original Decree in suit No. 821 of 1960 D/- 7-2-1966 (Cal) by Mukherjea, J. Reversed. AIR 1957 SC 357 and AIR 1957 SC 363, Rel. on. (Paras 13, 18 and 19)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 96 (V 54) =
 (1966) 1 SCR 796, A. K. Gupta
 & Sons v. Damodar Valley Corporation 15
 (1960) AIR 1960 SC 941 (V 47) =
 1963 SCR 590, Satyadhyam Ghosal
 v. Smt. Deorajin Debi 11
 (1957) AIR 1957 SC 357 (V 44) =
 1957 SCR 438, Leach and Co. v.
 Jardine Skinner and Co. 15, 16
 (1957) AIR 1957 SC 363 (V 44) =
 1957 SCR 595, Pirgonda Hon-
 gonda Patil v. Kalgonda Shid-
 gonda Patil 15, 17

(1359) 7 Moo Ind App 283=3 WR
 PC 45, Maharajah Moheshur
 Singh v. Bengal Govt. 11

RAY, J.: This appeal is from the decree dated 7 February 1966 passed by A. K. Mukherjea J.

2. The plaintiff is the appellant.

3. On 7 February 1966 the suit was dismissed with costs.

4. The suit was filed on 8 June 1960. The plaintiff asked for a decree for Rs. 2,74,178-12-3.

5. On 29 July 1965 a summons was taken out by the plaintiff for amendment of the plaint. The application for amendment was heard by S. P. Mitra J. on 21 September 1965 and the application was dismissed. There is no judgment to find out the reasons for dismissal of the application. It was contended that amendments should have been allowed.

6. In the application for amendment the plaintiff alleged that the defendant by letter dated 24 July 1957 written and signed by the defendant and/or its agents duly authorised in that behalf duly acknowledged its liability to deliver the balance quantity of the goods under the contract and also acknowledged that the time for delivery and/or performance had not expired. In the subsequent paragraph the plaintiff alleged that the plaint should be amended in the manner as indicated in red ink in a copy of the plaint annexed thereto and that the proposed amendments were by way of elucidation of the allegations and further that by mistake and/or through inadvertence the petitioner failed to incorporate the elucidation and/or particulars in the original plaint.

7. The plaintiff's claim arose out of a contract in writing dated 5 January 1956 whereby the defendant sold and/or delivered to the plaintiff certain quantities of steel rails at rates mentioned in the plaint and delivery was immediate. The plaintiff alleged that the defendant was unable to effect delivery in terms of the contract and that pursuant to the defendant's request time for delivery was extended.

8. In the proposed amendment the plaintiff alleged that time for delivery was extended till a reasonable time after 24 July 1957 which was a period of three weeks from 24 July that is to say, 16 August 1957 in the facts and circumstances of the case. In paragraph 20 (a) of the plaint the proposed amendment was that the defendant by letter dated 24 July 1957 acknowledged its liability to deliver the balance quantity of goods and also acknowledged that time for delivery and/or performance had not expired. The other proposed amendments sought for

are in paragraphs 9, 12 and 20 of the plaint.

9. At the trial it appears from the judgment, counsel appearing for the plaintiff stated that on the basis of the plaint the claim was time barred and counsel further invited the attention of the court to the fact that the plaintiff had sought to amend the plaint by pleading acknowledgment but the application for amendment was dismissed and in view of these facts counsel conceded that he could not proceed with the suit as on the face of the plaint the suit ought to be dismissed for limitation.

10. Counsel for the respondent contended that the dismissal of the application for amendment left the plaint in a form that disclosed no cause of action and that it was barred by limitation. Counsel for the respondent emphasized on the statement of counsel before the court on 7 February 1966 that counsel could not proceed with the suit by reason of the dismissal of the application for amendment and contended that all that happened at the trial on 7 February 1966 was that the plaintiff did not proceed with the suit and there was no decision or adjudication of the suit. On that reasoning counsel for the respondent contended that the appellant really appealed against the order of dismissal of the application for amendment but that the trial on 7 February 1966 was not a decision or adjudication on the question of limitation of the claim in the suit.

11. The recent decision of the Supreme Court in *Satyadhyan Ghosal v. Smt. Deorajin Debi*, 1963 SCR 590 = AIR 1960 SC 941 considered the scope and meaning of section 105 of the Code of Civil Procedure. The Supreme Court said that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken, could be challenged in an appeal from the final decree or order. This decision is an authority for the proposition that though an appeal could have been taken from the order refusing the application for amendment on the ground of limitation yet the question could be agitated in appeal from the decree inasmuch as the order affects the decision from which an appeal has been preferred. The Supreme Court referred to the decision of the Judicial Committee in *Maharajah Moheshur Singh v. Bengal Government*, (1859) 7 Moo Ind App 283 where the Judicial Committee said that it would be the duty of the court to correct erroneous interlocutory orders though not brought under their consideration until the whole cause had been decided and brought by appeal for adjudication.

12. I am therefore of opinion that it is open to the appellants to contend that

the amendment should have been allowed.

13. With regard to the proposed amendments I shall deal first with the proposed amendments in paragraph 20 (a) of the plaint. That part of the amendment is dealt with in paragraph 21 of the petition verified by an affidavit of the plaintiff affirmed on 29 July 1965 appearing at pages 23 to 30 of the paper-book. In paragraph 21 of that petition the plaintiff alleged about the letter dated 24 July 1957 in support of the proposed amendments. The defendant in the affidavit of Swaraj Paul affirmed on 16 August 1965 at pages 40 to 48 of the paper-book denied in paragraph 20 that any letter dated 24 July 1957 was written by or on behalf of the defendant as alleged or at all. The deponent further alleged that no letter alleged to be dated 24 July 1957 had been disclosed by the plaintiff in the affidavit of documents and further that no such alleged letter had been relied on by the plaintiff at any earlier stage. The deponent further denied and disputed the genuineness of the alleged letter dated 24 July 1957. The plaintiff dealt with the defendant's allegations in an affidavit affirmed by Devendra Kumar Somani on 24 August 1965 which will appear at pages 49 to 54 of the paper-book. The deponent Devendra Kumar Somani in paragraph 20 of the affidavit denied that the letter which was dated 24 July 1957 was an alleged one and stated that it was a genuine letter. It is significant that the letter dated 24 July 1957 was not annexed to the petition and even when the defendant denied the existence of the letter no copy of the letter was annexed to the affidavit and the original was not produced at the hearing of the application. Counsel for the respondent, in my view, rightly contended that the application for amendment was not a matter of right but the petitioner had to allege facts. One of the grounds taken in the appeal is that the learned judge should have held that the application for amendment was made bona fide. Counsel for the respondent rightly contended that the proposed amendment with regard to the acknowledgement of liability by the alleged letter dated 24 July 1957 suffers not only from the vice of mala fide but also from the infirmity of suppressing the same from the court. The plaintiff failed to establish the claim for amendment based on the letter dated 24 July 1957. In my opinion the learned judge correctly disallowed the proposed amendment with regard to paragraph 20 (a) of the plaint.

14. Counsel for the appellant contended that the proposed amendment with regard to extension of time was really perfecting the plaintiff's claim in view of

the fact that extension had already been pleaded and all that the plaintiff did was to give the relevant dates up to which there was extension. Counsel for the respondent submitted on the other hand that the plaintiff pleaded in the plaint that the reasonable time till which the plaintiff waited was 6 July 1957 and that the plaintiff was now making an inconsistent or a new case by pleading the alleged extension up to 15 August 1957.

15. Counsel for the appellant relied on the recent decision of the Supreme Court in the case of A. K. Gupta and Sons Ltd. v. Damodar Valley Corporation, AIR 1967 SC 96 as also the earlier decision of the Supreme Court in the case of Leach and Co. v. Jardine Skinner and Co. 1957 SCR 438 : (AIR 1957 SC 357) and another decision of the Supreme Court in Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil. 1957 SCR 595 : (AIR 1957 SC 363) in support of the proposition that the plaintiff was not making a new case but that the plaintiff was merely perfecting the cause of action. The Supreme Court in the Damodar Valley Corporation case, AIR 1967 SC 96 observed that the expression 'cause of action' could mean a new claim made on a new basis constituted by new facts. In the Damodar Valley Corporation case, AIR 1967 SC 96 the plaintiff asked for recovery of certain moneys for different categories of work. The only dispute between the parties was whether the plaintiff was entitled to the whole amount of increase in accordance with the provisions of the contract or not. At the trial a question arose as to whether the suit was maintainable in view of section 42 of the Specific Relief Act because the plaintiff claimed a declaration that on a proper interpretation of the clause in the contract the plaintiff was entitled to enhancement of 20% over the tendered rates. The plaintiff after the decision of the High Court at Patna sought leave to amend the plaint by adding an extra relief asking for a decree for Rs. 65,000/-. That application for amendment was the subject-matter of the decision of the Supreme Court. The Supreme Court observed: "The amendment seeks to introduce a claim based on the same cause of action, that is, same contract. It introduces no new case of facts. Indeed the facts on which the money claim sought to be added is based are not in dispute. Even the amount of the claim now sought to be made by amendment, was mentioned in the plaint in stating the valuation of the suit for the purpose of jurisdiction."

16. In the earlier decisions of the Supreme Court namely in the case of Leach and Co., 1957 SCR 438 = (AIR 1957 SC 357), the suit was for damages on the footing of conversion. The court came

to the conclusion that the suit must fail on that basis. Thereafter amendment was sought for asking for damages for non-delivery. The Supreme Court held that the prayer in the plaint claimed damages and all allegations which were necessary for sustaining the claim for damages were in the plaint and further that clause 14 of the contract on which the claim for damages was founded could not be said to be foreign to the scope of this suit. Counsel for the appellant relied on the decision in 1957 SCR 438 = (AIR 1957 SC 357) in support of the proposition that if without amendment a suit based on conversion was bound to fail for want of cause of action and the amendment was allowed on the ratio that the transaction on which the plaintiff in that case claimed damages really equated to the scope of the suit there was nothing foreign in the amendment asked for. Extracting that proposition counsel for the appellant contended that in the present case the pleading of extension having been there, any amendment would be in furtherance of the cause of action which was already there and would be within the scope of the suit.

17. The decision of the Supreme Court in the case of Pirgonda Hongonda Patil 1957 SCR 595 = (AIR 1957 SC 363) related to amendments being introduced in aid of the ownership of the plaintiff in that case. There were no particular averments in the plaint as to the facts or grounds on which the plaintiff based his title. The amendment was allowed by holding that it did not really introduce a new case but that the amendment was necessary for the purpose of determining the real questions in controversy between the parties.

18. In the present case the proposed amendments with regard to paragraphs 9, 12 and 20 cannot in the light of the principles stated above be said to be a new case or an inconsistent case for the obvious reason that the proposed amendments are really amplification of the case of extension already pleaded.

19. I am therefore of opinion that the amendments as sought for with regard to paragraphs 9, 12 and 20 of the plaint should be allowed.

20. The proposed amendments should be incorporated within a fortnight from the drawing up of the order. The order will be drawn up forthwith. The amended plaint will be served on the defendant's solicitor within seven days of the incorporation of the amendments. The defendant will have fourteen days' time to file additional written statement thereafter. The parties will have a fortnight thereafter to file their respective affidavits of documents. Inspection will be made forthwith thereafter. The suit

will be brought to hearing immediately thereafter by mentioning in the appropriate court.

21. The order for costs of the trial on 7 February 1966 is not disturbed but the decree is set aside. The order for costs made by S. P. Mitra J. on 21 September 1965 is also not disturbed.

22. The defendant will have costs of additional written statement and of additional discovery. The defendant will have costs of this appeal.

23. The appeal is allowed and disposed as above.

24. S. K. MUKHERJEA, J.: I agree.
Appeal allowed.

AIR 1970 CALCUTTA 12 (V 57 C 3)

R. N. DUTT

AND T. P. MUKHERJI, JJ.

Kalyanmal Agarwalla, Petitioner v. District Magistrate, Midnapore and others, Respondents.

Criminal Misc. Case No. 369 of 1963, D/- 26-6-1963, and Application for leave to appeal to Supreme Court, D/- 21-11-1963.

(A) Public Safety — Preventive Detention Act (1950), Ss. 7, 3-A, 3 (1) (a) and (b), and 3 (2) — Order of detention need not be served on the detenu at the time of arrest — S. 3-A too does not require it — Service of a copy of the grounds for detention need alone be served — The grounds to accompany a preamble complying with Sec. 3 (1).

An order of detention under S. 3 (2) of the Preventive Detention Act does not become invalid for non-service of a copy of the order of detention on the detenu at the time of his arrest. There is no specific provision in the Preventive Detention Act requiring service of the copy of the order of detention on the detenu. Section 7 requires service of copy of the grounds for which the detenu has been detained. Even S. 3-A of the above Act which provides that the detention order is to be executed in the manner provided for execution of warrant of arrest under Criminal P. C. can be of no help because under the Code no warrant of arrest need be served on the person to be arrested. (Para 3)

Therefore, it is enough if a copy of the grounds for detention accompanied by a preamble containing recitals in the terms of one or more of sub-clauses (a) and (b) of section 3 (1) is served on the detenu. Where the preamble to the grounds which were furnished to the detenu stated that he had been acting in a manner prejudicial to the main-

tenance of supplies and services essential to the community, held, was sufficient compliance of the requirement. AIR 1959 SC 1335, Rel. on. (Para 3)

(B) Public Safety — Preventive Detention Act (1950), Ss. 7 and 3 (1) (a) and (b) — On facts, held, that the grounds had proximate connection with the purpose of detention — Grounds also held to be not vague or misleading.

The grounds for detention of the petitioner were (a) that on 28-7-66 he was found carrying 40 bags of rice concealed under gravels in a truck from Midnapore Town to Calcutta and that he was tried and convicted for that on 7-10-66; (b) that on 30-10-67 he transported 20 bags of rice covered by tarpaulin by a truck from his grocery shop at Station road, Midnapore, without licence to deal in rice or any movement permit and (c) that on 30-10-67 his grocery shop was searched and it was found to contain 27 bags of rice stored for sale. The preamble accompanying the grounds stated that he was being detained because he was acting in a manner prejudicial to the maintenance of supplies and services essential to the community. The detenu contended (i) that ground (a) had no proximate connection with the purpose for which he was being detained and (ii) that grounds (b) and (c) were vague and misleading, in that he was not the owner thereof. The substance of the allegation investigated into by the Police on the basis of which the charge-sheet was filed was that it was the detenu who was indulging in unlawful deals in rice from that shop though he had no licence to deal in rice.

Held (1) that allegations in ground (a) as also those in grounds (b) and (c) related to acts prejudicial to the maintenance of supplies essential to the community. Thus, considering ground (a) in the context of grounds (b) and (c), ground (a) should be held to have proximate connection with the purpose for which the detenu was being detained, namely, maintenance of supplies essential to the community. (Para 4)

and (2) that in view of the positive allegation that it was the detenu who was indulging in such unlawful activities, the grounds in (b) and (c) could not be said to be vague or misleading. (Para 5)

(C) Public Safety — Preventive Detention Act (1950), Ss. 3 (2) and 10 (3) — Dealing in rice and movement thereof without licence — Accused charge-sheeted before a Magistrate — Accused discharged at the request of Police who said that he was already detained under the Act — Order of detention held, was not mala fide — (Constitution of India, Art. 22).

The accused was chargesheeted before a Magistrate for his unlawful dealings and movement of rice without any licence therefor. The Police, after filing the charge-sheet, recommended discharge on the ground that he had, in the meantime been detained under the Preventive Detention Act. The Magistrate discharged him accordingly. The detenu urged that the order of detention under the circumstances was mala fide in that the Police did not allow him to prove his innocence making the order of detention on the self-same allegations. It was further argued that if the Magistrate had not in fact discharged the detenu, which he was not sure about, the order of detention would adversely affect his right under Art. 22 of the Constitution, since his defence disclosed before the Advisory Board might come to be used by the Police against him at the trial.

Held, (1) that the Magistrate was competent to take those allegations into his consideration for arriving at his subjective satisfaction, even if the case continued against the detenu. Merely because the detenu was discharged from the criminal case the order of detention would not become mala fide. The trial was for what the detenu is alleged to have done: The detention was with a view to prevent him from acting in similar manner.

(Para 6)

and (2) that though the specific case was continued against a detenu even after he was detained, that would not adversely affect his constitutional right under Art. 22 because the representation which he might make to the Advisory Board as part of the proceedings of the Board is confidential under section 10 (3) of the Preventive Detention Act and could not be used against him at his trial. Thus whether the accused had been discharged or not was immaterial in the sense that in either view of the matter the order could not be quashed.

(Para 7)

(D) Constitution of India, Art. 133 (1)

(c) — Order of detention under Preventive Detention Act — Application under S. 491 of Criminal P. C. challenging order dismissed — Application for leave to appeal to Supreme Court on same points and further materials — Further materials, held, could not be considered for issue of a certificate of fitness under Art. 133 (1) (c) of the Constitution—(Civil P. C. (1908)), S. 110).

(Para 12)

Cases Referred: Chronological Paras (1959) AIR 1959 SC 1335 (V 46) =

1959 Cri LJ 1501, Naresh Chandra v. State of West Bengal 3

S. S. Mukherji, S. C. Majumdar, Prafulla Kumar Kundu and Ananga Kumar Dhar (in Appln. for leave to SC), for Petitioner; Dilip Kumar Dutta, for Respondents.

R. N. DUTT, J.: This is an application under section 491 of the Code of Criminal Procedure for a writ in the nature of Habeas Corpus against the detention of Kalyanmal Agarwalla under sub-section (2) of section 3 of the Preventive Detention Act, 1950.

2. It appears that the detenu Kalyanmal Agarwalla is being detained on the basis of an order of detention made by the District Magistrate, Midnapore, on February 29, 1968, under section 3 (2) of the Preventive Detention Act, 1950.

3. Mr. Mukherji first argues that no copy of the detention order was served on the detenu and as such the detention order should be struck down. It has been stated in the application that no copy of the detention order was served on the detenu when the detenu was taken into custody. The District Magistrate has in his affidavit said that copy of the detention order was served on the detenu when he was taken into custody. The District Magistrate has said this in his affidavit from information derived from the records in respect of this detenu. We do not, however, find any affidavit from the Officer who actually served the copy on the detenu. Be that as it may, even if we assume that the copy of the order was not served on the detenu that, in our opinion, is no ground for striking down the order of detention. There is no specific provision in the Preventive Detention Act requiring service of copy of the order of detention on the detenu. Section 7 requires service of copy of the grounds for which the detenu has been detained. Mr. Mukherji refers to section 3A of the Act and submits that the detention order is to be executed in the manner provided for execution of warrant of arrest under the Code of Criminal Procedure. True, but the Code of Criminal Procedure does not require that copy of the warrant of arrest has to be served on the person to be arrested and so we are not prepared to strike down the order of detention on the ground that copy of the detention order was not served on the detenu at the time when he was taken into custody. We read the decision of the Supreme Court in Naresh v. State of West Bengal, reported in AIR 1959 Supreme Court 1335 as requiring that the grounds should be accompanied by a preamble containing recitals in terms of one or more of the Sub-clauses (a) and (b) of section 3 (1). In the instant case there is such a preamble to the grounds which were furnished to the detenu and that preamble recites that the detenu has been acting in a manner prejudicial to the maintenance of supplies and services essential to the community.

4. The grounds for the detention are as follows:

"(a) That on 28-7-66, at about 06.30 hrs you were found carrying 40 bags of rice, weighing 30 qtls, concealed under gravels in truck no. W. G. C. 1373 from Midnapore Town to Calcutta, by the Checkpost staff of Sreerampore Checkpost on Bombay Road within Debra P. S. area. In this connection you were sent up in charge sheet in Debra P. S. Case No. 20 dt 27-7-66 u/s 7 (1) (a) (ii) of Act X/55 and you were convicted and sentenced to pay a fine of Rs. 500/- i.d. to suffer R. 1. for 15 days by Shri A. Mukhopadhyaya, Magistrate 1st Class, Midnapore on 7-10-66.

(b) That on 30-10-67 morning, you transported 22 bags of rice weighing 16.15 kgs covered by a tarpaulin by truck No W. G. B. 1369 from your grocery shop at Station Road, Midnapore without having any licence to deal in rice or any movement permit.

(c) That on 30-10-67 at 17-00 hrs. in pursuance of certain statement, S. I. M. L. Majhi of Kotwali P. S. Midnapore searched your grocery shop at Station Road, Midnapore, and seized 27 bags of rice weighing 15 qtls. 23 kgs. 700 mgs. which you stored for sale in your said grocery shop without having any licence." Mr. Mukherji submits that ground (a) has no proximate connection with the purpose for which the detenu is being detained. The detention order was made, as we have seen, in February 1968 but the conviction recited in ground (a) took place in October 1966. The allegations in ground (a) related to acts prejudicial to the maintenance of supplies essential to the community. Grounds (b) and (c) which relate to some incident on October 30, 1967 are again related to acts prejudicial to the maintenance of supplies essential to the community. When we consider ground (a) in the context of grounds (b) and (c), we have no hesitation in holding that ground (a) has proximate connection with the purpose for which the detenu is being detained, namely, maintenance of supplies essential to the community.

5. Mr. Mukherji then argues that grounds (b) and (c) are firstly vague and misleading. These grounds state that the detenu transported 22 bags of rice from his grocery shop and that 27 bags of rice were seized from his grocery shop. From annexure 'C' to the affidavit-in-reply filed on behalf of the detenu, Mr. Mukherji argues that the grocery shop was not the grocery shop of the detenu. The shop was owned by one Mohanlal Gupta and the business is carried on in the name of 'Mohanlal & Co.'. Furthermore from this annexure Mr. Mukherji also submits that there is no allegation that the detenu had transported 22 bags of rice in the lorry which was seized.

Annexure 'C' is the charge sheet submitted by the police after investigation of the allegations contained in grounds (b) and (c). The substance of the allegation is that though Mohanlal Gupta was the owner of the business carried on in the name of 'Mohanlal & Co.', and though 'Mohanlal & Co.' has a municipal trade licence for the shop, it was the detenu who was indulging in unlawful deals in rice from that shop though be or 'Mohanlal & Co.' had no licence to deal in rice. The positive allegation is that it was the detenu who was indulging in these activities from this shop. True it has not been said that the detenu was present in the lorry when the lorry which contained 22 bags of rice was seized but the allegation is that these were being despatched by the detenu and so far as ground No (c) is concerned, the allegation is that it was the detenu who had stored 27 bags of rice in the grocery shop without a licence. We are, therefore, not prepared to say that these grounds are either vague or misleading.

6. Mr. Mukherji then argues that the order was mala fide inasmuch as when a specific case was started against the detenu in respect of the allegations contained in grounds (b) and (c) the State did not allow the detenu to prove his innocence but made the order of detention on the self-same allegations. From annexure 'c' it appears that after investigation when the police submitted charge sheet, the police recommended discharge of the detenu on the ground that he had, in the meantime, been detained under the Preventive Detention Act. The District Magistrate was competent to take these allegations into his consideration for arriving at his subjective satisfaction, even if the case continued against the detenu. We do not therefore, think that merely because the detenu was discharged from the criminal case the order of detention becomes mala fide. The trial was for what the detenu is alleged to have done. The detention is with a view to prevent him from acting in similar manner. The District Magistrate cannot therefore be said to have made the detention order mala fide because after he made the detention order, the investigating officer has prayed for his discharge on the ground that he has already been detained under the Preventive Detention Act.

7. Mr. Mukherji finally submits that though the Police prayed for discharge of the detenu from the criminal case, we have no material before us to show that he was in fact discharged. Mr. Mukherji submits that if the detenu has not been discharged then this order of detention should be struck down as it adversely affects his constitutional right under Article 22 of the Constitution, inasmuch as

he will be forced to disclose his defence before the Advisory Board and the prosecution will be able to use the same against him at the trial. We have considered this point in some other cases also and we have held that though the specific case is continued against a detenu even after he is detained, that does not adversely affect his constitutional right under Art. 22 of the Constitution because the representation which he may make to the Advisory Board as part of the proceedings of the Board is confidential under section 10 (3) of the Preventive Detention Act and cannot be used against him at his trial. Thus whether the accused has been discharged or not appears to us to be immaterial in the sense that in either view of the matter we find no reason to strike down the order of detention.

8. No other point is taken. We find that the detenu is being detained under lawful authority and in that view of the matter the Rule is discharged.

9. T. P. MUKHERJI, J.: I agree. (Application for leave to appeal to Supreme Court).

10. R. N. DUTT, J.: This is an application under Art. 134 (1) (c) of the Constitution for a certificate of fitness to appeal to the Supreme Court.

11. The petitioner was detained without trial on the basis of an order of detention made by the District Magistrate, Midnapore, on February 29, 1968, under sub-section (2) of section 3 of the Preventive Detention Act, 1950. An application under section 491 of the Code of Criminal Procedure for a writ in the nature of habeas corpus was filed by the petitioner but was dismissed by us as we found that the detenu was being detained under lawful custody.

12. Various points were taken before us. The self-same points have again been raised. Mr. Dhar submits that he has in the meantime produced certain further materials and these should be taken into consideration for a decision about the legality or otherwise of the detention order. But this can never be a ground for a certificate of fitness to appeal to the Supreme Court.

13. The points raised before us and the points now raised by Mr. Dhar do not involve a substantial question of law requiring an authoritative decision from the Supreme Court and we do not think that it is a fit case for a certificate of fitness to appeal to the Supreme Court.

14. The application is, therefore, dismissed.

15. Let the certified copy of the judgment of this Court be returned to the learned Advocate for the petitioner.

16. T. P. MUKHERJI, J.: I agree. Petitions dismissed.

AIR 1970 CALCUTTA 15 (V 57 C 4)

B. C. MITRA, J.

The Metal Corporation of India Ltd., and another, Appellants v. Union of India and another, Respondents.

Matter No. 551 of 1968, D/- 1-4-1969.

(A) Metal Corporation of India (Acquisition of Undertaking) Act (1966), Preamble — Acquisition of Company's smelters, other plant and machinery held for public purpose — 'Exploit', meaning of — (Words and Phrases — 'Exploit') — (Constitution of India, Art. 31).

The Preamble of the Metal Corporation of India (Acquisition of Undertaking) Act, not only says that the object is to exploit zinc and lead deposit in the mines but also that it is to utilise those minerals in such manner as to subserve the common good. Utilisation of minerals is not merely extracting the ore from the mines, but the ore so extracted must be processed in order to make the minerals marketable, and for this processing, the smelters and other plant and machinery of the company would be needed. Therefore, the acquisition of the smelter and other plant and machinery cannot but be for a public purpose. (Para 8)

Further, the word 'exploit' means to turn to industrial account natural resources. Therefore, exploitation does not mean merely extraction of the ore, but includes turning of the ore to industrial account, and for this purpose the smelter and other plant and machinery of the company would be absolutely necessary. New English Dictionary P. 439 Ref.

(Para 8)

(B) Metal Corporation of India (Acquisition of Undertaking) Act (1966), Preamble — On facts, held, the Act was not inspired by any ulterior motive. — (Constitution of India, Arts. 31, 226).

The affidavits filed in support and in opposition of the writ petition revealed that the Company under acquisition had, with a view to overcome its financial stress, applied to the Industrial Finance Corporation of India for a loan of Rupees 46,75,000/- and the Corporation granted a loan of Rs. 30,00,000/-. The loan was guaranteed by the Central Government and under the agreement between the Central Government and the Company, the former had an absolute option to acquire all assets of the company on the basis of cost incurred minus depreciation permissible under the Income-tax Act. The Industrial Finance Corporation had by then guaranteed a Foreign Exchange loan upto Rs. 4.50 crores for purchase of plant, machinery and equipment. About 3 years later in 1952 the Company again faced financial distress and applied for a loan of Rs. 20 lacs. The loans by the

Corporation and the guarantee by the Central Government were to enable the Company to develop the zinc and lead mines of the company, which were the only deposits of importance in India. These were also strategic material, and for this the country was entirely dependent upon imports. In an enquiry made into the activities of the company, it was found that development work done by the company was inadequate and unsatisfactory, that the financial position of the company was unsound, that the company did not have sufficient resources for proper development of the mineral deposits, and that it would be uneconomical to sanction a further loan or to stand guarantee for a further loan. Under these circumstances, the above Act was passed seeking to acquire the Company with all its assets and as a going concern.

Held, that the decision of the Central Government to acquire the undertaking for the purpose of development and exploitation of the mine could not be said to be inspired by any improper or ulterior motive. (Para 12)

(C) Constitution of India, Arts. 32, 226 and 31 (2)—Petition for Rule nisi before Supreme Court under Art. 32 — Petition dismissed in limine — Aggrieved party filing writ petition in High Court — Parties, subject matter and ground of attack being same — Writ petition, held, barred by *res judicata* — Fact that Supreme Court's order dismissing the petition was not a speaking one held, not material. — (Civil P. C. (1908), S. 11).

A mining company which was sought to be acquired by the Central Government under the Metal Corporation of India (Acquisition of Undertaking) Act filed a petition before the Supreme Court under Art. 32 of the Constitution for a Rule nisi and the ground of attack in that petition was that the Act invaded the petitioner's fundamental right under Art. 31 (2) of the Constitution. The Supreme Court dismissed the petition in limine. The order of dismissal was not a speaking order. The company subsequently filed a writ petition in the High Court under Art. 226 of the Constitution challenging the above Act and though several grounds were taken in the petition the main ground canvassed was that the Act was *ultra vires* Art. 31 (2) of the Constitution. The respondents contended that parties being the same in both the petitions, the writ petition was barred by *res judicata*.

Held, upholding the contention of the respondents, that the writ petition was barred by *res judicata*. It was so, notwithstanding the fact that the order of Supreme Court dismissing the petition under Article 32 was not a speaking order. It was still an order on merits for the reason that the right

to move the Supreme Court under Article 32 being itself a fundamental right, the Supreme Court would not reject the application on any other ground namely, laches or the existence of alternative remedy. Therefore, the dismissal of the petition by the Supreme Court in limine must be taken to be a dismissal on the ground that no fundamental right of the petitioner had been violated.

(Para 17)

The High Court could, however, refuse to issue a writ on either of the two grounds mentioned above. If the High Court refused to exercise its discretion on the ground of laches or existence of alternative remedy, the decision of the High Court could not generally be pleaded in support of the bar of *res judicata*. But if the matter was considered by the High Court on merits and the petition was dismissed on such consideration on the ground that no fundamental right was prayed, or its breach was not established, or shown to be constitutionally justified, there was no reason why such decision should not be treated as a bar against the competence of a subsequent petition filed by the same party on the same fact and for the same relief under Art. 32. AIR 1963 SC 1295 and AIR 1961 SC 1457 at 1464, 1465 and 1466 and Civil Appeal No. 1 of 1964 (S. C.); and AIR 1959 SC 725, Foll.

(Para 14)

(D) Constitution of India, Art. 31 (2), (as amended by the Constitution 4th Amendment Act)—Expropriation of property — Act fixing compensation or laying down principles for its computation — Compensation fixed on principles laid down not justiciable — Principles may be attacked as being irrelevant. AIR 1967 SC 637 and AIR 1954 SC 170 and AIR 1965 SC 190 held overruled by AIR 1969 SC 634 Observations in AIR 1965 SC 1017, held obiter and dissented from in AIR 1969 SC 634—(Metal Corporation of India (Acquisition of Undertaking) Act (1966), Preamble.)

The effect of the amendment made in Cl. (2) of Art. 31 by the Constitution (Fourth Amendment) Act is that adequacy of compensation fixed by the Legislature or award according to the principles specified by the legislature for determination is not justiciable. Since in the amended provision, the expression "compensation" means only what the Legislature justly regards as proper and fair recompense for compulsory expropriation of property, a challenge based on the ground that the compensation which the impugned Act provides for is no compensation at all or an illusory one is not possible. However, the principles laid down in the impugned Act for determination of compensation to be paid can be challenged on the ground that they are irrelevant in that regard. A challenge to

a statute that the principles specified by it do not award a just equivalent will be in clear violation of the constitutional declaration that inadequacy of compensation provided is not justiciable.

(Paras 26 & 27)

In this writ petition, the Metal Corporation of India (Acquisition of Undertaking) Act was challenged on the ground that it did not provide for a just and fair compensation for all the items sought to be acquired under it. Firstly, it was contended that the fixation of 22-10-65 as the date of valuation had no principles behind it because the Government's taking possession of the undertaking was held to be illegal, though it was later on validated by another statute. Secondly, it was stated that several assets were left out of the list under S. 4 (1) of the Act and that though separate valuations were calculated under the principles specified in the schedule, the amount of compensation to be given for the undertaking should be deemed to be a single one to be given for the undertaking as a whole. Third attack was that Cl. (b) of para II of the Schedule did not take into account the potential value of the land in computation of compensation payable and lastly that by continuing to pay interest the Government could avoid payment of compensation for all time to come. (Section 10 (3)).

Held, that since the Act provided for acquisition of the company's undertaking as one integrated unit, the absence of provision for payment of compensation for one or other items of the assets could not lead to the conclusion that the Act was ultra vires Art. 31 (2) on the ground that it provided for acquisition of property without payment of compensation. AIR 1969 SC 634, Foll.; AIR 1967 SC 637 and AIR 1954 SC 170 and AIR 1965 SC 190 held overruled by AIR 1969 SC 634; Observation in AIR 1965 SC 1017 held obiter and dissented in AIR 1969 SC 634 and AIR 1968 SC 1138 and AIR 1966 SC 1593, Rel. on. (Paras 29 and 31)

(E) Constitution of India, Art. 226 — Laches — Court to be cautious before rejecting petition.

An application under S. 32 of the Constitution before the Supreme Court was dismissed in limine and after nearly 18 months the petitioner filed a writ petition under Art. 226 of the Constitution before the High Court for similar reliefs. The petition was opposed on the ground that the respondents had since the time of dismissal of the petition by the Supreme Court materially altered their position to their disadvantage and that the writ petition also suffered from delay.

Held, that apart from the question of altered position, the delay in moving the High Court under Art. 226 was not

fatal to the application. When a petition was moved under Art. 226 on the ground of violation of fundamental rights, the court must be slow and cautious in denying to the petitioner relief on the ground of delay and laches. (Para 32)

(F) Metal Corporation of India (Acquisition of Undertaking) Act (1966), S. 11 and Sch. Para II (a) — Acquisition of a mining company — Compensation to include value of minerals lying underground — (Land Acquisition Act (1894), Ss. 23 and 24) — (Constitution of India, Art. 31).

Since the above Act acquires all the assets of the mining company inclusive of the land, the compensation payable for such land should include the potential value of the land, that is to say the value of the minerals lying underground. Computation of the value of the land in accordance with the principles mentioned in para II (a) of the Schedule to the Act is for the Tribunal set up by Sec. 11 of the Act. (1909) 13 Cal WN 1046 and AIR 1925 PC 91 and 1917 A. C. 187 and AIR 1939 PC 98 and (1944) 48 Cal WN 609 and AIR 1961 SC 954, Rel. on. (Para 34)

(G) Metal Corporation of India (Acquisition of Undertaking) Act (1966), Sch. Para II (a) — On facts, held, that the company had no goodwill — Not entitled to compensation.

The mining Company sought to be acquired claimed that the compensation should include value of its goodwill. The evidence disclosed that the company was in acute financial distress resulting in total deadlock, that it had no customers other than two iron and steel companies, whom the Central Government had secured.

Held, that the Company had no goodwill in respect of which it could claim compensation by reason of compulsory acquisition of its undertaking. (1896) AC 7 and (1953) 2 All ER 1160, and (1912) 1 KB 589, Rel. on. (Para 35)

(H) Metal Corporation of India (Acquisition of Undertaking) Act (1966), S. 4 (1) — "know-how" — Value of — Compensation disallowed — Not a saleable asset — (T. P. Act (1882) S. 6).

Since "Know-how" is neither a capital asset nor a tangible asset capable of being sold, a mining company which was sought to be acquired by the Central Government under the above Act, held could not claim compensation for its "know-how" by reason of the compulsory acquisition of the undertaking.

Further, there was no evidence either that know-how which the company acquired was a secret process for extraction of ore or for processing of the same. Even assuming that it had acquired any know-how, it was exploited by the Company and recorded in maps, plans, charts

and drawings, which were included among the assets of the Company's undertaking and were to be paid for. (1959) 35 L.T.R. 707 (H.L.) Rel. on (Para 36)

(I) Metal Corporation of India (Acquisition of Undertaking) Act (1966), S. 10 (3) proviso — Provision does not exonerate Government from liability to pay compensation — It imposes additional burden.

The proviso to S. 10 (3) of the Act, does not give option to the Central Government of not paying any compensation at all, if it paid interest on the amount of compensation at 4%. The provision merely imposes upon the Central Government, the obligation to pay interest at 4 per cent if the compensation was not paid within six months. All that the proviso requires is that if the compensation is not paid within six months from the date of determination, interest at 4 per cent was to be paid. In other words, the proviso has created an additional obligation to pay interest at 4 per cent besides the obligation to pay the principal amount of compensation.

(Para 37)

(J) Constitution of India, Art. 31 (2) — Acquisition of Undertaking Act (1966), S. 10 (3) — Absence of provision to pay interest does not offend article — Act not ultra vires on that ground — (Land Acquisition Act (1894), S. 23) — (Metal Corporation of India (Acquisition of Undertaking) Act (1966), S. 10 (3)).

Since the question of payment of interest on the amount of compensation payable for property acquired under a statute is entirely one of adequacy of compensation, absence of a provision for payment of interest cannot invalidate the Act as being in contravention of Art. 31 (2) of Constitution. (Para 38)

(K) Constitution of India, Art. 31 (2) — Expropriation without any compensation — Plea to be substantiated by material regarding value of assets.

In order to substantiate a contention that there was total expropriation without any compensation or that the compensation awarded was illusory, it is the duty of the petitioners to place materials regarding the value of the assets. Therefore, in a case where the company which challenged the acquisition of its undertaking by the Metal Corporation of India (Acquisition of Undertaking) Act on the ground that the compensation provided by it was illusory and it had not placed any material before the Court as to what was the real and actual value of the assets of the Company, the plea could not be entertained. AIR 1962 SC 1753, Feltl (Para 38)

(L) Metal Corporation of India (Acquisition of Undertaking) Act (1966), Preamble — Act deemed to be in force from 22-10-65 — Legislature competent to

legislate retrospectively — (Constitution of India, Arts. 245 and 246).

The power to legislate for validating actions taken under a statute, which were not sufficiently comprehensive is ancillary or subsidiary to the power to legislate on any subject within the competence of the legislature, and such Validating Acts could not be struck down merely because courts of law had declared actions taken earlier to be invalid for want of jurisdiction. The first Ordinance of the year 1965 followed up by the Metal Corporation of India (Acquisition of Undertaking) Act of 1965 were held ultra vires Art. 31 (2) of the Constitution and were accordingly struck down by the Supreme Court. The judgment of the Supreme Court was followed by another Ordinance in the year 1966 and an Act of 1966 in the terms of such Ordinance. The 1966 Act provided that the Act must be deemed to have come into force from 22-10-65 when the first Ordinance was promulgated and the undertaking was taken possession of by the Government.

Held, that the Parliament was competent to make such law having retrospective effect. AIR 1966 SC 1593, Rel. on.

(Paras 30 and 39)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 634 (V 56) — Civil Appeal No. 1377 of 1968, State of Gujarat v. Shantilal Mangaldas 25, 27, 28, 29
(1968) AIR 1968 SC 1138 (V 55) — (1968) 3 SCR 41, Udal Ram Sharma v. Union of India 30, 31
(1967) AIR 1967 SC 637 (V 54) — (1967) 1 SCR 255, Union of India v. Metal Corporation of India Ltd. 26
(1966) AIR 1966 SC 1593 (V 53) — (1966) 3 SCR 557, State of Madhya Pradesh v. V. P. Sharma 30
(1965) AIR 1965 SC 190 (V 52) — 1964-6 SCR 936, State of Madras v. Namashivaya Mudaliar 24
(1965) AIR 1965 SC 1017 (V 52) — 1965-1 SCR 614, P. Vajravelu Mudaliar v. Spl. Duty Collector, Madras 24, 25, 26, 29, 30
(1964) Civil Appeal No. 1 of 1964 — (SC), Khairati Lal v. Life Insurance Corporation of India 25
(1963) AIR 1963 SC 1295 (V 50) — 1963 (2) Cri. LJ 329, Kharak Singh v. State of U. P. 24
(1962) AIR 1962 SC 1753 (V 49) — (1962) 2 SCR 747, West Ramnad Electric Distribution Co. Ltd. v. State of Madras 38
(1961) AIR 1961 SC 954 (V 48) — 1962-1 SCR 44, Burrakur Coal Co. Ltd. v. Union of India 34
(1961) AIR 1961 SC 1457 (V 48) — (1962) 1 SCR 574, Daryao v. State of U. P. 24

- (1959) AIR 1959 SC 725 (V 46) =
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cal Supplies Ltd. 36
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- (1954) AIR 1954 SC 170 (V 41) =
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gal v. Mrs. Bela Banerjee 24, 25
- (1953) 1953-2 All ER 1160 = 1954 Ch
50, R. J. Reuter Co. Ltd. v. Ferd'
Mulhens 35
- (1944) 48 Cal WN 609, Province of
Bengal v. Uma Charan Lal 33
- (1939) AIR 1939 PC 98 (V 26) =
1939 AC 302, Raja Vyricherla
Naravana Gajapathiraju v. Reve-
nue Divisional Officer, Vizagapatnam 23
- (1925) AIR 1925 PC 91 (V 12) =
52 Ind App 133, Narsingh Das v.
Secy of State for India 33
- (1917) 1917 AC 187, Fraser v. City
of Fraserville 33
- (1912) 1912-1 KB 539 = 81 LJ KB
704, Attorney General v. Bodon 35
- (1909) 13 Cal WN 1046 = 2 Ind
Cas 562, R. H. Wernicke v. Secy.
of State 33
- (1896) 1896 AC 7 = 65 LJ Ch 1,
Anna Trego and William Wilson
Smith v. George Stratford Hunt 35
- C. K. Daphtry, for Appellants; Attorney
General, for Respondents.

ORDER: This is an application for appropriate Writs and Orders directing the Union of India (respondent No. 1) not to give effect to the Metal Corporation of India (Acquisition of Undertaking) Act, 1966, and for orders striking down, cancelling and declaring void the said Act and also for orders prohibiting the Union of India from enforcing and/or giving effect to the Metal Corporation of India (Acquisition of Undertaking) Ordinance, 1965. There is also a prayer for an injunction restraining the Union of India from selling, charging and dealing with the petitioner's undertaking and also the petitioner's properties both movable and immovable including lead and zinc ore and lead and zinc metals and silver smelter of the petitioner.

2. In 1944 the petitioner No. 1 (hereinafter referred to as the company) was incorporated as a public company under the Indian Companies Act, 1913. The company initially commenced its business in 1944 with a share capital of Rs. 35 lacs. The authorised capital of the company at present is Rs. 5 crores divided into 7000, 5 per cent tax free cumulative preference shares of Rupees 100/- each; 1,93,000, 6 per cent tax free redeemable cumulative preference shares

of Rs. 100/- each and 30,00,000 ordinary shares of Rs. 10/- each. The paid-up share capital of the company is Rupees 2,46,64,235/-. The petitioner No. 2 is a share-holder of the company and is at present a Director. The petitioner No. 2 claims to make this application for self and for the benefit of all the share-holders of the company.

3. The company obtained the lease of 20 Sq. miles of the mining land at Zawar in Rajasthan from the Government of Rajasthan for a term of 20 years with options for two further terms of like period and commenced prospecting. A Geological survey of the area was made and survey reports were prepared. The company had a lead smelter at Tundoo near Dhanbad and started smelting of lead and silver metals. Subsequently the company also installed a zinc smelter at Udaipur, Rajasthan.

4. On October 22, 1965, the President of India promulgated an Ordinance namely the Metal Corporation of India (Acquisition of Undertaking) Ordinance, being Ordinance No. 6 of 1965, for the purpose of acquiring the entire undertaking of the company. Pursuant to this Ordinance the Central Government took over possession, control and administration of the assets and undertaking of the company on October 23, 1965. This was followed by a writ petition by the company in the Punjab High Court on October 26, 1965, in which the company challenged the vires of the ordinance on various grounds. In the meantime, the Parliament passed an Act namely the Metal Corporation of India (Acquisition of Undertaking) Act being Act No. 44 of 1965, on the same terms and conditions as contained in Ordinance No. 6 of 1965. Thereupon the company filed another writ petition in the Punjab High Court for a declaration that the Act was ultra vires the Constitution. The Punjab High Court by a judgment dated March 14, 1966, held that the impugned Ordinance and the Act violated Article 31 (2) of the Constitution and could not therefore be enforced against the company. Thereafter the Union of India preferred an appeal from the judgment, and order of the Punjab High Court to the Supreme Court and this appeal was dismissed with costs by the Supreme Court on September 5, 1966. The judgment of the Supreme Court was followed by another Ordinance on September 13, 1966 namely the Metal Corporation of India (Acquisition of Undertaking) Ordinance, being Ordinance No. 10 of 1966, for the purpose of acquiring the undertaking of the company. During all these proceedings the Government of India remained in possession of the company's assets and undertaking. An Act was passed by Parliament namely the Metal Corporation of India (Acquisition

of Undertaking) Act, 1966, being Act No. 36 of 1966, incorporating the terms of the said Ordinance No. 10 of 1966, and this Act came into force on December 3, 1966.

5. On February 23, 1967, the company moved the Supreme Court for a Rule nisi on an application under Article 32 of the Constitution. This application came up for admission on March 6, 1968, when directions were given for notices to be served on the respondents. After service of notice on the respondents, the application came up for hearing on March 20, 1968, and was dismissed in limine. Thereafter the present writ petition was moved challenging the vires of Act No. 36 of 1966 on various grounds set out under paragraph 69 of the petition. I must at once point out that although Article 14 and Article 19 (1) (f) and (g) of the Constitution have been invoked by the petitioners in the grounds set out in the petition the only ground urged at the hearing of the application was that the impugned Act was violative of Article 31 (2) of the Constitution.

6. The issue of the Rule nisi by this Court was followed by a notice of motion dated September 16, 1968, taken out by the petitioners' solicitors for an order of injunction restraining the respondents from investing any further sum of money in the undertaking of the company including mines and smelters, and also an injunction restraining the respondents from undertaking any expansion of the mines and the smelters by investing further sums of money. This application for injunction was directed to stand to trial along with the Rule and is now, before me for disposal.

7. The first ground of attack urged by Mr. C. K. Daphtry, learned counsel for the company was based on the preamble of the impugned Act. It was argued that although on the basis of the preamble there might be a public purpose in acquiring the mine at Zawar, and although the exploitation of the mine by the Government might be in public interest there was not and could not be, any public purpose in acquiring the company's smelter at Dhanbad and the other plant and machinery, which belonged to the company. It was further argued that there could also be no public purpose in acquiring zinc and lead which had already been processed by the company and was ready for sale and disposal. Furthermore there could be no public purpose, it was contended, in acquiring cash balances, cash in hand and other moveable properties of the company which had nothing whatsoever to do with the mines.

8. This contention on behalf of the petitioners cannot be accepted. No doubt

the preamble says that the object is to exploit zinc and lead deposit in the mines. But it also says that there is another object, namely to utilise those minerals in such manner as to subserve the common good. Utilisation of the minerals, cannot in my view be done, merely by extracting the ore from the mines, but the ore so extracted must be processed in order to make the minerals marketable, and for this processing, the smelters and other plant and machinery of the company would be needed. Therefore it seems that there is hardly any force in the contention that acquisition of the smelter and other plant and machinery cannot be for a public purpose. The learned Attorney-General appearing for the Union of India contended, and I think rightly, that the acquisition under the impugned Act is not confined to the mine or the minerals or the plant and machinery or other assets of the company; but it is acquisition of the company's undertaking as a going concern. He further referred to the meaning of the word 'exploit' as given in the New English Dictionary at page 439, in which it is stated that to exploit means to turn to industrial account (natural resources). Relying upon this definition of the word 'exploit' the Attorney-General submitted that exploitation does not mean merely extraction of the ore, but includes turning of the ore to industrial account, and for this purpose the smelter and other plant and machinery of the company would be absolutely necessary.

9. The learned Attorney-General next contended that there was very substantial and valid reason for acquisition of the entire undertaking by the Central Government. He submitted that the company's undertaking was one integrated unit, and all the different assets of the company namely mines, minerals, plant, machinery, smelter, plans and survey reports form part of this integrated unit. The mine at Zawar, was the only source in this country, of the two minerals zinc and lead, and it was argued that although large sums were obtained by the company on loan from the Industrial Finance Corporation of India, it failed to carry out the mining operations, and even to clear plant and machinery which had been imported on its account. In support of this contention a reference was made to the allegations in the petition and in the affidavit-in-opposition. In paragraph 8 of the petition it is said that the company obtained a loan of Rs. 35 lacs from the said Corporation. In paragraph 9 of the petition it is said that a group of businessmen joined the company and brought in additional share capital and loan to the extent of Rs. 25 lacs. In Paragraph 11 it is said that the company obtained a further loan of Rs. 75 lacs

from the Industrial Finance Corporation who also guaranteed a foreign exchange loan of up to Rs. 4.50 crores for purchase of plant, machinery and equipment. In paragraph 25 of the petition it is said that the Central Government was inspired by a desire to make it impossible for the company to carry on its business, because of financial deadlock and that the company's financial position was brought to such a pass, that it was not able to clear the valuable mining machinery which had arrived at Bombay, and the company was faced with labour unrest for its inability to pay the wages in due time. In paragraph 8 of the affidavit-in-opposition affirmed by Aravamudha Krishnan on November 20, 1958, it is said, that in 1948 the company applied to the Industrial Finance Corporation for a loan of Rs. 46,75,000/-. The Corporation granted a loan of Rs. 30,00,000 upon a guarantee given by the Central Government. This guarantee was given to enable the company to develop the zinc and lead mines of the company, which were the only deposits of importance in India. These materials it is further said were strategic materials, and for this the country was entirely dependent upon imports. The guarantee was given by the Central Government under an agreement whereby the Central Government had the absolute option to acquire all assets of the company on the basis of cost incurred minus depreciation permissible under the Income-Tax Act.

10. In paragraph 9 of the said affidavit it is said that in 1952 the company was again in financial distress, and applied to the said Corporation for a further loan of Rs. 20 lacs. Thereafter an enquiry was made into the activities of the company, and it was found that development work done by the company was inadequate and unsatisfactory, that the financial position of the company was unsound, that the company did not have sufficient resources for proper development of the mineral deposits, and it would be uneconomical to sanction a further loan or to stand guarantee for a further loan. In paragraph 12 of the said affidavit it is said that an industrial licence was granted to the company on January 6, 1960, to set up a zinc smelter, and for this purpose the said Corporation granted a loan of Rs. 75 lacs, which was to be repaid in instalments to commence from June 1, 1966. The Corporation also stood guarantee for Rs. 4.25 crores for payment for plant, machinery and equipment to be imported from abroad. The company defaulted in making payments due to the foreign suppliers of plant, machinery and equipment and the said Corporation as guarantor had to make payment to the foreign suppliers under the terms of the guarantee, and the

total payment made by the Corporation came up to Rs. 1.31 crores.

11. Relying upon the averments in the petition and the affidavit-in-opposition, the learned Attorney General submitted that having regard to the large loans obtained by the company upon guarantees given by the Central Government, and also, having regard to the default made by the company in repayment of the loan, and further having regard to the company's present financial position in which on its own admission it was unable to clear imported plant and machinery, and pay wages to its labourers, there was no force in the contention on behalf of the company that the acquisition of the company's undertaking was mala fide and the further contention that there was public purpose in the acquisition of the company's mine only, and there was no public purpose in acquiring the other assets of the company. The entire undertaking of the company was one integrated unit and this integrated unit, it was argued, was taken over as a going concern.

12. In my opinion there is good deal of force, in this contention of the learned Attorney General. The company repeatedly approached the said Corporation for loan, and obtained loans upon guarantees given by the Central Government. Under the agreement mentioned earlier the Central Government had the absolute option to acquire all the assets of the company on the basis of cost incurred less depreciation permissible under the Income-Tax Act. If in these circumstances the Central Government decided to acquire the undertaking for the purpose of development and exploitation of the mine, I do not see how it can be said that in acquiring the undertaking of the company under the special Act, the Central Government was inspired by any improper or ulterior motive.

13. The next point to be considered is the contention raised on behalf of the respondents that this application is barred by res judicata. This contention is based on the company's petition under Art. 32 of the Constitution before the Supreme Court for a Rule nisi, which as I have noticed earlier, was dismissed by the Supreme Court on March 20, 1968. It was argued by the learned Attorney General that the grounds of attack in this writ petition, are the same as those in the petition under Article 32 of the Constitution before the Supreme Court. The parties in this petition are the same as those in the petition before the Supreme Court; and although numerous grounds have been taken in the petition before this Court, the main ground canvassed on behalf of the petitioners was that the

impugned Act was ultra vires Article 31 (2) of the Constitution, and that was also the ground on which the petitioners applied to the Supreme Court for a Rule nisi under Article 32 of the Constitution. It was therefore argued that this writ petition was clearly barred by *res judicata*. It was further contended that the petitioners' right to move the Supreme Court under Article 32 was itself a fundamental right, and the dismissal of the petitioners' application by the Supreme Court was a dismissal on merits, although the order was not a speaking order. It was next contended that a writ petition under Article 226 of the Constitution before the High Court could be dismissed on grounds other than that there was no invasion of fundamental rights, namely that the petitioners were guilty of laches or delay, or that there was an alternative remedy. But a petition under Article 32 of the Constitution before the Supreme Court could be dismissed only on the ground that there was no invasion of the fundamental rights of the petitioners. Delay, laches or the existence of alternative remedy, it was submitted, were no grounds for dismissal of a petition under Article 32 of the Constitution. As the application under Article 32 of the Constitution was dismissed in limine, it was contended, that although the order was not a speaking order, it was a dismissal on merits, and the effect of the dismissal was that there was no invasion of the fundamental rights of the petitioners under Article 31 (2) of the Constitution. The dismissal of the petition under Article 32 of the Constitution, it was argued, completely barred the petitioners' right to move this Court under Article 226 of the Constitution challenging the vires of the impugned Act on the ground of violation of Article 31 (2) of the Constitution.

14. In support of the contention mentioned above the learned Attorney General firstly relied upon a decision of the Supreme Court *Kharak Singh v. State of U. P.* AIR 1963 SC 1295 for the proposition that when a person moved a petition before the Supreme Court under Article 32 of the Constitution, the existence of an alternative remedy would not bar his right to relief in that application, and that when such an application was moved before the Supreme Court it was not only the right but the duty of the Supreme Court to afford relief to the petitioner by making appropriate orders. Reliance was also placed on another decision of the Supreme Court *Daryao v. State of U. P.* AIR 1961 SC 1457. In that case before moving the application under Article 32 before the Supreme Court, the petitioners had moved the High Court for a similar writ under Article 226, and the High Court had rejected the peti-

tion. It was argued that the dismissal of the petition by the High Court under Article 226, created the bar of *res judicata* against a similar petition filed in the Supreme Court under Article 32, on the same or similar facts and praying for the same or similar writs. It was held that the Rule of *res judicata* was founded on consideration of public policy, and it was in the interest of the public at large that a finality should attach to the binding decision pronounced by courts of competent jurisdiction, and that individuals should not be vexed twice over with the same kind of litigation. It was further held that the rule of *res judicata* was admissible even in dealing with fundamental rights in petition filed under Article 32, and that if the High Court pronounced judgment in a writ petition rejecting the prayer for issue of appropriate writs such judgment must remain binding between the parties unless it was attacked by adopting the procedure prescribed by the Constitution itself. In that case the Supreme Court also rejected the contention that the plea of *res judicata* could not be invoked as the earlier decision was the decision of the High Court which was not competent to deal with a petition under Article 32, and in rejecting this contention it was held that the jurisdiction of the High Court in dealing with a writ petition filed under Article 226 was substantially the same as the jurisdiction of the Supreme Court in entertaining an application under Article 32. I set out below the observation of the Supreme Court at p. 1464 of the report on this question:

"It is the assertion of the existence of a fundamental right and its illegal contravention in both cases and the relief claimed in both the cases is also of the same character. Article 226 confers jurisdiction on the High Court to entertain a suitable writ petition, whereas Article 32 provides for moving this Court for a similar writ petition for the same purpose. Therefore, the argument that a petition under Article 32 cannot be entertained by a High Court under Article 226 is without any substance; and so the plea that the judgment of the High Court cannot be treated as *res judicata* on the ground that it cannot entertain a petition under Article 32 must be rejected."

Dealing with the question of the High Court's power to dismiss a writ petition on the ground of laches or existence of alternative remedy, the Supreme Court held that the High Court might refuse to issue a writ on either of those two grounds. But where a citizen moves the Supreme Court under Article 32, the right to move the Court under Art. 32 being itself a fundamental right, the

Supreme Court ordinarily issued an appropriate writ or order if a fundamental right had been illegally contravened. But a writ petition before the High Court, it was held, might be rejected on the ground of laches or the existence of alternative remedy; and if the High Court refused to exercise its discretion on the ground of laches or existence of alternative remedy, the decision of the High Court could not generally be pleaded in support of the bar of *res judicata*. But if the matter was considered by the High Court on merits and the petition was dismissed on such consideration on the ground that no fundamental right was proved or its breach was not established, or shown to be constitutionally justified, there was no reason why such decision should not be treated as a bar against the competence of a subsequent petition filed by the same party on the same fact and for the same relief under Article 32. The conclusion of the Supreme Court on the question of the bar of *res judicata* as stated at pp. 1465 and 1466 was as follows:

"We hold that if a writ petition filed by a party under Article 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Article 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party by an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Article 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated. If the petition is dismissed in limine without passing a speaking order then such dismissal cannot be treated as creating a bar of *res judicata*. It is true that, *prima facie*, dismissal in limine even without passing a speaking order in that

behalf may strongly suggest that the Court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of *res judicata* against a similar petition filed under Article 32".

Relying on this decision it was argued that the instant case now before me is a converse case, as in this case the earlier petition was before the Supreme Court, under Article 32. But even then it was contended that the bar of *res judicata* applied to the present petition as the only ground urged in this petition was violation of the fundamental rights under Article 31 (2), and the same question was agitated in the petition under Article 32 before the Supreme Court. On the question that the order of the Supreme Court was not a speaking order but was a summary dismissal in limine, it was argued by the learned Attorney General that although the order was not a speaking order, it was a dismissal on merits on the ground that no fundamental right of the petitioner was invaded. The question of rejection of the application under Article 32, it was submitted, on any other ground namely laches or the existence of alternative remedy could not arise, as those were not grounds on which the Supreme Court would reject an application under Article 32. The only ground on which the Supreme Court rejected the application under Article 32, it was submitted, was that no fundamental right of the petitioner under Article 31 (2) had been violated; and that being so although the order of the Supreme Court was not a speaking order the present petition was barred by *res judicata* as the same questions had been raised and canvassed on behalf of the petitioners as was done in the petition under Article 32.

15. Reliance was also placed on an unreported decision of the Supreme Court in Civil Appeal No. 1 of 1964 (SC), *Khairati Lal v. Life Insurance Corpn. of India*. In that case the Life Insurance Corporation Tribunal made an order on August 3, 1959. After the order was made an application was made to the Supreme Court for special leave against that order. That application was dismissed on August 31, 1959. After the order was made execution proceedings had been started and in those proceedings it was urged that the order sought to be executed had been passed by the Tribunal without jurisdiction and this objection was rejected and thereafter the appellant applied to the Supreme Court for special

leave, to appeal against the order of rejection. It was contended that the earlier dismissal by the Supreme Court of the application for leave to appeal against the order of the Tribunal passed on August 31, 1959 created a bar of res judicata against the subsequent application for special leave. It was held that the objection was well-founded and that as soon as the appellant's application for special leave was dismissed on the earlier occasion, it meant that the challenge to the validity of the order of the Tribunal was rejected and that being so the appellant could not raise that point once more.

16. Reliance was also placed on another decision of the Supreme Court *K. K. Kochunni Moopil Nayar v. State of Madras*, (1959) Supp (2) SCR 316 = (AIR 1959 SC 725) in which it was held that the right to enforce a fundamental right conferred by the Constitution was itself a fundamental right guaranteed by Article 32 and the Supreme Court could not refuse to entertain a petition under that Article simply because the petitioner might have some other adequate alternative legal remedy.

17. In my opinion this contention of the learned Attorney General must be upheld. The parties to the present writ petition are the same as those in the petition before the Supreme Court. The questions canvassed in this writ petition are identical with those raised in the petition before the Supreme Court namely violation of the fundamental right of the petitioners under Article 31 (2). The dismissal of the petition by the Supreme Court in limine must be taken to be a dismissal on the ground that no fundamental right of the petitioners had been violated. The question of delay or laches was not raised by the respondents to the petition in the Supreme Court and was not considered by the Court. The only ground on which the Supreme Court should be taken to have dismissed the petition was that no fundamental right under Article 31 (2) of the Constitution had been infringed. The absence of a speaking order, in my view, makes no difference in this case, because the dismissal by the Supreme Court must have been on the ground that no fundamental right of the petitioners had been violated. For these reasons the contention of the learned Attorney General that the present petition is barred by res judicata must be upheld. This conclusion on the question of the bar of res judicata would have been enough to dispose of the writ petition. But since various other questions on merits have been canvassed before me I should now proceed to deal with them.

18. The next point urged by Mr. Dufry was directed against the provi-

sions in the impugned Act and the schedule thereto regarding payment of compensation. Sub-section (2) of Section 1 of the Act provides that the Act shall be deemed to have come into force on October 22, 1965. Section 3 of the Act provides that the undertaking of the company shall be deemed to have been transferred to, and vested in, the Central Government on October 22, 1965. Paragraph I of the schedule provides that the compensation to be paid by the Central Government shall be an amount equal to the value of the properties and assets of the company as on the commencement of this Act. The impugned Act became a statute on December 3, 1966. The contention was that although the impugned Act came into operation on December 3, 1966, by the deeming provisions in sub-section (2) in section 1 and in section 3, the Act has been brought into force on an earlier date namely October 22, 1965, which date has also been fixed as the date on which the company's undertaking vested in the Central Government, and by paragraph I of the schedule the company is to be awarded compensation on the basis of the valuation of the assets on a date much earlier than the date on which the Central Government's act in taking possession became lawful namely December 3, 1966. In other words, it was argued that prior to December 3, 1966, on which date the Act became a statute, the possession of the company's undertaking by the Central Government was unlawful as the earlier Ordinance and the Act namely Ordinance No. 6 of 1965 and Act No 44 of 1965 were struck down and declared unconstitutional by the Supreme Court. The provisions to pay compensation on the basis of valuation on October 22, 1965, by the deeming provision in the Act, it was argued, were violative of Clause (2) of Article 31 of the Constitution. Mr. Dufry, however, conceded that Parliament had the power to legislate retrospectively; but he argued the provision for payment of compensation on the basis of valuation on a date earlier than the date on which the taking of possession was made retrospectively lawful was invalid as it violated Article 31 (2). It was further submitted that there was no nexus between the date of valuation namely October 22, 1965, and the object of payment of compensation for the acquisition. He further argued that there was no principle in fixing October 22, 1965, as the date of valuation of the undertaking and the assets, and therefore the provision for payment of compensation must be held to be unconstitutional and on that ground the Act should be struck down.

19. The next contention on behalf of the petitioners was directed against sub-section (2) of Section 10 of the Act which

provides that notwithstanding that separate valuations are calculated under the principles specified in the schedule, the amount of compensation should be deemed to be a single compensation to be given for the undertaking as a whole. It was argued that under this sub-section although separate valuations were made in respect of separate items of assets, the compensation was to be deemed to be a single compensation for the undertaking as a whole. In sub-section (1) of S. 4 of the Act the various assets and rights of the company have been enumerated, but several other items of assets namely goodwill and know-how had been left out and therefore there was no provision in the Act for payment of compensation for such items of assets. Therefore it was contended there was no provision for compensation of the properties acquired by the Central Government under the Act in accordance with clause (2) of Article 31.

20. The next argument of Mr. Duftry was that under clause (b) of paragraph II of the schedule the only compensation for the mine was the premium paid up to commencement of the Act, in respect of the leasehold properties reduced in the case of each premium by an amount which bears to such premium the same proportion as the expired term of the lease bears to the total term of the lease. It was contended that the payment of compensation for the mine as provided in the said clause (b) in paragraph II is entirely illusory, as there was crores of rupees worth of minerals in the mine, for which no compensation was payable. It was therefore argued that there was total expropriation of the minerals without payment of any compensation. It was further contended that in prescribing payment of compensation only on the basis of premium paid, without any reference to the minerals, no principle was laid down and the provision was entirely arbitrary. In computing valuation the potential value of the land, it was argued, was left out altogether.

21. It was next argued, that under paragraph I of the schedule the compensation was to be calculated on the basis of valuation of the properties and assets less the liabilities calculated in accordance with paragraph III. Therefore it was argued that while liabilities were to be deducted, the Central Government was taking advantage of the assets which were acquired by making payments which created the liabilities, namely payment made for acquiring know-how, for which no compensation was to be paid under the Act, though the liabilities for acquiring such know-how was to be deducted out of the total value of the assets.

22. The next attack of Mr. Duftry was directed against paragraph IV of the schedule which dealt with the question of interest. It was argued that while there was provision for payment of interest from October 22, 1965 being the date on which the Central Government took possession to October 13, 1966, being the date on which Ordinance No. 10 of 1966 was promulgated, there was no provision for payment of interest from October 14, 1966, until six months after the date of determination of the compensation by the Tribunal under sub-section (3) of Section 10 of the Act. It is on these grounds that the provision for payment of compensation in the Act and the schedule were attacked, and it was contended firstly that the Act was bad as no principles had been laid down for determination of the compensation; secondly that the provision for compensation was illusory and thirdly that there was no provision for compensation with regard to certain items of assets, fourthly that there was no relation between the date namely October 22, 1965, with regard to which the valuation was to be made and the compensation prescribed by the Act.

23. The last contention of Mr. Duftry was that under the proviso to sub-section (3) of section 10 of the Act if compensation was not paid within six months from the date of determination, the Central Government should pay interest on the amount of compensation at 4% per annum from the date of expiry of the said period. It was argued that under the Act the Central Government had been given the option of not paying compensation at all, if interest was paid on the amount of compensation at 4% per annum. It was submitted that the Central Government might choose never to pay compensation to the company but to go on paying interest at 4% per annum. Therefore it was argued the provision for payment of compensation became entirely nugatory, and in effect and in substance, the Act entitled the Central Government to acquire the company's properties without payment of any compensation, not even the compensation prescribed by the Act itself.

24. In support of the contentions mentioned above Mr. Duftry relied upon a decision of the Supreme Court *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras*, (1965) 1 SCR 614 : (AIR 1965 SC 1017). In that case a notification under section 4 of the Land Acquisition Act, 1894 was passed notifying that the petitioner's lands were needed for a public purpose. The first notification was followed by another notification under S. 4 (1) read with section 17 (4)

of the said Act and the Collector was authorised to take possession of the lands. The Madras legislature subsequently passed an amending Act providing for acquisition of lands for housing scheme and laying down principles for fixing compensation which were different from those prescribed in the Land Acquisition Act. The validity of the amending Act was challenged on the ground that it infringed Articles 14, 19 and 31 (2) of the Constitution. The Supreme Court after reviewing several of its earlier decisions namely the State of West Bengal v. Mrs. Bela Banerjee, (1954) SCR 558=(AIR 1954 SC 170) and State of Madras v. Namashivaya Mudaliar (1964) 6 SCR 938=(AIR 1965 SC 190) in which it was held that compensation under Article 31 (2) should be a "just equivalent" of what the owner had been deprived of and if the compensation fixed was not a "just equivalent" of what the owner had been deprived of. The question of compensation would be a justiciable issue. These decisions were given before the Constitution (4th Amendment) Act 1955, whereby Article 31 (2) was amended. The amendment provided inter alia that a law providing for compulsory acquisition of properties shall not be called in question in any Court on the ground that the compensation provided by that law was not adequate. With regard to this amendment it was held that neither the principles prescribed for arriving at the "just equivalent" of what the owner had been deprived of nor the just equivalent itself could be questioned by the Court on the ground of the inadequacy of the compensation fixed but it was also held in that case at p 629 of the report (SCR)=(at p. 1025 of AIR) that "if the legislature though ex facie purports to provide for compensation or indicates the principles for ascertaining the same, but in effect and substance takes away a property without paying compensation for it, it will be exercising power which it does not possess. If the legislature makes a law for acquiring a property by providing for an illusory compensation or by indicating the principles for ascertaining the compensation which do not relate to the property acquired or to the value of such property at or within a reasonable proximity of the date of acquisition or the principles are so designed and so arbitrary that they do not provide for compensation at all, one can easily hold that the legislature made the law in fraud of its powers. Briefly stated the legal position is as follows: If the question pertains to the adequacy of compensation, it is not justiciable; if the compensation fixed or the principles evolved for fixing it disclose that the legislature made the law in fraud of powers in the sense

we have explained, the question is within the jurisdiction of the Court".

The result of the amending Act was that if the State Government acquired land for housing purposes, the claimant got only the value of the land at the date of the publication of the notification under section 4 of the Land Acquisition Act, or an amount equal to the average market value of the land, during the 5 years immediately preceding such date whichever is less. Under the amendment he will get a solatium of only 5% of such value instead of 15% under the Land Acquisition Act. The Supreme Court held that the amending Act prescribed the principles for ascertaining the value of the property acquired, and that in the context of continuous rise in land prices depending upon abnormal circumstances, it could not be said that the fixation of average price over 5 years was not a principle for ascertaining the price of the land in or about the date of acquisition. Dealing with the question of exclusion of potential value of land, it was held that if such value was excluded it could not be said that the compensation awarded was just equivalent of what the owner had been deprived of; but such exclusion only pertained to the method of ascertaining the compensation. Exclusion of potential value means that one of the elements that should properly be taken into account in fixing compensation was omitted, and such omission resulted in inadequacy of compensation but that did not constitute fraud on powers. For these reasons the Supreme Court held that the amending Act did not offend Article 31 (2) of the Constitution. It was further held that the amending Act violated Article 14 of the Constitution and for that reason was void. I am not, however, in this case concerned with the question of infringement of Article 14 of the Constitution, and therefore it is not necessary to go into the reasons for striking down the amending Act in that case under Article 14. It is to be noticed that the Supreme Court for the first time considered the effect of the amended Article 31 (2) in the decision mentioned above.

25. The same question, however, came up before the Supreme Court in a later decision in Civil Appeal No 1377 of 1968 State of Gujarat v. Shri Shantilal Mangal Das, (unreported) (since reported in AIR 1969 SC 634) and in this case the Supreme Court considered its earlier decision in P. Vajravelu Mudaliar's case, 1965-1 SCR 614=(AIR 1965 SC 1017) (Supra).

Before proceeding to deal with the decision of the Supreme Court in Shantilal Mangal Das's case, Civil Appeal No. 1377 of 1968 unreported=(since reported in AIR 1969 SC 634), I shall briefly refer

to the facts in that case. The appeal in that case came to the Supreme Court from a judgment of the Gujarat High Court which had declared that Ss. 53 and 67 of the Bombay Town Planning Act 27 of 1955, ultra vires and unconstitutional. By a resolution passed in 1927 the Municipality of Ahmedabad declared its intention to make a Town Planning Scheme in respect of a specified area. The Provincial Government sanctioned the scheme and a draft scheme was then prepared under which the area of a plot being Plot No. 221 was reconstituted into two plots namely Plot No. 176 and Plot No. 178. Plot No. 176 was reserved for the owner, and the entire original plot No. 221 and plot No. 178 was reserved for the local authority for constructing quarters for municipal employees. Although the declaration of intention, preparation of draft schemes and the final scheme were made under the Bombay Town Planning Act of 1915, intimation of the amount of compensation due to the owner of the original Plot No. 221 was given under the Bombay Town Planning Act of 1955, by section 90 of which the Act of 1915 was repealed. Sections 53 and 67 of the 1955 Act which were declared ultra vires by the Gujarat High Court provided that all lands required by the local authority shall vest absolutely in the local authority free from all encumbrances, and the original plot which were to be reconstituted was to become subject to the right settled by the Town Planning Officer. The provisions relating to payment of compensation, and recovery of contribution were vital for the scheme, as the owner of the reconstituted plot, who got the benefit of the scheme, was to make contribution towards the expenses of the scheme, and the owner who lost his property was to be compensated for such loss. For the purpose of determining the compensation the legislature adopted the basis of market value of land acquired, but the land was valued not on the date of extinction of the owner's interest, but on the date of the declaration of intention to make the scheme. The High Court of Gujarat took the view that method of computing compensation infringed Article 31 (2) of the Constitution. It was held by the Supreme Court that sections 53 and 67 of the impugned Act in that case did not infringe the fundamental rights under Article 31 (2) of the Constitution, as the Act specified the principles on which the compensation was to be determined and given. On the question of computation of the compensation on the basis of market value on a date anterior to the date of extinction of interest of the owner, it was held that computation of compensation on the basis of market value on the

anterior date was still determination on a principle specified. On the question whether an Act for compulsory acquisition of property could be challenged on the ground that the provision for compensation was not a just equivalent of what the owner was deprived of, the Supreme Court referred to its two earlier decisions in *Mrs. Bela Banerjee's case*, 1954 SCR 558 = (AIR 1954 SC 170) and *Subodh Gopal Bose's case*, (AIR 1954 SC 92) in which it was held that the principles prescribed by the legislature for computing compensation, as well as the amount determined by the application of those principles were justiciable. After the two decisions mentioned above the Constitution (4th Amendment) Act, 1955, was passed and clause (2) of Article 31, amongst other clauses was substituted by the new clause (2), and various other amendments were also made but the amendment made in Article 31 was not retrospective with the result that in cases where land was acquired under a statute enacted before April 27, 1955, the law declared in *Mrs. Bela Banerjee's case*, 1954 SCR 558 : (AIR 1954 SC 170) and *Subodh Gopal Bose's case*, (AIR 1954 SC 92) continued to apply. The amendment of the Constitution in 1955 relating to acquisition of property and compensation was followed by the Constitution (7th Amendment) Act, 1956, which came into force on November 1, 1956. By this amendment Entries 32 of List 1 and 36 of List 2 were deleted from the 7th schedule, and Entry 42 of List 3 was amended and as amended it runs as "acquisition and requisitioning of property". By reason of this amendment, the power of acquisition and requisitioning of property is not in the concurrent list, and there is no reference to the principles on which compensation for acquisition or requisition is to be determined.

26. On the question of the right to challenge the vires of an Act on the ground of adequacy of compensation the Supreme Court held as follows:

"Reverting to the amendment made in Cl. (2) of Art. 31 by the Constitution (Fourth Amendment) Act, 1956, it is clear that adequacy of compensation fixed by the Legislature or award according to the principles specified by the legislature for determination is not justiciable. It clearly follows from the terms of Article 31 (2) as amended that the amount of compensation payable, if fixed by the Legislature, is not justiciable, because the challenge in such case, apart from plea of abuse of legislative power, would be only a challenge to the adequacy of compensation. If compensation fixed by the Legislature and by the use of the expression "compensation" we mean what the Legislature justly regards as proper

and fair recompense for compulsory expropriation of property and not something which by abuse of legislative power though called compensation is not a recompense at all or is something illusory, is not justiciable, on the plea that it is not a just equivalent of the property compulsorily acquired, is it open to Courts to enter upon an enquiry whether the principles which are specified by the Legislature for determining compensation do not award to the expropriated owner a just equivalent? In our view, such an enquiry is not open to the Courts under the statutes enacted after the amendments made in the Constitution by the Constitution (Fourth Amendment) Act. If the quantum of compensation fixed by the Legislature is not liable to be canvassed before the Court on the ground that it is not a just equivalent, the principles specified for determination of compensation will also not be open to challenge on the plea that the compensation determined by the application of those principles is not a just equivalent. The right declared by the Constitution guarantees that compensation shall be given before a person is compulsorily expropriated of his property for a public purpose. What is fixed as compensation by statute, or by the application of principles specified for determination of compensation is guaranteed: It does not mean however that something fixed or determined by the application of specified principles which is illusory or can in no sense be regarded as compensation must be upheld by the Courts, for, to do so, would be to grant a charter of arbitrariness and permit a device to defeat constitutional guarantee. But compensation fixed or determined on principles specified by the Legislature cannot be permitted to be challenged on the somewhat indefinite plea that it is not a just or fair equivalent. Principles may be challenged on the ground that they are irrelevant to the determination of compensation, but not on the plea that what is awarded as a result of the application of those principles is not just or fair compensation. A challenge to a statute that the principles specified by it do not award a just equivalent will be in clear violation of the constitutional declaration that inadequacy of compensation provided is not justiciable."

After having held as above the Supreme Court proceeded to consider the effect of its decision in *P. Vajravelu Mudaliar's case*, 1965-1 SCR 614 = (AIR 1965 SC 1017). After quoting the passage set out above at p. 629 of the report (SCR) = (at p. 1025 of AIR) it was held that the observations namely:

"If the question pertains to the adequacy of compensation, it is not justiciable; if the compensation fixed or the

principles evolved for fixing it disclose that the legislature made the law in fraud of powers in the sense we have explained, the question is within the jurisdiction of the Court."

were not necessary for the purpose of the decision in *P. Vajravelu Mudaliar's case*. In other words, that those observations were obiter. It was held that in *P. Vajravelu Mudaliar's case* it was found that principles were specified for ascertaining the value of the property acquired and those principles were not irrelevant for the determination of compensation and that if there was inadequacy in the compensation by the application of those principles, it was not open to question having regard to the amended provision in Article 31 (2). It was further held that when Parliament expressly enacted under the amended clause that 'No such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate', it was intended clearly to exclude from the jurisdiction of the Court an enquiry that what was fixed or determined by the application of the principles specified as compensation did not award to the owner a just equivalent of what he was deprived and that any other view was contrary to the plain words of the amendment and was also contrary to the ultimate decision of the Court in *P. Vajravelu Mudaliar's case*, 1965-1 SCR 614 : (AIR 1965 SC 1017) (Supra). Thereafter the Supreme Court proceeded to hold as follows:

"In our view, Art. 31 (2) as amended is clear in its purport. If what is fixed or is determined by the application of specified principles is compensation for compulsory acquisition of property, the Courts cannot be invited to determine whether it is a just equivalent of the value of the property expropriated. In *P. Vajravelu Mudaliar's case* the Court held that the principles laid down by the impugned statute were not open to question. That was sufficient for the purpose of the decision of the case, and the other observations were not necessary for deciding that case, and cannot be regarded as a binding decision."

Thereafter the Supreme Court overruled its earlier decisions *Union of India v. Metal Corporation of India Ltd.*, AIR 1967 SC 637, as in that case it was held that the clauses in the earlier Act that compensation was to be equal to the cost price in the case of unused machinery and written down value as understood in the Income-tax Act were irrelevant to the fixation of the value of the machinery as on the date of acquisition. In disagreeing with the observations in the *Metal Corporation's case* and in overruling the same, the Supreme Court held

that Parliament had specified the principles for determining compensation of the undertaking of the company and those principles expressly related to the determination of compensation payable in respect of unused machinery and also used machinery and that the principles were set out for determination of compensation and were not irrelevant to such determination and the compensation was not illusory.

27. The effect of the decision of the Supreme Court in Shantilal Mangal Das's case, CA No. 1377 of 1968 = (AIR 1969 SC 634) is that if the impugned Act either fixed the compensation or laid down principles, on which such compensation was to be computed, neither compensation fixed nor the principles on which such compensation was to be computed could be called in question in Court and the issues arising out of such questions were not justiciable. The observations in the earlier decision in P. Vajravelu Mudaliar's case that if a law lays down principles which were not relevant to the property acquired or to the value of the property at or about the time it is acquired, such principles were not principles contemplated by Article 31 (2) and that if the legislature indicated principles for ascertaining the compensation which did not relate to the property acquired or to the value of such property or that the principles so specified were arbitrary and did not provide for compensation would be bad on the ground that the legislature made the law in fraud of powers were declared to be obiter and not necessary for the purpose of the decision.

28. Mr. Duftry strongly relied upon the decision of the Supreme Court in 1965-1 SCR 614 = (AIR 1965 SC 1017) (Supra) and submitted that the observations of the Supreme Court in Shantilal Mangaldas's case, CA No. 1377 of 1968 = (AIR 1969 SC 634) that the earlier observation in P. Vajravelu Mudaliar's case, 1965-1 SCR 614 : (AIR 1965 SC 1017) regarding the right to challenge the principles laid down for ascertaining compensation were obiter was not a good law. He argued that the decision of the Supreme Court in P. Vajravelu Mudaliar's case, 1965-1 SCR 614 : (AIR 1965 SC 1017) clearly laid down that the principles for computing compensation could be challenged under certain circumstances mentioned therein and that was still good law so far as this Court is concerned, and applying those principles the provisions in the Act relating to payment of compensation and also those in the schedule to the Act whereby compensation was to be computed as on the basis of the value on October 22, 1965, must be held to be bad as there

was no relation between the valuation of the properties and the date fixed for computing the valuation and therefore it was no principle at all.

29. The learned Attorney General on the other hand contended that the Supreme Court in the later decision in Shantilal Mangaldas's case, CA No. 1377 of 1968 = (AIR 1969 SC 634) had clearly held that its observations in the earlier decision in P. Vajravelu Mudaliar's case, 1965-1 SCR 614 = (AIR 1965 SC 1017) were obiter, and therefore this Court in considering the question of the vires of the impugned Act on the basis of a challenge to the principle specified for computing compensation must be guided by and must follow the later decision of the Supreme Court in Shantilal Mangaldas's case, CA No. 1377 of 1968 = (AIR 1969 SC 634). In my opinion the contention of the learned Attorney General on the implications of the two decisions of the Supreme Court discussed above must prevail. In the later decision in Shantilal Mangaldas's case, CA No. 1377 of 1968 = (AIR 1969 SC 634), the Supreme Court quite plainly dissented from its observation in earlier decision in P. Vajravelu Mudaliar's case, 1965-1 SCR 614 = (AIR 1965 SC 1017) regarding the right to challenge the vires of the Act on the ground that if principles were prescribed for computing compensation by the legislature in fraud of its powers such principles would be violative of Article 31 (2). I must at this stage note that Mr. Duftry very frankly conceded that if it was held that the observations of the Supreme Court in P. Vajravelu Mudaliar's case, 1965-1 SCR 614 = (AIR 1965 SC 1017) regarding principles prescribed in the statute for computing compensation were not necessary for the purpose of that decision as held by the Supreme Court in Shantilal Mangaldas's case, CA No. 1377 of 1968 = (AIR 1969 SC 634) his contention regarding the vires of the Act must fail. In my view the Supreme Court in its later decision in Shantilal Mangaldas's case, CA No. 1377 of 1968 = (AIR 1969 SC 634), held that its earlier observations in P. Vajravelu Mudaliar's case, 1965-1 SCR 614 = (AIR 1965 SC 1017) mentioned above were not necessary for the purpose of the decision in that case. This court is bound by these observations and the contentions of Mr. Duftry regarding the vires of the impugned Act on the ground of violation of Article 31 (2) must therefore fail.

30. I should, however, refer to some other cases on which the learned Attorney General relied in repelling the contention of Mr. Duftry on this aspect of the case. The first decision to be dealt with is a decision of the Supreme Court *Udai Ram Sharma v. Union of India*, AIR

1968 SC 1138. In that case notifications under section 4 of the Land Acquisition Act were published in 1957 and 1959 and thereafter several declarations under section 6 of the Act were published, long afterwards in 1961 to 1966. Writ petitions under Article 32 of the Constitution were filed by the owners of the land challenging the validity of the Land Acquisition Proceedings on the basis of the judgment of the Supreme Court in *State of Madhya Pradesh v. V. P. Sharma*, AIR 1966 SC 1593. In this case notifications under section 4 (1) of the Land Acquisition Act were issued on May 16, 1949, declaring that land might be needed for a public purpose. Thereafter notifications were issued under section 6 of the Act, from time to time, and some lands in one village were acquired in 1956. In August 1960 a fresh declaration under S. 6 of the Act was issued proposing to acquire land in another village. The owners of the land affected by the second declaration under section 6 filed a writ petition under Art. 226. This matter ultimately came up before the Supreme Court and it was held that once a declaration under section 6 was made, the notification under section 4 (1) was exhausted and the latter section was not a reservoir from which the Government might from time to time draw out land and make declarations with respect to it successively. In other words it was held that there could not be successive declarations under section 6 with respect to land in a locality specified in one notification under section 4 (1) of the Act. The decision of the Supreme Court in AIR 1966 SC 1593 was followed by an Ordinance dated January 20, 1967, named the Land Acquisition (Amendment and Validation) Ordinance (1 of 1967). This Ordinance was followed on April 12, 1967, by an Act named the Land Acquisition (Amendment and Short Title Validation) Act 1967. Section 3 of the Amending Act amended section 6 of the old Act by empowering different declarations to be made from time to time in respect of different portions of land covered by the same notification under section 4 (1) of the Act. The other material change made by the amendment was that it was provided by clause II of section 3 of the Amending Act that no declaration in respect of any particular land covered by a notification under section 4 (1) published after the commencement of the said ordinance shall be made after the expiry of three years from the date of such publication. The ordinance mentioned above was repealed by section 5 of the Amending Act. The challenge before the Supreme Court was based on the ground that the amendment was hit by Art. 31 (2), as the sole purpose was to avoid payment of enhanced compensation which

would be necessary if a fresh notification was issued under section 4. It was contended that the date of notification under section 4 published in 1959, must be treated to be an arbitrary date divorced from the acquisition which was sought to be made 8 or 9 years afterwards, when the value of the land was substantially higher and that payment of compensation on the basis of a notification under section 4 published 8 or 9 years before the declaration under section 6, had no relation to the acquisition. The Supreme Court dealing with the question of retrospective operation of the Act, held that the power to legislate for validating actions taken under a statute, which were not sufficiently comprehensive is ancillary or subsidiary to the power to legislate on any subject within the competence of the legislature, and such Validating Acts could not be struck down merely because courts of law had declared actions taken earlier to be invalid for want of jurisdiction. Dealing with the question that the Amending Act violated Art. 31 (2), it was held that it was true that the underlying principle of the Land Acquisition Act, 1894, was that all increments due to the setting on foot of acquisition proceedings were to be ignored, because the ever spiralling prices all over India had forced land values upwards, but it could not be said that because owners of land were to be deprived of all the increments due to spiralling of prices, it must be held that there was a violation of Art. 31 (2). It was further held that the Amending Act did not derogate from the principle that the valuation on the date of issue of notification afforded the criterion for determining compensation of the land to be acquired, but it kept the notification under section 4 alive for more than one declaration under section 6, and therefore it could not be said of the Validating Act that it fixed an arbitrary date for valuation of the property which bore no relation to the acquisition proceedings. The Supreme Court reaffirmed its earlier decision in *P. Vajravelu Mudaliar's case*, 1965-1 SCR 614 = (AIR 1965 SC 1017) that the omission of one of the elements that should be taken into account in fixing the compensation might result in the inadequacy of compensation but did not constitute fraud on powers.

31. Relying upon the decision of the Supreme Court mentioned above, the learned Attorney General contended that there was no force in Mr. Duftry's contention that Article 31 (2) had been violated as no compensation was provided for items of assets like good-will and know-how. It was argued that in *Udai Ram Sharma's case*, AIR 1968 SC 1138 the Supreme Court held that omission to provide for compensation of one of

other of the elements of assets would not constitute a fraud on powers, and on that ground the statute providing for acquisition could not be challenged. In my view this contention of the learned Attorney General must be upheld. It is true that in sub-section (1) of S. 4 of the Act, there is no mention of assets like good-will and know-how and therefore no compensation is payable for the assets as such. But it cannot be overlooked that the Act provides for acquisition of the company's undertaking as one integrated unit and even if there is no provision for payment of compensation for one or other items of the assets, it cannot be said that the Act is ultra vires Article 31 (2) on the ground that it provides for acquisition of property without payment of compensation.

32. The next question to be determined is the contention of the learned Attorney General that the application is barred on the ground of laches and delay. The petition under Article 32 of the Constitution before the Supreme Court was dismissed on March 6, 1962 (1968?), and the present petition was moved and the Rule nisi was obtained on August 6, 1968. There was therefore a gap of just about a year and a half between the dismissal of the petition before the Supreme Court and the Rule nisi issued by this Court. The learned Attorney General submitted that this delay on the part of the petitioners barred their right to relief under Art. 226. He further argued that the Central Government had spent crores of rupees in developing the mines and the company's undertaking and had therefore altered its position to its disadvantage. Mr. Duftry on the other hand contended that the delay of only about 18 months cannot defeat the petitioner's right to appropriate writs under Art. 226, if they could satisfy the court that fundamental rights had been violated. As regards the contention of the learned Attorney General that crores of rupees had been spent by the Central Government he drew my attention to sub-paragraph (e) of paragraph 29 of the affidavit-in-opposition affirmed by Aravamudha Krishnan on November 20, 1968 in which it is alleged that the Central Government had spent about Rupees 5.16 crores by about September 5, 1966. It was submitted that this money was spent by the Central Government at a time when the previous Act and Ordinance had been declared to be unconstitutional and the challenge to the new Act was pending before the Supreme Court. Quite apart from the question of the money spent by the Central Government in development of the company's undertaking and thereby altering its position to its disadvantage, the delay in moving this court under Article 226, in my view, is not fatal to this application. When a petition is moved under Arti-

cle 226 on the ground of violation of fundamental rights, the court must be slow and cautious in denying to the petitioners relief on the ground of delay and laches. On the materials in this case I am not satisfied that the delay by itself in moving this court after dismissal by the Supreme Court of the petition under Article 32 was so enormous as to disentitle the petitioners to relief under Article 226, if they have otherwise made out grounds for such relief.

33. The next contention of the learned Attorney General was that the market value of the mine included its potential value. In other words that in computing the value of the mine not only the value of the surface of the land, but the value of the minerals lying underground would be taken into consideration. He submitted that this question regarding valuation of underground rights was well settled. In support of this contention reliance was placed on a decision of this court reported in (1909) 13 Cal WN 1046. Reliance was also placed on a decision of the Judicial Committee Narsing Das v. Secy. of State, 52 Ind App 133 = (AIR 1925 PC 91) in which the Judicial Committee quoted with approval the following observations of the House of Lords in *Fraser v. City of Fraserville*, 1917 AC 187,

"It is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired".

Reliance was next placed on another decision of the Judicial Committee *Raja Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatnam*, 1939 AC 302 = (AIR 1939 PC 98) in which it was held that the land compulsorily acquired must be valued not merely by reference to the use to which it is being put at the time at which its value has to be determined but also by reference to the use to which it is capable of being put in future and further that the owner is entitled to the value of the potentialities. In other words "that the value to be ascertained is a value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired". Reliance was next placed on another Bench decision of this court reported in (1944) 48 Cal WN 609 in which it was held that in case of compulsory acquisition, the value to the owner of the property is the price that a owner

willing and not obliged to sell, might reasonably expect to obtain from a willing purchaser, and that the property was to be valued not only with reference to its condition at the time of the declaration but its potential value must be taken into consideration excluding any advantage due to the carrying out of the scheme.

34. Relying upon the authorities mentioned above the learned Attorney General contended that it was well settled that compensation for land compulsorily acquired must include not only its present value but also the potential value, which must in this case, include the value of the minerals lying underground. It seems to me that this contention of the learned Attorney General is well founded. The schedule to the Act lays down the principles for determining compensation to be paid to the company and paragraph II (a) of the schedule specifies that compensation would be the market value at the commencement of the Act. The assets to be acquired under the Act in this case include land and the compensation payable for such land would include the potential value of the land, that is to say the value of the minerals lying underground. I must at once point out however that Mr. Dufry conceded that if the value of the land includes its potential value, he would not urge that land was sought to be acquired without payment of compensation. As to what the value of the land would be, is a matter for the Tribunal set up by Section 11 of the Act to consider. In this view of the matter I need say nothing more on this question. Before concluding I should however refer to another case relied upon by the Attorney General in support of this aspect of the case, namely, *Burrakur Coal Co. Ltd. v. Union of India*, AIR 1961 SC 954. In that case the question of compensation for coal-bearing land came up for consideration and the Supreme Court observed at page 963 of the report as follows:

"Here compensation is specifically provided for the land which is to be acquired under the Act. The land includes all that lies beneath the surface or, as Mr. Das quoted, all that is 'locked up' in the land. Parliament has laid down in subsection (5) of Section 13 how the value of this land is to be calculated. The contention that the provisions made by Parliament for computing the amount of compensation for the land do not take into account the value of the minerals is in effect a challenge to the adequacy of the compensation payable under the Act. The concluding words of Art. 31 (2) preclude such a challenge being made."

Mr. Dufry however sought to distinguish that case on the ground that in that case the rights of the owners were only kept

in abeyance or suspended for a limited period and at the time when the petition under Article 32 was moved, there was no outright acquisition of the land. He also submitted that in that case the impugned act was held to be protected under Article 31A, Clause 1 sub-Clause "C" of the Constitution. It is true that in that case the question of extinguishment or modification of the rights of the owner arose, but it is also true that the Supreme Court considered the question of the vires of the impugned Act, in that case having regard to the questions raised as to the value of the coal lying underground and held that the challenge to the impugned Act could not be sustained having regard to Article 31 (2) of the Constitution to that extent, at any rate, the questions raised by the petitioners regarding valuation of the minerals lying underground, are covered by the observations of the Supreme Court quoted above.

35. The next contention of the Learned Attorney General was that the company had no good-will at all. It was argued that even if it was held that the exclusion of one of the elements in the assets from the various assets for which compensation was to be paid would make the acquisition itself bad, and the statute providing for such acquisition ultra vires Article 31 (2), the Act in this case could not be challenged because the company had no good-will at all. It was submitted that the financial position of the company disclosed a distressing situation. It was argued that the company had no customers other than the two Iron & Steel Companies, whom the Central Government had secured. As to the meaning of good-will, the learned Attorney General relied on the decision of the House of Lords *Anna Trego and William Wilson Smith v. George Stratford Hunt* (1896) AC 7. He also relied on two other English decisions reported in (1953) 2 All ER 1160 and (1912) 1 KB 539. It was next argued that there was no evidence that the company had any good-will at all. On the contrary from the company's averments in the petition it appeared that the company was unable to carry on its business without massive financial aid. In my view, this contention on behalf of the respondents must be upheld. In the first place there is no evidence that the company had any good-will at all, or that in respect of such good-will the company is entitled to any compensation. Averments in the petition, such as they are, disclose that the company was in acute financial distress and indeed there was total deadlock. It was unable to pay the wages of its workers. It was also unable to pay for plant and machinery which it had imported. It had defaulted in discharging its liabilities to

its creditors and the Industrial Finance Corporation had to pay such creditors in discharge of the guarantee provided by it. There is no evidence either that the company had at any time a large number of customers. On these facts I cannot hold that the company had a good-will in respect of which it is entitled to compensation by reason of compulsory acquisition of its undertaking.

36. The next contention of the learned Attorney General was that there was no substance in Mr. Duftry's contention that the Act must be struck down as there was no provision for the payment of compensation for know-how. Know-how, it was argued, was not a capital asset of the company nor was it an intangible asset for which the company could claim compensation. In so far as such know-how had been exploited by the company, it is incorporated in the maps, plans, sections, drawing and records of survey and all these items of assets have been included in the company's undertaking by Section 4 (1) of the Act. On the question as to what know-how meant, reliance was placed by the learned Attorney General on a decision of the House of Lords *Moriarty v. Evans Medical Supplies Ltd.* reported in (1959) 35 ITR 707. In that case it was said that "know-how" for tax purpose was a revenue-producing asset and "the producer can use it to make things for sale; or he can teach it to others for reward. But he cannot sell it outright. It is rather like the "know-how" of a professional man. He can use it to earn fees from his clients; or he can teach it to people for reward; and so produce revenue. But he cannot sell it as a capital asset for a capital sum. He cannot sell his brains". These observations which were made in connection with the liability to pay tax for sale of know-how, do not to my mind apply to a case of payment of compensation for compulsory acquisition. But nevertheless it is clear to me that know-how is not a saleable commodity. There is no evidence either that know-how which the company acquired was a secret process for extraction of ore or for processing of the same. To me it is clear that know-how, assuming the company acquired any, was exploited by the company and recorded in maps, plans, charts and drawings; and these items have been included among the assets of the company's undertaking and are to be paid for. The contention of the learned Attorney General on the question of know-how must therefore prevail.

37. The learned Attorney General sought to repel the contention of Mr. Duftry based on the proviso to sub-section (3) of Section 10 of the Act that under that proviso the Central Govern-

ment was given the option of not paying any compensation at all, if it paid interest on the amount of compensation at 4 per cent. It was argued that there was no substance in this contention of Mr. Duftry. The proviso to sub-section (3) of Section 10 merely imposed upon the Central Government, the obligation to pay interest at 4 per cent if the compensation was not paid within six months. This proviso did not wipe out the liability to pay compensation. In my view this contention of the learned Attorney General is well founded. There is nothing in the proviso to sub-section (3) of Section 10 of the Act to warrant the conclusion that the Central Government was completely exonerated from its liability to pay the principal amount of compensation, if it kept on paying interest at 4 per cent on the amount of compensation. All that the proviso requires is that if the compensation is not paid within six months from the date of determination, interest at 4 per cent was to be paid. In other words, the proviso has created an additional obligation to pay interest at 4 per cent besides the obligation to pay the principal amount of compensation.

38. Before proceeding any further, I should note another contention of Mr. Duftry regarding payment of interest. This contention was based on paragraph IV of the schedule to the Act read with the proviso to sub-section (3) of Section 10. The contention was that under paragraph 4 provision for interest was made from October 22, 1965, that is to say, the date on which the Central Government took possession, up to October 23, 1966, that is to say up to the date of the promulgation of the Ordinance No. 10 of 1960, but there was no provision for payment of interest on the compensation from September 14, 1966 until six months expired from the date of determination of the compensation by the Tribunal. In other words it was argued that after the Ordinance 10 of 1966 came into operation, interest ceased to run until six months expired from the date of determination of the compensation by the Tribunal. In my view there is no force in this contention. It is true that there is no provision for payment of interest from September 14, 1966, until six months expired from the date of determination of the compensation by the Tribunal. But non-payment of interest on the amount of compensation does not provide any ground for challenging vires of the Act for violation of Art. 31 (2). The learned Attorney General contended, and I think rightly, that the question of payment of interest is entirely a question of adequacy of the compensation and this question cannot be gone into by the court under Article 31 (2). In passing I should notice

one another contention of the learned Attorney General regarding compensation prescribed by the Act. It was submitted by him that the petitioners had placed no material before this court as to the value of various assets, which are now claimed by the learned Counsel for the petitioners to have been expropriated without payment of any compensation at all. It was submitted that beyond vague and general statements as to the value of the Zink and Lead Ore and other assets of the company the petitioners have not placed any material before this court to support their contention that the compensation award was illusory or that there was total expropriation without any compensation at all. It was further submitted that in order to substantiate a contention that there was total expropriation without any compensation or that the compensation award was illusory, it was the duty of the petitioners to place materials regarding the value of the assets and in support of this contention reliance was placed on a decision of the Supreme Court, *West Ramnad Electric Distribution Co. Ltd. v. State of Madras*, AIR 1962 SC 1753. In my view the contention on behalf of the respondent must prevail. The petitioners have placed no materials before me in support of their contention that having regard to the real and actual value of the assets of the Company, the compensation that could be awarded under the Act and its schedule is altogether illusory.

39. I have dealt with the rival contentions canvassed before me by the parties. The petitioners' contention is that the provisions for payment of compensation under the Impugned Act are violative of Article 31 (2) of the Constitution cannot be accepted for the reasons discussed earlier in this judgment. The Impugned Act is retrospective in its operation in so far as it provided that it would be deemed to have come into operation on October 22, 1965, and Parliament undoubtedly has the competence to legislate retrospectively. The market value prescribed by the schedule of the Act is the market value at the commencement of the Act, namely, October 22, 1965 that being the date on which the Central Government took possession of the company's undertaking. This, in my view, is clear indication of a principle for computation of the compensation as it was the date on which the Central Government took over possession of the company's undertaking. As to what the amount of compensation will be is a matter for determination by the Tribunal created by the Act.

40. Quite apart from the conclusion to which I have arrived namely that the contention of the learned Counsel for the petitioners that the impugned Act should be struck down as it violates Art. 31 (2)

of the Constitution, fails and cannot be accepted, this petition is barred by res judicata on the grounds discussed by me earlier in this judgment.

41. For the reasons mentioned above this application fails and is accordingly rejected. The rule is discharged. Each party to pay its own costs.

42. There will be no order on the application for injunction.

Petition dismissed.

AIR 1970 CALCUTTA 34 (V 57 C 5)

P. N. MOOKERJEE

AND S. K. CHAKRAVARTI, JJ.

Charu Chandra Poali Appellant v. Birendra Nath Dutta and others, Respondents.

A. F. A. D. Nos. 261 and 262 of 1960, D/- 20-3-1969.

Civil P. C. (1908). Ss. 47, 9, O. 23, R. 3, O. 21 R. 32 — Executability of decree — Right to specific performance obtained under terms of compromise decree—Suit to enforce right is maintainable and decree passed therein valid — Court can, within period of limitation, convert suit into proceeding under S. 47.

The suit property belonged to A. After certain court sales, a rival title was claimed by predecessors-in-interest of B. In 1943 A had to institute suit for declaration and possession. The suit ended in compromise by which it was dismissed in terms thereof. Under the terms of the compromise, A obtained right to conveyance of the disputed property from the defendants therein. On the basis of the said agreement in 1950, A instituted suit for specific performance of contract which was decreed ex parte. The said ex parte decree was questioned in suit filed by B in as much as A's suit of 1950 was barred by S. 47 of Civil P. C.

Held (1) that though the term of contract of sale could be included in the operative part of the decree, it was not such a term which under the circumstances could be enforced in execution. A right to specific performance by itself did not allow it to be put in execution. In absence of the term that the right would be enforceable in execution, execution was not available. The decree in suit of 1943 being dismissal of A's suit, the only remedy available to A for enforcing his right of specific performance would be by way of suit. Thus A's suit of 1950 was maintainable in law and the decree passed therein was valid. (Para 11)

(2) that as the period of limitation had not expired, under S. 47 (3) the Court was entitled to convert a suit which

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would otherwise be hit by S. 47, into a proceeding under S. 47. Thus the mere fact that a suit was filed, which would be hit by S. 47 would not rob the Court of its jurisdiction to deal with the matter and the decision of the court could not be said to be a nullity or without jurisdiction. It would, at best, be a defect in procedure or an irregularity and would not, therefore, attract the bar of nullity. (Para 12)

Cases Referred: Chronological Paras

- (1956) AIR 1956 Cal 317 (V 43)=
60 Cal WN 99, Sadananda Saha
v. Union of India 12
- (1954) AIR 1954 SC 340 (V 41)=
1955 SCR 117, Kiran Singh v.
Chaman Paswan 12
- (1940) AIR 1940 Cal 82 (V 27)=
43 Cal WN 1007, Rabindra Nath
Roy v. Dharendra Nath Roy 12
- (1908) 7 Cal LJ 492 = 12 Cal WN
349, Gobind Chandra Paul v.
Dwarka Nath Paul 12
- Tarakanath Roy, for Appellant; Krishna
Benode Roy, for Respondents.

P. N. MOOKERJEE, J.: These two appeals arise out of two suits for declaration that the ex parte decree, obtained by the appellant, who was defendant no. 1 in the court below, in Title Suit No. 93 of 1950, was not binding on the plaintiff respondent no. 1 before us, and was also null and void and liable to be set aside on the ground of fraud and collusion.

2. The suits were contested by the present appellant, who denied the plaintiff's plea that the said decree was a nullity or was vitiated by fraud or collusion or had any legal defect. It was further pleaded in defence that the plaintiff's claim to the disputed property was hit by the doctrine of *lis pendens*.

3. The learned trial Judge gave effect to all the above defences and dismissed the plaintiff's suit.

4. On appeal, the said decision has been reversed by the lower appellate court only on the ground that the ex parte decree in question was a nullity, the suit wherein the same was passed being hit by Section 47 of the Code of Civil Procedure and not being maintainable on that account. On all other points, the learned Additional District Judge, who heard the appeal in the court of appeal below, agreed with the learned trial Judge and accepted the defence contentions.

5. Before us, the appellant has challenged the view of the learned Additional District Judge against him on the question of nullity of the impugned ex parte decree and he has contended that, on that point, too, he was entitled to succeed and the learned trial Judge's view ought to have been accepted.

6. On behalf of the contesting respondent No. 1, his case was rested on the above question of nullity, the concurrent findings of the two courts below against the respondent on the other points not being seriously challenged. Indeed, so far as the said questions are concerned, they are primarily questions of fact, on which concurrent findings of the two courts below would be binding on us in second appeal and would thus conclude the parties. Apart from that, on those questions of fact, we agree, on the materials before us, with the said concurrent findings of the two courts below in favour of the appellant and against the respondent no. 1's contention.

7. So far as the point of law is concerned, on which also the two courts below have concurred, namely, on Section 52 of the Transfer of Property Act, relating to the question of *lis pendens*, in favour of the present appellant, we see no reason to differ from the said finding. In the circumstances, the only point, which will be relevant and necessary for consideration in these appeals would be the point of alleged nullity of the impugned ex parte decree. In this state of things, we do not feel it necessary to state the facts in any great detail as the same have already been stated in sufficient detail in the judgments of the two courts below and we would only, for our present purpose, set out the facts, which appear to be necessary or relevant for the above limited enquiry.

8. The property in suit, which is 79A, Manicktolla Main Road, originally belonged to the present appellant. Thereafter, after certain court sales, a rival title was claimed by some persons, who may be briefly called predecessors-in-interest of the present respondent no. 1. Thereupon, the present appellant had to institute Title Suit No. 65 of 1943 for declaration of his title and recovery of possession. The said suit eventually ended in a compromise decree on the basis of a petition of compromise, filed by the parties. That petition was made a part of the decree, by which the suit was dismissed in terms of the said compromise. Under the said terms, the present appellant, who was the plaintiff in the said suit, and whose suit was dismissed by the said compromise decree, obtained a right to a conveyance of the disputed property from the defendants therein. On the basis of the said agreement for sale or conveyance, the present appellant instituted the above Title Suit No. 93 of 1950 for specific performance of contract. It is this suit, which was eventually decreed ex parte, and the said ex parte decree was sought to be questioned in the instant suits.

9. The point of nullity of the above ex parte decree arises in this way: Ac-

cording to the respondent no. 1, who was the plaintiff in the instant suits, the above Title Suit No. 93 of 1950 would not be maintainable, as the contract, for specific performance whereof the said suit was instituted, was already the subject-matter of a decree, namely, the decree in Title Suit No. 65 of 1943, and, accordingly, relief under or in respect of the contract was obtainable and should have been obtained only by execution of the said decree, the result being so says respondent No. 1, that the above suit (T. S. No. 93 of 1950), would be barred under Section 47 of the Code of Civil Procedure. Upon that view, the said respondent contended that the instant suits ought to succeed as the said suit (Title Suit No. 93 of 1950) being hit by S. 47 of the Code of Civil Procedure, as aforesaid, would not be protected by S. 9 of the Code of Civil Procedure and would thus be not maintainable in law and the court would have no jurisdiction to entertain the said suit, the consequence being that the decree, passed therein, would be without jurisdiction and thus a nullity.

10. The appellant contests the above position and his plea is that the above compromise decree, being a decree of dismissal of the suit, was not executable, particularly when there was no term in the compromise, indicating that the relief, obtainable thereunder by the present appellant against the respondent no. 1's predecessors, who were defendants in that suit, would be available in execution, and, upon this view, the appellant contends that execution was not the appropriate remedy for the said reliefs and no question under Section 47 of the Code of Civil Procedure would arise and the proper remedy would be a suit for enforcing the said reliefs. It is on this question that the two courts below have differed. They have also differed on the preliminary question whether the contract for sale, which was embodied in the compromise petition and eventually made a part of the compromise decree, was within the scope of the suit. The learned trial Judge was of the view that the same was outside or beyond the scope of the suit and accordingly could not form an effective or operative part of the decree and no question of execution would at all arise under the circumstances. The learned Additional District Judge, however, on the authority of certain decisions, cited in his judgment, has taken the view that although the suit was a suit for declaration of title and recovery of possession and although the plaintiff's claim to that effect was dismissed, the parties by the compromise inserted the contract in question as a term of such dismissal and thus brought the said contract within the scope of the suit.

11. In our view, even assuming that the said term of contract for sale would be within the scope of the suit and the same may legitimately be included within the operative part of the decree, it was not a term, in the circumstances of these cases, which could be enforced in execution. It undoubtedly embodied a contract for sale and gave the party concerned, namely, the present appellant, a right to specific performance. A right to specific performance, by itself, does not allow it to be put into execution. It was open to the parties to stipulate in the terms that this right would be enforceable in execution, which would really mean that the parties agreed to a decree for specific performance in favour of the appellant in spite of the dismissal of his suit which was for declaration of title and recovery of possession. In the instant case we find no terms in the compromise decree to the said effect and, accordingly, the principle that the parties by their own agreement can stipulate and lay down the procedure and substitute execution for a suit would not apply. Execution thus not being available, the decree in question being really a dismissal of the plaintiff's suit, the only remedy, available to the present appellant, for enforcing his right of specific performance would be by way of a suit. In this view, we would hold that Title Suit No. 93 of 1950 was maintainable in law and the decree, passed therein, cannot be held to be invalid or a nullity or without jurisdiction on the ground that the suit was not maintainable and not entertainable by the court.

12. In taking this view, we have not gone against any of the decisions, relied on by the learned Additional District Judge, namely, (1908) 7 Cal LJ 492; 43 Cal WN 1007 : (AIR 1940 Cal 82) and AIR 1954 SC 340, which are all distinguishable from the instant case, in which the compromise decree in question was a decree of dismissal of the suit, however much this particular term or agreement for sale may be considered to be within the scope of the suit or brought within its scope by the parties' conjoined action. There remains, however, one other case which was also relied on by the learned Additional District Judge, namely, 60 Cal WN 99 : (AIR 1956 Cal 317) which, apparently, supports his view. That case, however, is also distinguishable on its facts and, apart from that, we may point out that the bar of Section 47 of the Code of Civil Procedure was, in that decision, somewhat widely interpreted. It is to be remembered that even under Section 47, provided the period of limitation has not expired, and, in the instant case, that period had not expired at the material time, under sub-section (3), the court is entitled to

convert a suit, which would otherwise be hit by the said section, into a proceeding under Sec. 47 and vice versa. It is clear, therefore, that the mere fact that a suit is filed, which would be hit by Section 47 of the Code, would not rob the court of its jurisdiction to deal with the matter and the decision of the court cannot be said to be a nullity or without jurisdiction. It will, at best, be a defect in procedure or an irregularity and would not, therefore, attract the bar of nullity. This aspect of the matter does not appear to have been considered in the above-cited decision and the proposition that the decree in a suit, which was hit by Section 47, would simply on that ground or merely because of that fact, be a nullity, was stated too broadly. As we have already said, that decision is distinguishable on its facts, as it was, primarily, rested on the other point, involved therein, namely, as to the effect of the Indian Independence Order.

13. In the above view, we would allow these appeals, set aside the decrees, passed by the learned Additional District Judge, and restore those of the learned Subordinate Judge, dismissing the instant suits of the plaintiff respondent no. 1.

14. There will be no order for costs in any court.

15. S. K. CHAKRAVARTI, J.: I agree.
Appeals allowed.

AIR 1970 CALCUTTA 37 (V 57 C 6)

P. N. MOOKERJEE, A. C. J.

AND S. K. CHAKRAVARTI, J.

Smt. Hemangini Dassi, Appellant v. Sm. Rashmoni Dassi, Respondent.

A. F. A. O. No. 156 of 1961 D/- 3-4-1969.

Civil P. C. (1908), S. 47 — Executable decree — Decree entitling future maintenance of Rs. 20/- per month with charge on property and also for recovery of arrears of maintenance — Execution — Decree is executable and plaintiff cannot be compelled to file another suit. Case law Discussed. (Para 6)

Cases Referred: Chronological Paras

(1957) AIR 1957 Tra Co 90 (V 44) =

ILR (1956) Tra Co 321, Sankaran Pankajakshan v. Narayana Pillai Vellayudhan Pillai 4

(1950) AIR 1950 All 210 (V 37) = 1949 All LJ 515, Sm. Indra Devi v. B. Pirag Nath 4

(1937) AIR 1937 Pat 654 (V 24) = 172 Ind Cas 234, Sah Radhakrishna v. Mt. Bechui Devi 4

(1931) AIR 1931 Mad 120 (V 18) = 130 Ind Cas 666, Abdul Muhamed v. Seethalakshmi 4

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(1911) ILR 38 Cal 13 = 14 Cal WN

918, Asad Ali Mollah v. Haidar Ali 4

(1892) ILR 19 Cal 139 (FB), Ashutosh

Banerjee v. Lukhimoni Debye 4

Rabindra Nath Mitra and Mahendra Kumar Ghose, for Appellant.

S. K. CHAKRAVARTI, J.: A short point arises for determination in this appeal. It is as to whether a decree in respect of future maintenance can be enforced in execution without having recourse to any further suit or not.

2. The appellant before us had filed a suit against the respondent for a declaration that she was entitled to future maintenance at the rate of Rs. 20/- per month and for recovery of arrears of maintenance at that rate and also for granting a charge in respect of Kha schedule properties for arrears of maintenance and future maintenance. The decree in that suit, as modified by this Court, was to the effect that the plaintiff was entitled to future maintenance at the rate of Rs. 20/- per month and that a charge on the Kha schedule properties was declared with respect to the future maintenance. There was also a decree for recovery of arrears of maintenance at the rate of Rs. 20/- per mensem.

3. The appellant put the decree into execution not only for realisation of arrears of maintenance but also for the future maintenance due to her on the basis of that decree. The respondent filed an application under Section 47 of the Code of Civil Procedure alleging therein that the decree-holder was not entitled to realise future maintenance at the rate of Rs. 20/- per month without bringing a fresh suit and obtaining a decree therein. This plea prevailed with the learned Subordinate Judge as also with the learned District Judge sitting in appeal.

4. In this appeal by the decree holder it is contended by Mr. Mitra that both the courts below erred in so holding. Though the decree with regard to the future maintenance in this particular case was in the form of a declaratory one, still, in substance, it directed the respondent to pay to the appellant a sum of Rs. 20/- per month by way of maintenance, and Mr. Mitra submits that the future maintenance may be realised in execution. The same question arose for determination before a Full Bench of this Court Ashutosh Banerjee v. Lukhimoni Debye, (1892) ILR 19 Cal 139 (FB), and the question was answered in the affirmative. It was subsequently followed by this Court in Asad Ali Mollah v. Haidar Ali, (1911) ILR 38 Cal 13. The same principle has also been laid down in Sm. Indra Devi v. B. Pirag Nath, AIR 1950 All 210 and also in Sankaran Pan-

kajakshan v. Narayana Pillai Velayudhan Pillai, AIR 1957 Trav Co. 90, by the Patna High Court in Sah Radhakrishna v. Md. Bichui Devi, AIR 1937 Pat 654 and by the Madras High Court in Abdul Muhamed v. Seethalakshmi, AIR 1913 Mad 120.

5. The learned District Judge appears to have relied on Section 581 of Mulla's Principles of Hindu Law (12th Edn.) at p. 728. There also it has been laid down that a decree which directs the payment of future maintenance from time to time can be enforced by execution, but a decree which merely declares a right of maintenance cannot be so enforced. Here there was not only a right of maintenance declared but the amount was also fixed and property charged and in the Madras decision, which has also been referred to in Section 581 of Mulla's book, it has been held that such a decree is executable. The learned Judge appears to have misread Section 581 of Mulla's Hindu Law.

6. As a matter of fact, the decisions of the different High Courts are quite unanimous on this point that in such a case the party concerned need not be compelled to file another suit claiming arrears of maintenance, but that the right to maintenance may be enforced in execution of the original decree. In this view of the matter, the appeal is allowed, the judgments and orders passed by the courts below are set aside and the Misc. Case filed under Section 47 of the Code of Civil Procedure is dismissed and it is directed that the execution case do proceed in accordance with law, in the light of the observations mentioned above.

7. There will be no order as to costs in this appeal.

8. We may also note that the respondent has not appeared in this proceeding before us.

9. P. N. MOOKERJEE, A. C. J.: I agree.

Appeal allowed.

AIR 1970 CALCUTTA 38 (V 57 C 7)

BIJAYESH MUKHERJI AND S. K. DATTA, JJ.

Sachindranath Chatterjee, Appellant v. Sm. Nilima Chatterjee, Respondent.

A. F. O. D. No. 399 of 1965, D/- 16-5-1969.

(A) Hindu Marriage Act (1955), Ss. 13 (1) (i) and 23 (1)—Divorce — Adultery — Standard of proof — Law in England and India — Burden of proof — Post-suit adultery — Evidentiary value of.

The procedure in divorce is a civil proceeding, not a criminal proceeding.

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and the analogies and precedents of criminal law have no authority in the divorce court, a civil tribunal. In spite of the law having been laid down so by the House of Lords in *Mordaunt v. Moncreiffe*, (1874) 2 Sc & D 374, there has been a divergence of opinion in England on the question whether the same strict proof, proof beyond reasonable doubt, is required for a matrimonial cause as is required in a criminal offence. The House of Lords in *Blyth v. Blyth*, 1966 AC 643 by a majority of three to two settled the controversy, but only about condonation, connivance and the like, bars to relief, the standard laid down therefor being preponderance of probability, not about the grounds for dissolution, adultery and the like, where satisfaction beyond reasonable doubt was necessary.

(Paras 20, 22, 25, 37 and 39)

While so much divergence of opinion is there about the standard of proof beyond reasonable doubt, a concept of criminal law, being applied in a divorce suit, a civil proceeding, criminal jurisdiction is being instructed, on high authority, to eschew the expression "beyond reasonable doubt" an expression which is too refractory to be brought within the limits of a clear and precise definition — and, what is more, to go by simply "satisfied". Such indeed is the case of *R. v. Summers*, (1952) 1 All ER 1059. If that is that, the very edge of the controversy is then gone. And the standard of proof in all jurisdictions — civil, criminal and matrimonial (part of civil) — appears to be the same: satisfaction of the court. S. 3 of our Evidence Act, defining "proved" lays down as much too, making no distinction between proof in a civil case and proof in a criminal case.

(Paras 40 and 41)

In the law laid down by the Supreme Court, however, what one finds is consensus, in the sense of unanimity that the standard of proof in a matrimonial cause in India is proof beyond reasonable doubt, AIR 1957 SC 176 & AIR 1958 SC 441 & AIR 1964 SC 40 & AIR 1965 SC 364, Ref.

(Para 50)

That there were opportunities for committing adultery is nothing: there must be circumstances amounting to proof that opportunities could be used, such as, the association of the parties was so intimate and their mutual passion so clear that adultery might reasonably be assumed as the result of an opportunity for its occurrence.

(Paras 82 and 284)

The falsity of a particular defence on the part of the wife can never be a substitute for proof of the charge of adultery brought against her which it is for the petitioner husband to prove. 1951 AC 391 Foll.

(Paras 84 and 154)

Evidence on post-suit adultery is admissible, not as the basis for a decree of divorce, not as the ground on which divorce can be granted, but to prove and explain other evidence given in the case, to tend to show the character and quality of the previous acts. The mere fact that the wife was suffering from acute uterine haemorrhage during the divorce proceedings some three years after she had left the petitioner husband, proves neither pregnancy nor abortion and not adultery either. Where the evidence given in the case proves the utter falsity of the four specific acts of adultery the wife was charged with, this sort of post-suit adultery has nothing to explain, far less to prove, such evidence and by parity of reasoning cannot tend to show the character and quality of something which does not exist. And of course this cannot serve as the basis for a decree of divorce the petitioner prays the court for. AIR 1955 NUC (Cal) 857, Foll.

(Paras 356, 357, 358 and 360)

(B) Evidence Act (1872), S. 60 — Hearsay evidence — What is.

Where the truth of what A told B is in issue, what B says A told him is hearsay and inadmissible in the absence of evidence of A. The outlook would, however, be otherwise where the object of such evidence is not to establish the truth of A's statement, but only the fact that A did make a statement. (1956) 1 WLR 965, Foll. (Para 126)

(C) Evidence Act (1872), S. 101 — Benami — Burden of proving benami is on person who alleges it — But where all relevant facts are before Court all that remains is what inference should be drawn from them and question of onus becomes academic. AIR 1920 PC 67 & AIR 1922 PC 292, Foll. (Para 327)

(D) Evidence Act (1872), S. 101 — Benami — System of putting property benami being extremely common, even slight quantity of evidence to show that transaction was sham transaction will suffice for the purpose. (1887) 14 Ind App. 127 (PC), Foll. (Para 327)

(E) Evidence Act (1872), Ss. 155, 3 and 118 — Credibility of witness — Absence of inherent vice — Adverse presumption on any matter cannot be drawn in absence of opportunity to explain it.

In absence of any inherent vice, no presumption adverse to a witness should be drawn on any matter unless it is put to him and he is given an opportunity to explain it. (Paras 124, 211 and 326)

(F) Evidence Act (1872), Ss. 137 and 138 — Failure to cross examine witness on point stated in examination-in-chief — Does not amount to acceptance of testimony when it is inherently incredible.

Failure to cross examine a witness on a point stated in her evidence in chief will not amount to acceptance of her testimony thereon when such testimony is inherently incredible. (Para 215)

(G) Civil P. C. (1908), O. 6, R. 2 — Averment in pleading that B discovered the wife and one N in room bolted from inside — Evidence of B that he opened the room's door locked from outside and discovered the wife and N in that room in embrace with one another, completely naked and committing sexual intercourse — Pleading silent about such evidence — Evidence must go down as cooked. (Paras 288, 295 & 296)

Cases Referred: Chronological Paras

(1969) 73 Cal WN 19. Lilabati v. Kashinath	51
(1969) 73 Cal WN 143. Sm. Tusharkana Debi v. Bhowani Prosad Roy Chowdhury	126
(1968) AIR 1968 Cal 133 (V 55)=71 Cal WN 605. Adelaide Mande Tobias v. William Albert Tobias	50
(1968) 72 Cal WN 279. Kamal Krishna Deb v. Birju Kumvakar	126
(1968) 1968-1 WLR 1684. Bastable v. Bastable	52A
(1966) 1966 AC 643=1966-2 WLR 634. Blyth v. Blyth	26, 37, 38, 39, 42, 50, 52, 52A
(1965) AIR 1965 SC 364 (V 52)= (1964) 7 SCR 267. Mahendra v. Sushila	45, 49, 53
(1964) AIR 1964 SC 40 (V 51)= (1964) 4 SCR 331. Lachman Utamchand v. Meena	47, 51
(1964) AIR 1964 Cal 28 (V 51)= 67 Cal WN 740. (FB), Agnes Cecilia Gome v. Lancelot Ashley Gome	50
(1963) 1963-2 All ER 994=1964 AC 698. Williams v. Williams	36
(1961) 1961-3 All ER 243=(1961) 1 WLR 1135. R. v. Attfield	40
(1958) AIR 1958 SC 441 (V 45)= =1958 SCR 1410. Earnist John White v. Kathleen Olive White	45, 46, 49
(1957) AIR 1957 SC 49 (V 44)= 1956 SCR 691. Sree Meenakshee Mills Ltd. v. Commr. of Income-tax	328
(1957) AIR 1957 SC 176 (V 44)= 1956 SCR 838. Bipinchandra Jaisingbai Shah v. Prabhavati	44, 47
(1956) 1956-1 WLR 965=100 SJ 566. Subramaniam v. Public Prosecutor	126
(1955) AIR 1955 NUC (Cal) 857 (V 42), Knight v. Knight	357
(1955) 1955-2 All ER 918=(1955) 2 QB 600. R. v. Hepworth	40
(1954) 1954 P. 252=1954-1 All ER 536. Galler v. Galler	35, 48
(1952) 1952-1 All ER 1059=1952 WN 185. R. v. Summers	40

(1951) 1951 AC 391=(1951) 1 All ER 124, Preston Jones v. Preston Jones 33, 35, 45, 46, 48, 49, 84, 256	
(1950) 1950-1 All LR 737=1950 AC 361, Jacobs v. London County Council 50	
(1950) 1950-1 All ER 804=114 JP 221, Gower v. Gower 29, 46, 50	
(1950) 1950 P 125=(1950) 1 All ER 40, Davis v. Davis 28, 30, 36	
(1949) 1949 P 277=(1949) 1 All ER 76, Lauder v. Lauder 27	
(1949) 1949 P. 341=(1949) 1 All ER 938, Fairman v. Fairman 27, 28, 35	
(1948) 77 CLR 191, Wright v. Wright 26, 27, 30, 36	
(1948) 1948 P 179=(1948) 1 All ER 373, Ginesi v. Ginesi 25, 26, 28, 30, 31, 38	
(1947) 63 TLR 474=(1947) 2 All ER 372, Miller v. Minister of Pensions 28, 227	
(1945) 1945 P 44=114 LJP 17, Churchman v. Churchman 25, 27, 28, 30	
(1943) 1943 KB 607=(1943) 2 All ER 156, Rex v. Carr-Briant 37	
(1938) 60 CLR 336, Briginshaw v. Briginshaw 23, 26	
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(1936) 1936-2 All ER 1138=80 Sol Jo 532, Sodeman v. The King 37	
(1930) 1930 AC 1=98 LJPC 163, Ross v. Ross 82, 284	
(1922) AIR 1922 PC 292 (V 9)=49 Ind App 288=27 Cal WN 245, Chidambara Sivaprakasa Pandara Sannadhiyal v. Veerama Reddi 327	
(1920) AIR 1920 PC 67 (V 7)=47 Ind App. 76, Seturatnam Aiyar v. Venkatachala Goundan 327	
(1893) 6 R. 67, Browne v. Dunn 211, 215	
(1887) 12 Ind App 127=ILR 15 Cal 20 (PC), Uman Parshad v. Gandharo Singh 327, 330	
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(1873) 2 Sc & Div 300, Cuno v. Cuno 34	
(1810) 2 Hag Con 1=161 ER 648, Loveden v. Loveden 21, 25, 28, 39, 303	

Gouri Mitter, Bhupendra Kumar Panda, and Ajit Kumar Sen Gupta, for Appellant; Amarendra Mohan Mitra and Arunendra Nath Basu, for Respondent.

BIJAYESH MUKHERJI, J.:— The appellant in this case is Dr. Sachindra Nath Chatterjee, M.B. and D.T.M. (Calcutta), D.M.R. (Madras), D.M.R.T. (England), and Reader, Radiotherapy, Medical College, Calcutta, and the respondent is his wife, Sm. Nilima Chatterjee; they are

referred to hereinafter as simply Sachindra and Nilima.

2. Sachindra is now about fifty-five and Nilima fifty years of age.

3. The appeal is brought from a judgment and decree dated December 16, 1964, of a learned Additional District Judge, Allpore, dismissing Sachindra's petition dated January 19, 1962, for divorce on the ground of Nilima's adultery: just the ground under Section 13, sub-section (1), clause (i), of the Hindu Marriage Act 23 of 1955, or, in the alternative, for judicial separation on the ground of "severe cruelty and tremendous torture" by her: just the ground under Section 10, sub-section (1), clause (b), thereof.

4. Sachindra and Nilima, Hindus both, and domiciled in India too, were married in accordance with Hindu rites, some thirty-two years ago from today, to be exact, on Asarh 14, 1344 B.S., corresponding to June 28, 1937, in the town of Barisal, now in East Pakistan. Sachindra, then an M.Sc. student, was about twenty-three and Nilima, then or thereabouts a matriculate, eighteen years of age.

5. Nilima's father had died long before her marriage. She was, therefore, brought up by her mother's father, Chandrakanta Chakrabarti, a practising muktear of the Barisal courts at the relevant time. Indeed, in his house at Barisal the marriage was solemnized.

6. The ceremony of marriage over, Nilima moved, as usual, to Sachindra's ancestral home at Bakal, also in the district of Barisal or Backarganj, as it is called, and continued living there, broken by periodic visits to her grandfather Chandrakanta's place. Sachindra was with her too at Bakal, but only for thirteen days, after which he returned to Calcutta, as indeed he had to, leaving Nilima behind, with a view to prosecuting his studies. Prosecute that he did on return to Calcutta. But soon enough the course he was in, did undergo a change. A change, because he discontinued reading for M.Sc., and, in 1938, got into the medical college instead. There he had continued until 1944 when he passed the M.B. examination. Having graduated so, he worked there as house physician and house surgeon until 1946's end or thereabouts. Then, he took to studies again — this time for the D.T.M. course — until April 1947, and, in due course, obtained the diploma he was working for. But there he did not rest. From July 1947 to June 1948 he was in Madras, "doing" the D.M.R. course, and succeeded in getting this diploma as well.

7. Passing by, for the time being, still another feather in his cap — a D.M.R.T. — which he earned in England, after having stayed and toiled there from March 1956 to February 1958 or thereabouts, it

is time now to notice, in the barest outline, how the connubial relation developed between the two spouses, Sachindra having left Nilima, his newly wedded wife, at Bakal, only thirteen days after the marriage. While in the medical college — and Sachindra was there, first as a student from 1938 to 1944, and then as a house physician and the like until 1946's end — he did visit Nilima at Bakal, but only once or twice a year, and that too for not more than eight to ten days at a time. Nilima in turn, did come from Bakal to Sachindra's Calcutta residence at 4D Mohanlal Street (shortened hereafter into "4D") in the northern part of the town and so close to a well known park of the locality the Deshabandhu Park. Such visits, however, by her to Sachindra here in Calcutta were very few, only three or four, and for short duration as well on each occasion. Only in July 1948 she was "permanently shifted" to "4D" — an address which bulks large in this matrimonial litigation, so unpleasant and unfortunate.

8. There were three children of the marriage — two daughters and a son — when Nilima had shifted so, and at last found her normal abode with the husband, some eleven years after her wedding. The children are —

1. Khana, a daughter, twenty-six or twenty-seven years of age, on March 24, 1964, when Sachindra was giving evidence at the trial, and, therefore, born in or about 1938. 1937 the year of birth cannot possibly be, her parents having been married only on June 28, 1937.

2. Reba, also called Krishna, another daughter, twenty-one or twenty-two years of age on the same date, and, therefore, born in 1942 or 1943, going by Sachindra's evidence. Reba, however, says, on cross-examination, her precise date of birth to be July 2, 1943. It does not matter which.

3. Panna, a son, aged eighteen on March, 24, 1964, as spoken to by Sachindra in his evidence, and, therefore, born in or about 1946.

9. Naturally, these three children of the marriage were "permanently shifted" too, along with their mother, from Bakal to "4D" in July 1948, when they were not even in their teens, having been no more than about ten, five and two years of age respectively.

10. There is another issue of the marriage yet: a boy Chanchal by name, aged fourteen on March 24, 1964, as is the evidence on that date of Sachindra. That makes the year of his birth 1950 or thereabouts.

11. More, to Dr. Shantipada Ganguli, an LMF in the beginning, but later an M.B.B.S., thanks to the condensed course,

Khana, the first-born, was married on July 1, 1955, when she was some seventeen years of age. What is still more, Dr. Ganguli, now Reader and Head of the Department of Radiology in the College of Medical Science, Varanasi, had his early training on the subject in the chambers of his father-in-law, Sachindra, who did not stop at that, but had sent him to England, bearing all his expenses, so that he could qualify himself for B. M. R. D. (London), which he did.

12. From the little that goes before, one should have thought: here was a happy home, the usual wear and tear of a married life notwithstanding. And a married life which is above wear and tear must be rare indeed. Then, on January 19, 1962, when the two spouses were in their forties, Sachindra having been forty-eight and Nilima forty-three years old, married for about a quarter of century, with passions necessarily in a state of greater composure, blessed with four children, the oldest of whom was about twenty-four and the youngest twelve years of age, having in addition the gift of a grandchild, the child of Khana and Dr. Ganguli, referred to by both Sachindra and Nilima in a common letter bearing date March 3, 1959, to Dr. Ganguli, then in London, exhibits A(3) and A(4) as "Dadubhai", a term by which a grandchild is petted by his grandparents, Sachindra informing his son-in-law of the stay of Khana and her child with them at "4D" (which is in Shambazar) for about a week with a view to restoring "Dadubhai's" health, gone down for some time past, and when the male spouse Sachindra had earned name and fame, as also lucre, in his profession as a radiologist, the marriage, one should have thought again, was brought to a high pitch of success. But, on that very day, namely, on January 19, 1962, Sachindra raised his action for divorce or judicial separation — an action we are now adjudicating in appeal. Why such action? Sachindra answers it in one way, and Nilima answers it, as is only to be expected, in a way exactly the opposite. But both rest their answers on a common event which is as uncommon as breath-taking.

13. And that uncommonly common event (as alleged) came into view on January 28, 1961, when Reba alias Krishna, whose acquaintance we have just made, and who was then a little less than eighteen years of age, lodged a complaint before the police that her father, Sachindra, had attempted to commit rape on her nearly a year back namely, on March 10, 1960. Sachindra, twenty-three years old on June 28, 1937, the date of his marriage, was forty-six or thereabouts on March 10, 1960. It was in sober truth

a most astounding complaint, leading to Sachindra's arrest three days later, that is to say, on January 31, 1961, and his production before the magistrate on the day following, when he was enlarged on bail. On April 5, 1961, his house at "4D" was searched. That very day, Nilima left "4D". Investigation of the complaint completed, a charge-sheet was submitted against Sachindra under Section 376 of the Penal Code for the offence of rape on his daughter Reba alias Krishna on March 10, 1960, not merely an attempt to commit rape. In due course, he was committed to the court of session, where he stood his trial thereunder and was acquitted on December 23, 1961.

14. Such is the event — that there was a prosecution as above culminating in Sachindra's acquittal is not in the realm of controversy — upon which each party relies in its own way. What Sachindra says comes to this: "My wife is a nymphomaniac, more or less. I have been putting up with her sexual lapses ever since July 1941. But the one on January 1, 1961, broke me, and I gave out. I would go to law with her for divorce. That led her to bolster against me the false and agonizing prosecution she did, through Reba, with a view to forestalling my action for divorce and forcing me 'with the assistance of the police' to agree to the terms dictated by her". Hence this matrimonial cause by me on January 19, 1962, only twenty-seven days after my acquittal — a cause which I could not have very well initiated during the continuance of the criminal case against me on a most heinous charge, and a false charge at that." What Nilima says comes to this: "Nothing of the nymphomania in me, but satyriasis, so to say, in my husband who used to revel in sexual intercourse with all sorts of women, sparing not even his near relations of all degrees. Such a one, so difficult to get on with, encouraged and emboldened by the failure of the prosecution against him, true though it was, has raised this matrimonial cause, falsely charging me with adultery over the years."

15. The acts of adultery charged by Sachindra and denied by Nilima resolve themselves into four heads:

I. An affair with Gopal, none else than Sachindra's nephew (his eldest brother Jitendra's son), at or about Barrackpore at 7 p. m. in July 1941.

II. An affair with Umakanta, a servant and cook combined, at "4D", at 10-30 p. m. in July 1955, hereinafter referred to as the first Umakanta affair.

III. An affair with the same man Umakanta at "4D" again at or about 11-30 a.m. in July 1959, referred to hereinafter as the second Umakanta affair.

IV. An affair with one Narayan Chakraborty, the night-watchman of the clinic on the ground floor of "4D", between 5.30 and 6 p. m., on January 1, 1961, a Sunday, hereinafter referred to as the Narayan affair. This is the one, Sachindra says, that broke him and made him give out his determination to sue for divorce.

16. Upon proof or disproof of such fourfold charge hang the fortunes of this painful litigation. But one difficulty must be got out of the way first. That is about the standard of proof obtaining in this class of case, a subject on which we have had the advantage of hearing a fascinating address from Mr. Gouri Mitter, the learned counsel for Sachindra, the appellant.

17. To the statute law first. Since, however, we have been referred to decisions, Indian and English, and some of the English cases refer to Australian authority, we reproduce below alongside one another the material excerpts from the relevant provisions of the connected statutes:

(Please see overleaf)

18. In the realm of statutes, it only remains to be noticed that not materially different from the Victorian (Marriage) Act 1928 is the South Australian Act the Matrimonial Causes Act 1929-41, the thirteenth section of which bears inter alia:

"... the court upon being satisfied as to the existence of any ground shall make the order or the order nisi claimed as the case may be."

19. Such being the plain provisions of each statute — and they cannot be plainer — all that the court has to ask itself is whether or not it is satisfied if the ground for granting relief exists, if the charge of adultery uncondoned has been proved. Parliament has used a simple word "satisfied". Give this word its normal and natural meaning which is: "to be convinced." "To be convinced" in turn means "to be free from doubt". That is plain common sense too. If I entertain a doubt about a fact existing, sure enough, I am not convinced about it: I am not satisfied about it either. So, had the question of standard of proof come up before us *res integra*, we would have proved and conned the whole of the evidence in this case, and having done so, would have come to either of the two following conclusions:

A. We are satisfied, the ground for granting relief to Sachindra exists, and we, therefore, grant him the relief he prays the court for.

B. We are satisfied, the ground for granting relief to Sachindra does not

Hindu Marriage Act
25 of 1955.

28. (1). In any proceeding under this Act, whether defended or not, if the Court is satisfied that—

(a) any of the grounds for granting relief exists

(b) where the ground of the petition is the ground specified in . . . in clause (i) of sub-section (1) of section 18, the petitioner has not in any manner . . . condoned the act or acts complained of

... ..

... ..

then in such a case, but not otherwise, the Court shall declare such relief accordingly.

Matrimonial Causes Act
1950 (14 Geo. 6, c. 25)

4. (2). If the Court is satisfied on the evidence that—

(a) the case for the petition has been proved; and

(b) where the ground of the petition is adultery the petitioner has not in any manner condoned the adultery . . . the Court shall pronounce a decree of divorce, but if the Court is not satisfied with respect to any of the aforesaid matters it shall dismiss the petition . . .

Victorian (Marriage) Act
1928 (Australia).

80. Upon any petition for dissolution of marriage it shall be the duty of the Court to satisfy itself, so far as it reasonably can, as to the facts alleged.

81. . . . subject to the provisions of this Act, the Court, if it is satisfied, that the case of the petitioner is established, shall pronounce a decree for dissolution of marriage.

exist, and we, therefore, refuse the relief he prays us for.

20. But the matter does not appear to be that easy now, in view of a respectable body of decisions which cluster round the subject. An embellishment, in the form of an adverbial qualification, beyond reasonable doubt, has been added to the simple word "satisfied". A gloss as that, it would seem at first sight, means so much, changing as it does the very colour of the proceeding. An action for divorce, a civil proceeding without doubt, becomes in a trice a criminal proceeding, all because of the application of the yardstick of proof beyond reasonable doubt, which has in fact been the standard of proof in a criminal case, "from time out of mind", save a note of dissonance in the recent past. (More of which in paragraph 40 infra.) It, therefore, assists one's convenience to the understanding of the problem if a short history as to the addition of the adverbial phrase "beyond reasonable doubt" to the clear word "satisfied", leading ultimately to its subtraction therefrom, but within a very limited sphere, (paragraphs 37 and 38), is set out.

21. Let us start from that celebrated and oft-quoted case of *Loveden v. Loveden*, (1810) 2 Hag Con, 1, in which the judgment was rendered by one whom the Earl of Selborne, Lord Chancellor, in *G. (The Husband) v. M. (The Wife)*, (1885) 10 AC 171, described as "a judge of the greatest possible eminence, no less a person than Lord Stowell", Sir William Scott in 1810. It was a case of adultery

too. And the general rule laid down by Lord Stowell (then Sir William Scott) is:

"The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations, — neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind if they let themselves loose to subtleties, and remote and artificial reasonings upon such subjects. Upon such subjects the rational and legal interpretation must be the same."

How well it accords with the definition of "proved" in Section 3 of our Evidence Act 1 of 1872 which adopts the requirement of a prudent man as the footrule to measure proof by. A prudent man is but another name of "a reasonable and just man", "a discreet man". And what such a one requires, with a view to acting upon the supposition that a fact (here adultery) exists, cannot be anything short of his "careful and cautious consideration", of his "guarded discretion, leading to such a conclusion. Neither in (1810) 2 Hag Con 1 nor in Section 3 of the Evi-

dence Act, you find the expression "beyond reasonable doubt" which became the battle-ground of judges in later years.

22. Sixty-four years later, a question arose in *Sir Charles Mordaunt v. Sir Thomas Moncreiffe* (as *Lady Mordaunt's* guardian ad litem), (1874) 2 Sc. & D. 374, whether proceedings in a petition by *Sir Charles Mordaunt* for divorce, on the ground of adultery, against his wife, *Lady Mordaunt*, who had become incurably lunatic, should be suspended, with liberty to *Sir Charles* to apply again to the Court in the event of her recovery. The House answered the question in the negative, Lord Hatherley observing in his speech (p. 393):

"Much has been said . . . as to the analogy of the suit for a divorce to a criminal proceeding, and it has been inferred, that inasmuch as every step in the proceedings against a criminal is arrested by his or her becoming a lunatic (cf. Section 464 et seq. of our Code of Criminal Procedure), so by parity of reasoning lunacy shall bar all procedure against a Respondent in a divorce case. But the procedure in divorce is not a criminal procedure. It is true that the consequences of a divorce may be far more severe than those in any merely civil suit, but it is consequentially only that this result takes place. The divorce bills* in Parliament were not bills of pains and penalties. They proceeded on the ground of relieving the petitioner for the bill from his unhappy position, that of indissoluble union with one who had herself, as far as was in her power, broken the marriage tie. The remedy applied was simply dissolution of the tie. No ordinary Divorce Act punished the adulterous party personally, or inflicted any pecuniary penalty."

In sum, the procedure in divorce is a Civil proceeding, not a criminal proceeding, and the analogies and precedents of criminal law have no authority in the divorce Court, a civil tribunal.

23. Sixty-four years after this pronouncement by the House of Lords that proceedings for a divorce are of a civil

*Here his Lordship is speaking of the old days before the statute 20 & 21 Vict. c. 85, the Matrimonial Causes Act 1857, — the very Act which fell for construction in this case under review — when marriage was indissoluble except by death (just like ours before the Hindu Marriage Act 1955), and Parliament had to pass special Acts, expressed to be on the petition of the injured spouse; and "it was usually expressed that the Sovereign, compassionating the condition of the Petitioner, had assented to the Special Act by which the tie was dissolved on proof of adultery."

nature, though Lord Chelmsford, in his speech, turned to the Act (20 & 21 Vict. c. 85) "as the only guide to a determination of the question raised by the appeal" before the House, and considered it unnecessary to determine the exact character of the proceedings—civil, criminal or quasi-criminal —, the High Court of Australia was called upon to apply itself to the problem, in *Briginshaw v. Briginshaw*, (1938) 60 CLR 336 on an appeal from the Supreme Court of Victoria, the material extracts from the relevant statute, obtaining there, have been reproduced in paragraph 17 ante. The trial judge, Martin J., whose judgment in an action for dissolution of marriage was under appeal in the *Briginshaw* case, (1938) 60 CLR 336 brought the problem to the forefront, by having used the controversial expression "beyond reasonable doubt" and concluded as under:

"I do not know whom to believe, I have done my best to decide but the petitioner must satisfy me that his story is true. I think I should say that if this were a civil case, I might well consider that the probabilities were in favour of the petitioner, but I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted."

24. Latham C. J. and his four companion judges of the Australian High Court were unanimous that the appropriate standard was the 'civil' and not the 'criminal'. Even so, the final words just quoted from the judgment of Martin J., they held, did by no means amount to a finding in favour of the petitioner. So they unanimously dismissed the appeal. And one of the reasons, why they decided so, was the law laid down by the House of Lords in (1874) 2 Sc. & D. 374 supra: that a suit for divorce is not a criminal proceeding.

[See the note by an anonymous learned contributor in *Law Quarterly Review*, volume 65, 1950, pages 35-38].

25. In England, however, the law took a different turn. Even some seventy-one years after the *Mordaunt* case, (1874) 2 Sc. & D. 374 Lord Merriman P. in the court of appeal, seized with the question of adultery and connivance, was saying:

"The same strict proof is required in the case of a matrimonial offence as is required in connexion with criminal offences properly so called": *Churchman v. Churchman*, (1945) P. 44.

And it was so said, reversing Denning J. (as his Lordship then was) who, as trial judge, held that the adultery was proved, but not absence of connivance on the part of the petitioning husband. In *Ginesi v. Ginesi*, (1948) p. 179, whereas *Wrottesley L. J.* would not go so far, but

confine instead the standard of proof in criminal offences to cases of adultery, "leaving to other occasions the decision whether it is equally applicable to other matrimonial offences, in addition, of course, to connivance which Lord Merriman P. must have had in mind in 1945 P. 44"; Tucker L. J. would approve of the general rule of Lord Stowell (then Sir William Scott) in (1810) 2 Hag & Con 1 supra about "the guarded discretion of a reasonable and just man" leading to a conclusion, one way or the other, upon the whole of the matters.

26. It, therefore, very much looks that the rule, rested on the high authority of the House, that an action for divorce fosters civil not criminal proceedings, is made a casualty of in England even up to 1948, seventy-four years after the Mordaunt case, (1874) 2 Sc. & D. 374 which enunciated such rule. To Australia again. Because, in the same year, 1948, and after the Ginesi case, 1948 P. 179 too, the High Court of Australia, seized of an appeal from the Supreme Court of South Australia, the relevant law whereof has been reproduced, in so far as it is material here, in paragraph 18 ante, was confronted with the difficult task of deciding whether to adhere to its earlier decision in the Briginshaw case, (1938) 60 CLR 338 or to follow the view of the English Court of appeal in 1948 P. 179. The Court, by a majority of three to one, declined to follow the Ginesi case, 1948 P. 179 and reiterated its view, that the "civil" and not the "criminal" standard of persuasion would apply to matrimonial causes including issues of adultery: Wright v. Wright, (1948) 77 CLR 191. Dixon J., a member of the court, commented *inter alia*:

"Of late years English courts have from time to time dealt in almost an unconsidered fashion with the standard of persuasion in civil proceedings involving crime, fraud or moral turpitude, that is, without going back to earlier case law inconsistent with assertions that have been casually made."

(1874) 2 Sc & D 374 — is one such earlier case-law not gone back to. Dixon J. went on:

"A 'full-dress' examination of the question would, I am sure, lead to some revision of the statements made in 1948 P. 179."

Such words proved almost prophetic. Only 18 years later, that is, in 1966, the House of Lords, in Blyth v. Blyth, (1966) AC 643, by a majority of three to two, did make the revision Dixon J. had expressed a wish for in 1948, but within a very narrow limit. (More of which in paragraph 37 *infra*).

27. But how the judicial view was getting into shape in England after (1948)

77 CLR 191 in Australia and before 1966 must be noticed. On November 25, 1948, Lord Merriman P., who had, in 1945 P. 44 (*supra*), equated the standard of proof for a matrimonial offence with that of in a criminal offence, contented himself saying in *Lauder v. Lauder*, (1949) P. 277: (1949) 1 All ER 76:

"The wife alleged a course of conduct (not including any acts of violence) of such a character as to be calculated to injure the wife's health. It is a commonplace to say that cases of that character need, as, indeed, do all cases of cruelty, to be strictly proved. . . ."

On March 22 and 23, 1949, in *Fairman v. Fairman*, (1949) P. 341: (1949) 1 All ER 938, Lord Merriman P., sitting with Ormerod J., had before them an appeal by the wife against the decision, discharging a maintenance order in her favour, on the ground that she had committed adultery with a man who had been staying as a lodger with her *qua* landlady. The decision appealed from was set aside, because the finding on adultery rested on the lodger's evidence alone and his evidence was plainly that of an accomplice. Cf. Section 114, illustration (b), and Section 133 of our Evidence Act, as also the law laid down by the Privy Council in *Mahadeo v. King*, AIR 1936 PC 242: that this rule of corroboration of the evidence of an accomplice, long a rule of practice, is now virtually a rule of law. So, here again the standard of proof in a criminal prosecution triumphed very much, even the analogy of criminal law on accomplice evidence having been pressed into service with vigour, just the thing the House of Lords had set its face against in 1874 in the Mordaunt case, (1874) 2 Sc & D. 374. But it was so only about adultery, "a quasi-criminal offence". About other matrimonial offences, Lord Merriman P. quoted what he had said in 1945 P. 44 (reproduced in paragraph 25 ante), and, "as a footnote to the phrase" he had then employed, added:

". . . I am not conscious of ever having directed either myself or a jury that the same strictness (as in adultery) applies to other matrimonial offences — in other words, in relation, for example, to desertion, cruelty, or wilful neglect to provide reasonable maintenance, that it is necessary to direct oneself more strictly than that the onus lies on the spouse who makes the charge to satisfy the Court that the offence is proved."

So, no more of the standard of proof in a criminal case is seen here. What is seen here instead is the triumph of the plain meaning of the simple word "satisfy". And in becoming humility it may be pointed out that the addition of the adverb "strictly", as in the phrase employed by Lord Merriman P.: "strictly prov-

ed", is apt to create a difficulty. Sure enough, we have nothing like "loosely proved" or "lightly proved" in our courts. That apart, "proved" is "proved", meaning just what it says: the fact to be proved has been proved. If "proved" means always "strictly proved", what duty would the word "proved" filleted to itself do? I repeat, I submit so, with great humility.

28. Then came another cruelty case: Davis v. Davis, decided on November 9, 1949, and come into the reports in 1950: (1950) P. 125; (1950) 1 All ER 40. The trial judge, Barnard J., on the line of what Lord Merriman P. had laid down in (1945) P. 44, said:

"A charge of cruelty must be proved with the same degree of strictness as a crime is proved in a criminal court."

This judgment was displaced by the Court of appeal (Bucknill, Somervell and Denning L. JJ.). Bucknill L. J. considered it unnecessary to bring the ques-

tion of criminal charges into consideration, referred to the mandate of the statute that the court should be "satisfied on the evidence that the case for the petition has been proved", and said:

"I understand that to mean that if there is any reasonable doubt at the end of the case, then the burden of proof has not been discharged and the decree ought not to be granted. If on the other hand, the court is satisfied beyond all reasonable doubt, the petitioner is entitled to a decree."

So, the standard of proof beyond reasonable doubt again. But is that not just the standard of proof in a criminal case? What error then did Barnard J. fall into, in saying what he did? More of which hereafter in paragraph 34 *infra*. Denning L. J. agreed with Bucknill L. J. and Somervell L. J. (who delivered judgment only on the facts) that the appeal should be allowed, but his approach, which was different, may be summed up as under:

I. A considerable degree of difference between the standard of proof required in criminal cases and that required in civil cases.

The degree of cogency required in a criminal case before an accused person is found guilty.

That degree is well settled. It need not reach certainty. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "Of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice.

This is just the gist of what his Lordship had said in an earlier case: Miller v. Minister of Pension, (1947) 63 TLR 474; (1947) 2 All ER 372, a case of a widow's claim to a higher pension for death of her husband, an officer of the army, on account of cancer of the gullet, i. e., carcinoma of oesophagus, attributable, so it was said, to war services.

II. (1874) 2 Sc. & D. 374 again, and effect thereof.

A suit for divorce is a civil and not a criminal proceeding. The rules of civil procedure would, therefore, apply to divorce suits, and not the rules of criminal procedure, which have been built up out of the high regard, the law has for the liberty of the individual, — liberty which is not to be taken away unless the case is proved against him or her beyond reasonable doubt. The same stringency is not necessarily called for in divorce suits, or, at any rate, in divorce

The degree of cogency required to discharge a burden in a civil case.

That degree is well settled too. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "We think it more probable than not," the burden is discharged, but if the probabilities are equal, it is not.

suits on the ground of cruelty or desertion, where the court is concerned not to punish any one, but to give statutory relief from a marriage that has irretrievably broken down.

[So, even Lord Denning here confines himself to divorce suits on the ground of cruelty or desertion, leaving such suits on the ground of adultery open.]

III. Satisfied on evidence — a sufficient test.

The statute itself lays down a sufficient test as this. That puts the burden of proof on the person who makes the allegation, but it is not a burden of extraordinary weight. It is a burden which exactly accords with the general rule laid down by Lord Stowell (when Sir William Scott) in (1810) 2 Hag Con 1: that circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion. Even Lord Merriman P., in 1949 P. 341 = (1949) 1 All ER 938

(paragraph 27) has never required, in cruelty cases, any higher standard than that of the court being satisfied on the evidence, and, strengthened by his authority, Lord Denning would require no more too in this cruelty case as well.

IV. 1948 P. 179 and standard of proof in criminal cases.

Whatever may be the position in adultery cases — (one more indicium of the standard of proof in adultery cases being kept open) — 1948 P. 179 gives no authority to the Divorce Courts to adopt for themselves in all divorce cases at one jump the standard of proof in criminal cases, to say nothing of the rules as to corroboration of accomplices and so forth in criminal courts.

[In 1949 P 341=(1949) 1 All ER 938, paragraph 27 ante, Lord Merriman P. rejected the evidence of the lodger on the question of adultery, the evidence of an accomplice as it plainly was.]

V. A danger in asserting what the statute does not assert.

The statute requires the court to be satisfied on the evidence. The statute does not say that the charge must be proved beyond reasonable doubt. Why say then what the statute does not? Therein lies the danger, because of the temptation it affords to give effect to shadowy or fanciful doubts.

29. Such was the lone voice of Lord Denning on November 9, 1949, up against the imposition, upon divorce suits, grounded on cruelty and desertion, at any rate, of the standard of proof in a criminal case. Soon enough, indeed on March 6 and 7, 1950, came an adultery case: Gower v. Gower, [1950] 1 All ER 804, and before Bucknill and Denning L. JJ. again. The facts were strongly in favour of adultery. It was a case for reduction of maintenance granted to a wife who had divorced her husband on the ground of adultery. The wife, with the child of the marriage, lived with a Mr. Cockburn, a married man living apart from his wife, in a flat consisting of a bed-sitting room, a kitchen and a bathroom. The landlord knew the wife as Mrs. Cockburn. In 1945, they moved to Wolverhampton, where the wife and Mr. Cockburn occupied one bedroom. To London and then to Richmond, they — the wife of another husband and the husband of another wife — went together and lived together so. Yet the trial judge (Barnard J. again) found that adultery was not made out, as there was not a scrap of evidence of any inclination.

30. The husband appealed. The appeal was allowed. Bucknill L. J. held that it was proved beyond reasonable doubt that the parties did commit adultery, though his Lordship did not accept the

contention on behalf of the wife that adultery, a quasi-criminal offence, was to be proved as such, i. e., as a crime would be proved. Denning L. J. agreed, but not without adding:

"I think the real reason why the judge fell into error may have been that he required an excessively high standard of proof. I would issue a caveat about the standard of proof. I do not think that this court is irrevocably committed to the view (remember Lord Merriman P.'s view in 1945 P. 44: Paragraph 25: reversing Lord Denning, then Denning J.) that a charge of adultery must be regarded as a criminal charge to be proved beyond all reasonable doubt."

Barnard J. was perhaps overborne by 1948 P. 179 (Paragraph 25) where Lord Wrottesley confined the standard of proof in criminal offences to cases of adultery only. Lord Denning pointed out several things affecting the weight of the Ginesi case, 1948 P. 179:

One, counsel there conceded that the standard of proof of adultery was the same as in a criminal case.

Two, (1874) 2 Sc. & D. 374, ruling that a suit for divorce is a civil and not a criminal matter, was not cited. Result, this strikes at the root of 1948 P. 179 which appears to have proceeded on the supposed criminal or quasi-criminal character of adultery.

Three, the statute simply requires the Court on a petition for divorce to be "satisfied on the evidence that the case for the petition has been proved." This itself lays down a standard and puts adultery on the same footing as cruelty, desertion or unsoundness of mind.

Four, the High Court of Australia in (1948) 77 CLR 191 (paragraph 26), after a full consideration, declined to follow 1948 P. 179 and held the 'criminal' standard of proof to be not appropriate in an adultery case.

Five, 1950 P. 125=(1950) 1 All ER 40 (paragraph 28) held that the 'criminal' standard of proof would not apply to cruelty. And between cruelty and adultery no valid distinction could be drawn. [Thus, the question of the standard of proof, not beyond reasonable doubt, but by the test in 'civil' law of the preponderance of probability, in an adultery case, a question which was kept open by Lord Denning in 1950 P. 125=(1950) 1 All ER 40: paragraph 28: was now closed.]

31. Pointing all this out, Lord Denning concluded:

"These matters may well be sufficient to entitle this court to reconsider 1948 P. 179 if and when the occasion arises . . . In the present case, I say simply I am satisfied on the evidence that adultery has been proved."

32. It will be noticed that though the conclusion come to by Lord Bucknill and Lord Denning is the same, the approach by each to the problem is different. While Lord Bucknill finds adultery proved beyond reasonable doubt, keeping the concept of proof beyond reasonable doubt separate from the 'criminal' standard of proof, Lord Denning will have nothing to do with such a concept, proof beyond reasonable doubt being in the domain of criminal law, not in that of civil law, within which a suit for divorce falls, and is simply satisfied on the evidence about the adultery having been committed.

33. On December 14, 1950, came the decision of the House in Preston-Jones v. Preston-Jones, [1951] AC 391. Here is an extraordinary case of the birth of a normal full-time baby conceived 360 days after a particular coitus by the husband. Held by the majority: a child conceived so, it is proved beyond reasonable doubt, cannot be the fruit of that coitus. But cannot spermatozoa remain alive that long in the tucks and crannies of the female genital tract? After all, abnormal things do happen; a freak of nature does happen too. But the scientific impossibility of the husband, continuously absent abroad, being the father of the child, need not be established. That will be putting upon him the onus too high. The standard of proof beyond reasonable doubt does suffice. By that standard, the adultery of the wife, against whom there is not the slightest breath of scandal or of looseness of conduct, is proved. By parity of reasoning, by that standard, the child is bastardized too.

34. Such then is the ratio. But is not to go by the standard of proof beyond reasonable doubt really to go by the 'criminal' standard, by that degree of cogency required in a criminal case before an accused man is found guilty? No. I can do no better than quote the words of Lord MacDermot's speech (p. 417) in the Preston-Jones case, 1951 AC 391 in support of such a negative answer:

"The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognize this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be 'satisfied', in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusions as to the appropriate standard on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in (1874) 2 Sc & D. 374, that

two jurisdictions (divorce and criminal) are other than distinct. The true reason, as it seems to me, why both accept the same general standard — proof beyond reasonable doubt — lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned."

The position then comes to this. If the standard of proof beyond reasonable doubt is there, in the realm of criminal jurisdiction, out of high regard the law has for the liberty, and even the life, of the individual, it is there too, in the realm of divorce jurisdiction, out of high regard the law has, on grounds of public policy, for the sanctity of home, which is not to be broken far too easily. As Lord Selborne, L. C., observed in *Cuno (The Wife) v. Cuno (The Husband)*, (1873) 2 Sc. & D. 300:

"To open the door to lax and easy declarations of matrimonial nullity would be a grave public mischief; and it is therefore imperative to proceed upon strict and thoroughly satisfactory proof."

35. On February 4, 1954, the Court of appeal (Singleton, Jenkins and Hodson L. JJ.) rendered judgment in *Galler v. Galler*, [1954] P. 252, where Commissioner Grazebrook accepted the uncorroborated testimony of a Mrs. Thompson to the effect that she had come to the house of the husband, Harry Galler, in 1950, after the departure of the wife, Marjorie Phillips Galler, therefrom, in October 1948, and that, while acting as a nurse for the husband's three children, she had frequently committed adultery with the husband in her bedroom. Hodson L. J., with whom the other two members of the court agreed, referred to 1949 P 341, where Lord Merriman P. discarded the evidence on adultery given by the lodger, himself the participant in the adultery, the evidence of an accomplice as it plainly was (paragraph 27), quoted *inter alia* the passage (I have just quoted: paragraph 34) from the speech of Lord MacDermot in 1951 AC 391, and ordered a new trial, observing:

"It might appear from the passages I have read from the judgment in 1949 P. 341 that the analogy of criminal law was the ratio of that decision, but I think the result is the same by whichever road one travels. In divorce, as in crime, the court has to be satisfied beyond reasonable doubt."

36. Thus, the standard of proof beyond reasonable doubt — the 'criminal' standard for all time — was passing as the standard in divorce jurisdiction as well — entirely a civil jurisdiction — even in February 1954. And so it was, because to send an accused man to the gallows or to the jail without his guilt being proved

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Delhi High Court

AIR 1970 DELHI 1 (V 57 C 1)

V. S. DESHPANDE, J.

Dr. S. C. Sharma, Petitioner v. Union of India; through the Secy.; Ministry of Health, New Delhi, Respondent.

Civil Writ Petn. No. 1576 of 1967, D/- 30-4-1969.

Civil Services — Central Health Services Rules, 1963 (as amended by Central Health Services (Amendment) Rules, 1966, and Central Health Services (Second Amendment) Rules, 1967), Rr. 7, 7-A — Provision for second selection under R. 7-A(1) (b) is not ultra vires the Constitution — Non-selection to post in selection grade is not removal or reduction in rank — Losing job on total abolition of post is also not removal from service — (Constitution of India, Arts. 14, 309, 310 and 311).

Petitioner was appointed to a post in category 'E' under R. 7 of the Central Health Services Rules, 1963. R. 7A was brought in by the 1966 Amendment Rules which provided for a second selection amongst the departmental candidates working in 'C', 'D', and 'E' categories for appointment to new posts under the 1966 Rules. Accordingly, there was a fresh selection under 1966 Rules as a result of which the petitioner was not selected for appointment to the new categories. This action of the Government was challenged on two grounds: (1) that the true construction of R. 7A(1) (b) of 1966 Rules was that all those employed in C, D, E categories under 1963 Rules should get appointed to new posts under 1966 Rules and that none could be kept outside these new categories and (2) that if the true construction of the rules authorised the Government to select some only of such departmental candidates and even to keep them out of the new categories, then,

this rule read with R. 7A(3) in its original form as also as amended by 1967 Rules was ultra vires and unconstitutional.

Held, (1) that the power not to take some of these candidates in the new categories could not be denied to the Government on a plain reading of Rule 7A(1) (b). (Para 6)

The interpretation placed as above on Rule 7A(1)(b) is confirmed by sub-rules (2) and (3) of Rule 7A. They would, therefore, stay outside the new category. (Para 7)

and (2) that R. 7A was not ultra vires or unconstitutional. For the reason that the departmental candidates who were not selected could continue to hold the posts to which they were originally selected under 1963 Rules would show that Art. 311 was not attracted. By the exclusion of the posts from the Service, however, the future prospects of these candidates for promotion, etc., were severely curtailed. This, however, did not amount either to removal or reduction in rank within the meaning of Art. 311. (Para 8)

Even if the Government should totally abolish those posts, which it could always do, the incumbents of such discontinued posts could claim no protection either under the Constitution nor under any law. In such an event, they would be losing their jobs not because they were removed but because the posts held by them ceased to exist. (Para 8)

Though under Sub-rule (3) of R. 7A as reviewed by 1967 Rules the candidates not selected for new posts would be entitled to pay and non-practising allowance as prescribed under 1963 Rules and not by 1966 Rules, the disparity or differential treatment could not be termed arbitrary because by selection they were found to be not good enough for being appointed to new categories. (Para 9)

Further, under Art. 310 and the proviso to Art. 309, of the Constitution, the Government has the power to take steps for the re-selection of the candidates after re-formation of the categories whenever it feels that the original categorisation and selection has not been satisfactory. AIR 1969 SC 118, Rel. on; AIR 1964 SC 600 and AIR 1967 SC 1427, Ref.

(Para 10)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 118 (V 56)=

1968-3 SCR 575, B. S. Vadera

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(1967) AIR 1967 SC 1427 (V 54)=

1967 (2) SCR 703, S. G. Jaisinghani

v. Union of India

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(1964) AIR 1964 SC 600 (V 51)=

(1964) 5 SCR 683, Moti Ram

Deka v. General Manager

North East Frontier Rly.

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A. S. R. Chari, Sr. Advocate with B. R. G. K. Achar, and H. K. Puri, for Petitioner; Narsaraju, Sr. Advocate, with S. S. Chadha, for Respondent.

ORDER:— In this writ petition we are concerned with the true construction and the legality of certain provisions of the Central Health Services Rules, 1963 (hereinafter called 'the Original Rules of 1963') as amended by the Central Health Services (Amendment) Rules, 1966 (hereinafter called 'the Rules of 1966') and the Central Health Services (Second Amendment) Rules, 1967 (hereinafter called 'the Rules of 1967').

2. In exercise of the powers conferred by the proviso to Article 309 of the Constitution, the President promulgated the Central Health Services Rules, 1963 constituting the Central Health Services by Rule 3 thereof. Under Rule 7 thereof, the Union Public Service Commission constituted a Selection Committee to determine the suitability of the departmental candidates for appointments to the different categories of the Central Health Service on its initial constitution, which are described in the first schedule thereto. Accordingly, the petitioner was selected and appointed to a post in category E of the said service on the 1st January, 1965 under Rule 7 thereof. However, the Rules of 1966 added Rule 7A of the Original Rules of 1963, the relevant portion of which may be reproduced below, as it is the main provision, the true construction and validity of which is to be considered:

"7A. Appointment of departmental candidates; (1) As soon as may be after the commencement of the Central Health Service (Amendment) Rules 1966—

(a) every departmental candidate who was appointed immediately before such commencement to any post in Category A or Category B of the Service or in any equivalent post, shall be appointed

to the corresponding Supertime Grade I or Supertime Grade II of the Service; (b) every departmental candidate who was appointed, immediately before such commencement to any post in any category (other than Category A or Category B), or in any other post, shall be appointed to the appropriate category after selection made on the recommendation of a Selection Committee constituted in accordance with the provisions of Sub Rule (1) of Rule 7, on the basis of his experience and the conditions of eligibility as specified below:—

Conditions of Eligibility

xx

xx

xx

(2) Vacancies in each category shall be filled by the appointment of departmental candidates selected under Sub-rule (1) and in the event of the non-availability of suitable departmental candidates for filling a vacancy, such vacancy may be filled by direct recruitment through the Commission.

(3) Departmental candidates who are not absorbed under Sub-rule (1) shall continue to hold the posts to which they were regularly appointed, and for this purpose, such posts shall be deemed to have been excluded from the Service for so long as such departmental candidates continue to hold them.

(4) Notwithstanding anything contained in these rules, any person who has been appointed to the Service under Sub-rule (1) shall be entitled to draw salaries in the scales of pay specified in Rule 4 and non-practising allowance of the rates prescribed in Rule 15.

(a) if his appointment to the Service was made on or before the 1st day of July, 1965, from that date; or

(b) if his appointment to the Service was made after the 1st day of July 1965, from the date of such appointment, as if such scales of pay and rates of non-practising allowance were in force, and the categories of posts were in existence, on the 1st day of July, 1965, or on the date of such appointment, as the case may be."

The Rules of 1967 substituted the following Sub-rule (3) of Rule 7A in place of the original Sub-rule 3:—

"(3) Every departmental candidate who is not absorbed under Sub-rule (1) shall—

(i) In the case of a candidate appointed to the Central Health Service before the commencement of the Central Health Services (Amendment) Rules, 1966, continue to be a member of the Service holding a post specified before such commencement in Part A or Part B of the First Schedule, as the case may be, subject to the condition that for the purpose of pay and non-practising allowance, he shall be governed by these rules as they stood before the commencement of the

Central Health Service (Amendment) Rules, 1966;

(ii) in the case of a candidate referred to in Sub-rule (3) of Rule 7, who is not appointed to the Central Health Service before the commencement of the Central Health Service (Amendment) Rules, 1966, continues to hold the post to which he was regularly appointed; and the respective posts, for the time being held by every such departmental candidate, shall be deemed to have been excluded from the service for so long as such departmental candidate continues to hold it."

3. The Central Government construed Sub-rule (1) (b) of Rule 7A to mean that a second Selection Committee was to be established to select candidates from among the departmental candidates, who had been appointed at the initial constitution of the Service to categories C, D and E of the original Rules of 1963 for appointment to appropriate categories established by the Rules of 1966. Briefly, the Rules of 1966 left intact categories A and B formed by the original Rules of 1963, but substituted the categories of the specialists and general duty grades I and II in place of the original categories C, D and E. Accordingly, there was a fresh selection by a second Selection Committee constituted under the Rules of 1966 as a result of which the petitioner among 44 departmental candidates, who had been initially appointed to the Service under the original Rules of 1963, were not selected for appointment to the new categories, which were formed by the Rules of 1966 in place of the categories C, D and E of the original Rules, of 1963. It is this action of the Government, which is challenged in this writ petition on various grounds.

4. The learned counsel for the petitioner, however, restricted themselves only to the following two grounds of attack during the argument, viz.,:

(1) The true construction of Rule 7A (1)(b) of the Rules of 1966 is that all the departmental candidates, who had been initially appointed to categories C, D and E of the Service under the original Rules of 1963, have to be appointed to the new categories formed by the Rules of 1966 and, therefore, none of them can remain outside these new categories; and

(2) If the true construction of the abovementioned rules authorised the Government not to select any of the departmental candidates, who became a part of the service at its initial formation under the original Rules of 1963 and even to keep them out of the categories formed by the Rules of 1966, then this rule read with Rule 7A(3) in its original form as also as amended by the Rules of 1967 as ultra vires and unconstitutional.

5. The writ petition was resisted by the Government on the ground that the

true construction of Rule 7A (1) (b) authorised the Government to make a further selection from the departmental candidates initially appointed to the Service under the original Rules of 1963 and on making such selection, the petitioner along with other 44 candidates was not selected for appointment to the new categories. The Rules enabling the Government to make such further selection and to keep out the petitioner and the other persons from appointment to the new categories were valid.

6. Let us first consider the meaning of Rule 7A(1). It has two parts (a) and (b). Part (a) deals with the departmental candidates, who were initially appointed to categories A and B of the Service. All of them are to be appointed to the corresponding supertime grade I and supertime grade II of the new categories formed by the Rules of 1966. Part (b) significantly departs from part (a). It says that every departmental candidate who was appointed to a category other than the categories A and B initially to the Service shall be appointed to the newly formed appropriate category "after selection". The learned counsel for the petitioner did not dispute the fact that a second Selection Committee had to be appointed under Rule 7A (1) (b) and that it had to make a selection from among the departmental candidates who had initially been appointed to categories C, D and E under the original Rules of 1963.

They, however, submitted that the selection was restricted only to the allocation of the departmental candidates to different posts in the newly formed categories. They supported this argument by pointing out that the selection had to be made "on the basis of experience and conditions of eligibility", which are specified at the end of Rule 7A (1) (b). They further pointed out that substantially the conditions of eligibility for the new categories were the same as those for categories C, D and E under the original Rules of 1963.

The learned counsel for the respondent, on the other hand, pointed out that the names of the new categories were different and the conditions of eligibility also had been revised. He went so far as to argue that the formation of the new categories in 1966 amounted to the formation of a new service. In my view it is not necessary to decide whether a new service was formed by the Rules of 1966. The name of the Service remained the same, the incumbents of posts in categories A and B also remained intact and the departmental candidates other than the 44 of which the petitioner is one, were also taken into the new categories. Therefore, even if it is assumed that the Rules of 1966 did not provide for the

formation of the new service as such, it cannot be denied that a revision or reformation of the old service was made by the Rules of 1966. The conditions of eligibility were slightly revised. The designations were changed and the pay scales were also revised. What is important to bear in mind is that the Government had decided that there should be a selection from among the departmental candidates for appointment to these new categories.

It cannot be denied that the power to "select" implied the power not to select. The very concept of selection means that only some from all may be taken. If all were to be taken necessarily on the true meaning of Rule 7A (1) (b), then the use of the words "after selection" was not warranted. This is proved by the fact that in Rule 7A (1) (a) the words "after selection" were not used for the simple reason that all the candidates in categories A and B were to be taken in the new categories. I am of the view, therefore, that the selection on the recommendation of the Selection Committee necessarily implied that the Government was not bound to take all the departmental candidates initially appointed to the Service in categories C, D and E. The power not to take some of these candidates in the new categories could not be denied to the Government on a plain reading of Rule 7A (1) (b).

7. The interpretation placed by me above on Rule 7A (1) (b) is confirmed by Sub-rules (2) and (3) of Rule 7A. Sub-rule (2) reiterates that vacancies in the new categories shall be filled in by appointment of departmental candidates selected under Sub-rule (1) and in event of non-availability of suitable departmental candidates for filling a vacancy, such vacancy may be filled by direct recruitment through the Commission. Sub-rule (2) apparently applies only to the selection made under Rule 7A (1) (b), inasmuch as Rule 7A (1) (a) does not talk of any selection. Sub-rule (3) is even more clear. It expressly contemplates that certain departmental candidates, who had been initially appointed to the Service under the original Rules of 1963 would not be absorbed in the new categories under Sub-rule (1), viz., Sub-rule (1)(b) of Rule 7A. If the construction suggested by the learned counsel for the petitioner for Sub-rule (1)(b) of Rule 7A had been correct, there would have been no need for Sub-rule (3) at all. The existence of Sub-rule (3) destroys the suggestion made by the learned counsel for the petitioner. The learned counsel for the petitioner emphasised that Sub-rule (3) uses the word "absorbed", which shows that all the departmental candidates had to be absorbed. I am unable to agree.

The use of the word "absorbed" only shows that those who are appointed to the new categories would be appropriately said to be absorbed, inasmuch as they were already in the Service under the original Rules of 1963. This is why they are absorbed in the new categories. Sub-rule (3) on the other hand, expressly contemplates that some departmental candidates would not be absorbed in the new categories. They would, therefore, stay outside the new category. I, therefore, find that on a correct construction of Rule 7A of the Rules of 1966, it authorised the Government to make a second selection from among the departmental candidates of categories C, D and E appointed under the original Rules of 1963 and to select some of them and not to select the others for the appointment to or absorption in the new categories formed by the Rules of 1966.

8. The learned counsel for the petitioner could not point out any definite reason why Rule 7A was either ultra vires or unconstitutional. A reference was made to the Supreme Court decision in *S. G. Jaisinghani v. Union of India*, AIR 1967 SC 1427, to support the argument that once departmental candidates were initially appointed to the Service under the original Rules of 1963, the Government was bound to take them in the new categories formed by the Rules of 1966. I do not see how the said decision supports the petitioner. In *Jaisinghani's* case the quota for the recruitment of the promotees was originally fixed by the Government by an administrative act at 25%. Later by another administrative act it was varied to 33.1/3%. This shows that the Government was free to vary the conditions of service even administratively. If so, the Government could certainly change the conditions of service by making a statutory amendment to the original Rules of 1963 by making the Rules of 1966. The right of the Government to change the conditions of service even retrospectively has been upheld by the Supreme Court in *B. S. Vadera v. Union of India*, AIR 1969 SC 118.

The decision of the Supreme Court in *Moti Ram Deka v. General Manager North East Frontier Railway*, AIR 1964 SC 600, was also referred to. The ratio of the said decision is that if a Government servant had a right to hold a post because he was a confirmed Government servant, then he cannot be removed from the said post except after following the procedure laid down under Article 311 of the Constitution and the disciplinary rules framed to carry out the purposes of Article 311. The original Sub-rule (3) of Rule 7A excluded from the Service the posts held by the departmental candidates who were not selected to the new categories formed by the Rules of 1966.

But, there was no removal of the departmental candidates from those posts. Those candidates could continue to occupy those posts as long as they chose to do so subject to superannuation. This would show that Article 311 was not attracted at all. By the exclusion of the posts from the Service, however, the future prospects of these candidates for promotion, etc. were severely curtailed. This, however, did not amount either to removal or reduction in rank within the meaning of Article 311. In fact, the Government could have totally abolished those posts held by the Departmental candidates. In that event, the departmental candidates would have lost their jobs not because they were removed from service, but because the posts held by them ceased to exist. There is no fundamental right or any kind of right in the incumbents of posts under the Government that these posts must be continued by the Government for any amount of time. The Government has the discretion to create and abolish posts. The incumbents of the posts so abolished automatically go out of the service and I am not aware of any protection given by law or the Constitution to such incumbents against such abolition of posts.

9. The Rules of 1967 have, however, revised Sub-rule (3) in this respect and now these posts continue to be in the service, though for the purpose of pay and non-practising allowance, the incumbents are to be governed by the original Rules of 1963 and not by the Rules of 1966. This cannot be challenged as discriminatory inasmuch as the departmental candidates, who were not selected to the new categories formed in 1966 form a class by themselves separate from the departmental candidates who were selected to the new categories. The different treatment to this different class is justified by the fact that the Selection Committee had found the petitioner and some others not good enough for being appointed to the new categories.

10. The decision of the Government to form the new categories and to subject the departmental candidates already appointed to the Service under the original Rules of 1963 to a second Selection was also attacked as arbitrary. To me, it seems, on the other hand, that the decision was a studied one. The Government was apparently not satisfied with the categories formed by the original Rules of 1963 and some of the appointments made to some of the posts in categories C, D and E thereof. As the Government was of that view it could certainly take steps for the reselection of the candidates after the re-formation of the categories. This power of the Government has never been doubted and is firmly established by

Article 310 and the proviso to Article 309 of the Constitution.

11. Some of the points regarding the study leave taken by the petitioner and whether he was entitled to pay during it or not were not germane to the decision of this petition. The learned counsel for the petitioner, therefore, requested me to leave them open. They are, therefore, left open.

12. For the above reasons, the writ petition is dismissed, but without any order as to costs.

Petition dismissed.

AIR 1970 DELHI 5 (V 57 C 2)

RANGARAJAN, J.

M/s. Raymond Engineering Works, Calcutta, Petitioner v. Union of India, through the Secy. Ministry of Industrial Development and Companies Affairs, New Delhi and another, Respondents.

Civil Writ No. 357 of 1968, D/-24-4-1969.

(A) Companies Act (1956), Ss. 269 (1) and 637-A (as amended in 1960) — Permission under S. 637-A — Government has power to impose conditions.

When a Company applies to the Central Government for permission to appoint a particular person as a Managing Director of the Company, for a specific period, it is an occasion when the Central Government could exercise the power under Section 637-A, its approval being required under Section 269(1) of the Act, in relation thereto. In such a situation, in the absence of anything to the contrary contained in such or any other provision of the Act, the Central Government may accord, give or grant such approval, subject to such conditions, limitations or restrictions, as it may think fit to impose, and may, in the case of contravention of any such condition, limitation or restriction, rescind or withdraw such approval. (Para 15)

(B) Companies Act (1956), Ss. 269(2) and 637-A — "Reappointment" of managing director means 'reappointment' for first time after Companies (Amendment) Act, 1960.

Section 269(2) can only apply to the case of reappointment of a person as a managing Director in the case of an existing company, such reappointment being made for the first time after the commencement of the Companies (Amendment) Act 1960. Section 269(2) does not cover the case of "reappointment" of a Managing Director, in the case of one, who had been appointed (with the Central Government's approval) after the coming into force of the Companies (Amendment) Act 1960.

Held, that the case came within Section 269(1) of the Act and the applicability of Section 367-A would not be ruled out.

(Para 19)

(C) Constitution of India, Art. 226 — Order of Central Government upon application for permission to appoint a person as Managing Director of Company having necessary power to impose, imposing conditions under Section 269(1) read with Section 637-A, Companies Act — Question of mala fide is not very relevant — (Companies Act (1956), Ss. 269(1), 637-A) (Para 35)

(D) Companies Act (1956), Ss. 269(1) and 637-A — Company Law — Board and Controller of Capital Issues — Different questions are considered.

The questions that arise for consideration by the Company Law Board under Section 269(1) read with Section 637-A are different from what had to be considered by the Controller of Capital Issues.

(Para 34)

(E) Constitution of India, Art. 226 — Order of Central Government — Allegations of mala fide against some official — Allegations cannot be heard unless those persons were made parties to the petition and thus given opportunity to rebut those allegations. (Para 35)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 707 (V 56) = 1969-1 SCC 325, Rohtas Industries v. S. D. Agarwal	35
(1968) LPA No. 40 of 1968 D/- 4-11-1966 (Delhi), Rampur Distillery & Chemical Co. Ltd. v. Company Law Board	36
(1966) 36 Com Cas 63 = (1965) 2 Mys LJ 520, Canara Work-shops Ltd. v. Union of India	26
(1965) AIR 1965 Mad 307 (V 52) = 1965 (2) Cr LJ 104, A. R. Hussain Khan v. Registrar of Companies	28
(1914) 1914-1 Ch 332 = 83 LJ Ch 372, Omnium Electric Palaces Ltd. v. Baines	32

B. Dutta, for Petitioner; Davinder K. Kapur, B. Sen with A. D. Chaudhary and Arun Madan, for Respondents.

ORDER:— A very interesting question with reference to the scope of Section 269 and Section 637-A of the Indian Companies Act (as amended by Act 65 of 1960) arises for consideration, as a case of first impression, in this civil writ petition.

2. A few salient facts alone may be sufficient to notice for deciding this question. The petitioner, called the Raymon Engineering Works Limited, is a public limited company which was incorporated on 30th November, 1954 with an authorised capital of rupees three Crores. It was, therefore, an existing company within the meaning of Section 3(2) of the Act.

3. Raymon & Company (India) Private Limited, incorporated in 1951, consisting only of two share-holders (Mrs. and Mr. M. C. Ray) were appointed on 7th February, 1956 as Managing Agents of the petitioner-company for a period of ten years. The Managing Agents negotiated, on 5th September 1955, for the purchase of a Bone Mill from Messrs. David Cur-lenders for Rs. 3,25,000/- out of which Rs. 15,000/- had been paid as earnest money. There was a conveyance dated the 25th June, 1957, whereby the balance of Rs. 3,10,000/- was paid. The negotiations for the purchase of this Mill are stated to have commenced in the year 1953-54 but completed on the 25th June, 1957. Shri M. C. Ray, the director and share-holder of the Raymon & Company (India) Limited was also one of the promoters of the company.

4. Some time in 1957, Raymon & Company (India) Private Limited offered to sell the entire land comprised in the Bone Mill along with the structures and machinery to the petitioner-company in order to enable the petitioner-company to erect and start their factory for the manufacture of wagons, for which they had obtained a licence under the Industries (Development & Regulation) Act, 1951. In pursuance of the said offer a meeting of the Board of Directors of the petitioner-company was held on 12th June, 1957 in which two independent valuers had valued the assets of the Bone Mill at Rs. 10,18,000/- and Rs. 9,60,000/- respectively. The Board of Directors of the petitioner-company accepted the offer of Raymon & Company (India) Private Limited for the sale of the said Bone Mill unanimously resolving to purchase the said Bone Mill land and machinery for Rs. 10 lakhs, if necessary, by issuing fully paid-up ordinary shares for the said Rs. 10 Lakhs. The resolution, copy of which is Annexure 1 to the return filed by the first respondent, states that the Bone Mill had been purchased by the Managing Agents for and on behalf of the petitioner-company.

5. In July, 1957, the petitioner-company applied to the Controller of Capital Issues, Government of India, seeking his consent for the issue of one Lakh equity shares of Rs. 10/- each, to the Managing Agents. But the Controller suggested payment of only rupees five Lakhs as sale consideration for the said Bone Mill. Raymon & Company (India) Private Limited did not agree to this; finally the Controller of Capital Issues agreed, by his letter dated the 5th January, 1959, to the issue by the petitioner-company of ordinary shares worth rupees 6½ Lakhs to Raymon & Company (India) Private Limited in respect of said Bone Mill. The sale deed, which was completed earlier, was not finalised till 17th January, 1959.

6. In August, 1960, the petitioner-company issued Rs. 3,99,400/- ordinary shares of rupees ten each and two thousand preference shares of Rs. 100/- each. In the prospectus, the fact of the purchase of Bone Mill from the Managing Agents-company for Rs. 6½ Lakhs was disclosed, but not the fact of the same having been purchased for 3½ Lakhs by the Managing Agents-company.

7. On 23rd September, 1963 an application was made in accordance with Section 269 of the Companies Act, for permission to appoint Shri Ray as a Managing Director of the petitioner-company, supported by a resolution of the petitioner-company to that effect. Annexure A to the petition is the copy of notice of the Annual General Meeting of the Members of petitioner-company to be held on 23rd September, 1963 containing the above draft resolution. The Company Law Board required the petitioner-company to give various particulars from time to time and ultimately rejected the request of the petitioner-company to appoint Shri Ray as the Managing Director (vide Annexure A-1, dated the 5th December, 1964 to the return). The petitioner-company was informed by the Under Secretary of the Company Law Board (Shri Balbir Singh) that the proposal of the company for the appointment of Shri M. C. Ray as the Managing Director of the Company for a period of five years with effect from 23rd September, 1963 on a remuneration of Rs. 6,500/- per month plus certain perquisites had been considered very carefully but having regard to the facts and circumstances of the case, the Company Law Board regretted its inability to approve the same.

8. In reply thereto (Annexure A-2 to the return) another opportunity for making representation was sought. As a result of further representations and discussions the Company Law Board finally agreed, by their letter, dated the 31st December, 1964 (Annexure W) approved under Section 269 of the Companies Act read with the Department of Revenue Notification No. GSR 178 dated the 1st February, 1964, the appointment of Shri M. C. Ray as the Managing Director of the Company for a period not exceeding three years with effect from 23rd September, 1963 on a remuneration, as stated therein, but subject to the further conditions stated in paragraph 4 therein, which are as follows:—

“(i) That Shri M. C. Ray secures in five yearly instalment, the first one to be paid within a fortnight of the receipt of this letter, the refund by Raymon & Co. (India) Private Ltd. to the company (Raymon Engineering Works Ltd.) the sum of Rs. 2,75,000/- being the difference between the actual price paid by the former for the purchase of the property known as

the “Bone Mill” from Messrs. Devid Cullender and others, and the price at which the said property was sold by the said Raymon & Co. (India) Private Ltd. to Raymon Engineering Works Ltd., as reduced by Rs. 50,000/- being the estimated expenditure, etc., incurred by Raymon & Co. (India) Private Ltd;

(ii) That the Company Law Board shall have the right to rescind or withdraw the aforesaid approvals at any time during the tenure of three years if the Board is of the opinion that the conduct of the Management of the affairs of the company by the Managing Director is not satisfactory; and

(iii) That the reappointment of Shri M. C. Ray, if any, as the Managing Director of the Company on the expiry of his tenure of three years, as mentioned in paras 1 and 3 above, shall require fresh approval of the Company Law Board under Section 269 of the Act after compliance with all the legal requirements.”

This letter was merely acknowledged by the petitioner-company in its communication dated the 7th January, 1965 (Annexure A-3 to the return).

9. In March, 1962 the Company Law Board received an anonymous letter containing allegations against Shri M. C. Ray. In September, 1966 we find the Company making a representation to the Hon'ble Minister for Law mentioning for the first time that it had been subjected to coercion by the Ex-Finance Minister, whereas Shri Ray had made very substantial contribution to the petitioner-company by his obtaining American and German financial participation (obtaining a loan from the U.S. Aid Coolie Funds), that he had paid Rs. 55,000/- as directed by the Company Law Board in the hope that the merits of the case would be duly considered by Government in due course and asking for the conditions imposed by the said order of the Company Law Board, dated the 31st December, 1964, to be withdrawn. The advice of the Company Law Advisory Commission was also taken but the Company Law Board refused to withdraw the conditions imposed on 15th December. It is contended in the return that the Chairman of the Board had discussed the matter with the Finance Minister and that he had agreed to Shri Ray being appointed as the Managing Director, if suitable conditions were drafted to ensure that the Company was well managed and that the difference between the actual price paid by the Raymon & Company (India) Private Limited and the price for which it was sold to the petitioner-company was refunded. In this regard, a sum of Rs. 50,000/- was allowed to Shri Ray, representing the value of the improvements he is said to have made in respect of that property. On the expiry of the

period of three years the Company Law Board, by its order dated the 28th February, 1968, informed the petitioner-company (vide Annexure J dated the 28th February, 1967) that it regretted its inability to approve of the proposal of the petitioner's company to appoint Shri Ray for a further term of five years with effect from 23rd March, 1956.

10. In this writ petition the petitioner challenges not only the said impugned order (Annexure J) but also the Company Law Board having imposed the above conditions on 13th December, 1964.

11. It may also be noticed in this context that despite the order of the Company Law Board (Copy of which is Annexure J) the petitioner-company had passed a resolution (copy of which is Annexure O) on 29th October, 1966 re-appointing Shri Ray as Managing Director for five years with effect from 23rd September 1966 on the terms of the draft agreement placed before the Meeting of the said date; with reference to this matter however, the Company Law Board has not yet taken any penal action.

12. Before I deal with the rival contentions in this case it is necessary to clear the ground of the misconception which seemed to have entertained, even by the Company Law Board, regarding the actual scope of sub-sections (1) and (2) of Section 269 and of Section 637-A of the Companies Act. Shri B. Sen has cleared up much of the confusion by the approach which he made before me to this question. He made it quite clear that he was seeking to bring this case not under Section 269(2) but only under Section 269(1) read with Section 637-A of the Act. He also relied upon the acceptance by the petitioner-company of the conditions which had been imposed on 31st December, 1964 (as set out supra) one of which was that at the end of three years' period the petitioner-company had to apply afresh for further continuance of Shri Ray as Managing Director. Shri Sen contended that these conditions were validly imposed and they having been accepted by the petitioner-company (as seen from the copy of its letter Annexure J dated 6th January, 1965) the petitioner-company could not have any valid grievance in this writ-petition. His third contention was that since Shri Ray was continuing as Managing Director in pursuance of the resolution which had been passed (copy of which is Annexure O) and this not having been interfered with yet by the Company Law Board the present writ-petition was premature.

13. The question of questions in this case, however, is whether the present case would fall within Section 269(1) read with Section 637-A of the Companies Act. Since sub-section (2) of Section 269 has

also to be understood, a misunderstanding of which, at least in the earlier stages, caused some confusion, it is necessary to set out fully both sub-sections (1) and (2) of Section 269 as well as Section 637-A:—

"269(1) In the case of a public company or a private company which is a subsidiary of a public company, whether such public company or private company is an existing company or not, the appointment of a person for the first time as a managing or whole-time director shall not have any effect unless approved by the Central Government;

Provided that in the case of a public company, or a private company which is a subsidiary of a public company, incorporated after the commencement of the Companies (Amendment) Act 1960 (65 of 1960), the appointment of a person as a managing or whole-time director for the first time after such incorporation may be made without the approval of the Central Government but such appointment shall cease to have effect after the expiry of three months from the date of such incorporation unless the appointment has been approved by that Government.

(2) Where a public company or a private company which is a subsidiary of a public company, is an existing company, the reappointment of a person as a managing or whole-time director for the first time after the commencement of the Companies (Amendment) Act, 1960 (65 of 1960), shall not have any effect unless approved by the Central Government."

"637-A(i) Where the Central Government is required or authorised by any provision of this Act—

(a) to accord approval, sanction, consent, confirmation or recognition to or in relation to, any matter;

(b) to give any direction in relation to any matter; or

(c) to grant any exemption in relation to any matter,

then, in the absence of anything to the contrary contained in such or any other provision of this Act, the Central Government may accord, give or grant such approval, sanction, consent, confirmation, recognition, direction, or exemption subject to such conditions, limitation or restrictions as it may think fit to impose and may, in the case of contravention of any such condition, limitation or restriction, rescind or withdraw such approval, sanction, consent, confirmation, recognition, direction or exemption.

(2) Save as otherwise expressly provided in this Act, every application which may be, or is required to be, made to the Central Government under any provision of this Act—

(a) in respect of any approval, sanction, consent, confirmation or recognition

to be accorded by that Government to, or in relation to, any matter; or

(b) in respect of any direction or exemption to be given or granted by that Government in relation to any matter; or

(c) in respect of any other matter, shall be accompanied by such fee not exceeding one hundred rupees as may be prescribed;

Provided that different fees may be prescribed for applications in respect of different matters or in case of applications by Companies, for applications, by different classes of companies.

14. The language of Section 269(1) is perfectly simple and does not cause any difficulty; it applies when the following conditions are present:—

(i) When the company is a public company or a private company;

(ii) Whether it is an existing company or not;

(iii) A person is appointed as a Managing Director for the first time for that company after the coming into force of the Act of 1960.

15. In such a case such appointment as Managing Director shall not take any effect unless approved by the Central Government. When the petitioner-company applied to the Central Government for permission to appoint Shri Ray as a Managing Director, for a period of five years, this was undoubtedly an occasion when the Central Government could exercise the power under Section 637-A, its approval being required under Section 269(1) in relation thereto. In such a situation, in the absence of anything to the contrary contained in such or any other provision of the Act, the Central Government may accord, give or grant such approval, subject to such conditions, limitations, or restrictions as it may think fit to impose, and may, in the case of contravention of any such condition, limitation or restriction, rescind or withdraw such approval.

16. What happened in this case, as already noticed, was that when the petitioner wanted Shri Ray to be appointed as Managing Director, the Central Government had declined to appoint him; one important reason was that in the matter of buying and selling the Bone Mill, which transaction had been entered into by him as Managing Director of the said Company, he had made an "unconscionable profit" to the extent of Rs. 2,75,000/- even after allowing a sum of Rs. 50,000/- said to have been spent by him in the matter of improving the said property.

17. The question is not whether Shri Ray was legally entitled to make a profit in the manner he did. Shri Datta, learned counsel for the petitioner-company argued that it was a profit which Shri Ray could have legally made for himself. Sri Sen cut this argument short by conceding

that it was open to Shri Ray, legally, to make such a profit; but in granting or refusing to accord permission to be appointed as a Managing Director of the Company the Central Government had, when its approval was sought under Section 637-A to impose conditions, limitations or restrictions in this regard. This, it was perfectly competent for the Central Government to do; these were the conditions to which the petitioner-company had agreed when it wanted the previous decision of the Central Government refusing to give approval to his appointment as Managing Director was sought to be reviewed. It is also worth recalling that when the conditions were ultimately imposed and communicated to the petitioner-company it had acknowledged the said communication without any protest whatever. It is easy to imagine how the petitioner-company should have then reacted to the imposition of these conditions because the petitioner-company wanted Shri Ray to be appointed as Managing Director; when permission to appoint him as Managing Director had been refused they were only too happy to get him appointed as Managing Director and agreed to the conditions imposed by the Central Government, one of which was that the said sum of Rs. 2,75,000/- should be repaid in five instalments. In fact, Shri Ray himself had subsequently paid the first of those instalments.

18. It is also important to notice that one of the conditions imposed then was that the petitioner-company could have Shri Ray as its Managing Director only for a period of three years, not five years as requested; the petitioner-company had to seek the approval of the Central Government for continuing Shri Ray as Managing Director beyond the period of three years. Such a condition had necessarily to be imposed if the conditions imposed were really to be implemented, for only in this way, the Central Government could make sure that Shri Ray would refund the amount of gain made by him, as agreed to by the petitioner's company, in instalments. Obviously, if he did not refund those amounts, as directed, the Central Government had no doubt the power to even terminate his appointment as Managing Director within the period of three years; the mere fact that the Central Government did not do so could not lead to the inference that the Central Government had waived the fulfilment of the conditions imposed by it earlier in this regard.

19. When I asked Shri Datta as to how he would get out of Sections 269 sub-section (1) and 637-A read along with it, he was unable to even mention a single circumstance which would help take this case out of the ambit of Section 269(1) read with Section 637-A. Shri Datta

could only reply that Section 637-A would only apply in the absence of "anything to the contrary contained in such or any other provision of this Act" and that Section 269(2) was such a provision. I am afraid whatever confusion there was earlier on the question, whether it was a case of Shri Ray being "re-appointed" as Managing Director or not, there is no scope at all for such a confusion now when it is seen, as explained by Shri B. Sen, that Section 269(2) could only apply to the case of a "re-appointment" of a person as a Managing Director, in the case of an existing company, such re-appointment being made for the first time after the commencement of the Companies (Amendment) Act, 1960. In other words, an existing company may already have a Managing Director; such Managing Director would continue to hold office despite the coming into force of the Companies (Amendment) Act 1960, and the question of the approval of the Central Government in such a case would arise only when that Managing Director of the existing Company, who had been appointed as Managing Director prior to the Act of 1960, was sought to be "re-appointed" for the first time after the coming into force of the Companies (Amendment) Act 1960. Once this is understood the scope of S. 269(2) becomes clear; it also becomes clear that Section 269 does not cover the case of "reappointment" of a Managing Director, in the case of one, who had been appointed (with the Central Government's approval) after the coming into force of the Companies (Amendment) Act, 1960.

20. When I have stated so far regarding the relative scope of sub-section (1) and sub-section (2) of Section 269 it would become even clearer if the proviso to sub-section (1) of section 269 is studied. It provides for the appointment of a person as a Managing Director for the first time after such incorporation, even without the approval of the Central Government, if the Company was incorporated after the commencement of the Companies (Amendment) Act, 1960; in such cases even though the first appointment of a Managing Director could be made without the approval of the Central Government it shall cease to have effect after the expiry of three months from the date of such incorporation unless the appointment has been approved by the Central Government. This provision was obviously necessary in order to help a company incorporated after the Amending Act of 1960 to have a Managing Director of its own even without the approval of the Central Government for a limited period of three months within which time the approval of the Central Government should be had.

21. After hearing both sides elaborately on this question and after having given

the above provisions my most anxious consideration it seems to me that the construction adopted by me, accepting the argument of Shri Sen for the Central Government, is one which harmonises every part of the relative provisions without excluding any portion. On the other hand, any other construction would lead to several difficulties in the matter of interpretation.

22. It is seen from the Statements of Objects and Reasons that the Amending Act 65 of 1960 was enacted mainly as a result of the recommendations of the Vishwanatha Shastri Commission.

23. In some particulars, no doubt, the recommendations were modified in the light of the experience of the working of the Act gained since the submission of the report and partly by the views expressed on these recommendations by the Chambers of Commerce and others. A Bill incorporating the above objects was referred to a Joint Committee which presented a Report to the Lok Sabha on the 16th August, 1960 (Gazette of India Part 2, Section 2 dated the 16th August, 1960). The Bill was then passed into Act and received the assent of the President of India coming into force on the 20th December, 1960.

24. Section 269 of the Act of 1956 reads as follows:

"Appointment of managing or whole time director to require Government approval: In the case of a public company or a private company which is a subsidiary of a public company, the appointment of a managing or whole time director for the first time after the commencement of this Act in the case of an existing company, and after the expiry of three months from the date of its incorporation in the case of any other company, shall not have any effect unless approved by the Central Government; and shall become void, if, and in so far as it is disapproved by that Government."

25. The section, as it stands amended by Act 65 of 1960, has been already read; it is with the effect of sub-sections (1) and (2) we are now concerned. Not only during the time that the petitioner's representations were considered by the Government but also in the return filed to this writ petition there was an attempt to justify the refusal of the petitioner's request to appoint Shri Ray as the Managing Agent for a further period of five years as one coming under Section 269(2) of the Act. If, as already stated, the case falls within Section 269(1) read with Section 637-A (as amended in 1960) and does not come under Section 269(2) for the reason that sub-section (2) only governs a case of person who had previously been appointed as Managing Director being reappointed in an existing company

but after the coming into force of Act 65 of 1960, then it becomes fairly clear that in granting permission to the petitioner to have Shri Ray as Managing Director only for three years (not for five years) as applied for, subject to the two important conditions, inter alia, that Shri Ray should return the sum of Rs. 2,75,000/- in the manner stated and the petitioner-company should further seek for continuance of Shri Ray as Managing Director beyond the period of three years, the Central Government was imposing conditions, which it was open to it to impose. Once there was necessity for the petitioner to apply for appointing Shri Ray as Managing Director, for the first time after the coming into force of the amending Act of 1960 and it was open, in this context, for the Central Government to impose conditions on such permission being granted under Section 637-A, no further question can really arise for decision in this writ petition.

26. I fail to see how the petitioner-company can seek to derive any assistance from anything that was stated by a Bench of the High Court of Mysore in *Canara Workshops Ltd. v. Union of India*, 1966-36 Com Cas 63 (Mys). In discussing the nature of the conditions that were imposed under Section 637-A, it was observed by his Lordship Mr. Justice M. Sadasivayya as follows:—

"It will be noticed that the power under Section 637-A(1) is really an incidental power, in the sense that the Central Government can exercise this power only when it is required under any provision of the Act, to accord approval, sanction, consent, confirmation or recognition to or in relation to, any matter. Therefore, when the Central Government has the competence under some other provisions of the Act to accord its approval, sanction, consent, confirmation or recognition, then, while granting the same, the Central Government may attach such limitations or restrictions as it may think fit. This does not mean that the competence of the Central Government to impose such conditions, limitations or restrictions is either arbitrary or unlimited. Being an incidental power, it is necessary that the limitations or restrictions should be relevant to, or bear relation, to the matter in respect of which the Central Government has been given the competence to accord approval, sanction, consent, confirmation or recognition. In that way, the purpose for which the approval, sanction, consent, confirmation or recognition is necessary under any concerned provision of the Act, will be a relevant consideration while imposing the conditions, limitations or restrictions under Section 637-A(1), because the incidental power to impose the latter cannot travel beyond the said purpose. In the present

case, it is not stated before us that the competence of the Central Government to grant approval to the two resolutions arises under any provision of the Act other than Sections 309 and 310."

27. His Lordship Mr. Justice Gopivallabha Iyengar agreed with the above observations but differed only regarding the scope of Section 309, which is not relevant for our present purpose. It is not disputed by Shri Sen that the jurisdiction to impose conditions, restrictions, etc., under Section 637-A is really confined to cases where the permission under the Central Government is required. In other words, if no permission is necessary in respect of any matter, no conditions, etc. could be imposed with reference to such matters by the Central Government. The sine qua non for the exercise of the powers under Section 637-A, therefore, is the need to apply to the Central Government for permission in respect of the concerned matter; this is not disputed by Shri Sen. There can be no difficulty in understanding what was meant by the expression "incidental power" in the Mysore decision because his Lordship Mr. Justice Sadasivayya has himself explained the sense in which the said expression has been used, namely, "that the Central Government can exercise this power only when it is required under any provision of the Act to accord approval, sanction", etc. A look into any standard dictionary, like the *Shorter Oxford*, shows that the expression "incidental" connotes the idea of something being subordinate or fortuitous. There is nothing fortuitous in the exercise of the powers under Section 637-A because these powers could be exercised only where the permission of the Central Government is necessary. If no such permission is necessary there will be no occasion whatever for the exercise of the powers under Section 637-A and the consequent imposition of conditions, limitations, etc. There is probably nothing subordinate, in my view, in such a situation because the power, to impose conditions, etc. under Section 637-A, as in this case, arises directly by reason of the requirement of the Central Government's permission. The expression 'incidental' also seems to have retained its earlier meaning of "resulting from". The terminology 'incidental' employed by his Lordship Mr. Justice Sadasivayya need not, however, detain us, because his Lordship has made it abundantly clear, what he meant by referring to the power under Section 637-A as being 'incidental'. Be that as it may, the matter, as one of substance, does not admit of any doubt that the power under Section 637-A, to impose conditions, etc. can only arise where any provision of the Act requires such approval, etc. of the Central Government. It is in this context that it becomes necessary.

to find the need for the approval of the Central Government by reason of Section 269(1) in the instant case. Once Section 269(1) is understood, in the way in which I understand it, it follows, for that very reason, the occasion for the exercise of the power under Section 637-A arises.

28. It will be different question, whether the said power is exercised properly or arbitrarily, a question to which I shall address myself presently. Before I do so, however, it is necessary to refer to yet another decision of the Madras High Court in A.R. Hussain Khan v. Registrar of Companies. AIR 1965 Mad 307. That case arose under Section 269, as it stood before the amendment in the year 1960, in a criminal matter; there was a prosecution in respect of the accused having described himself as a Managing Director without having taken the express approval of the Central Government to his being appointed as Managing Director. The accused had so described himself in three returns which he submitted on 31st December, 1957, the balance-sheet of the company dated the 24th July, 1959, the annual return dated the 24th November, 1956 and the return concerning the allotment of shares of the Company. Subsequently, he was re-elected for five years as Managing Director on 10th June, 1961. He had applied under Section 269 of the Amended Act and his appointment was approved by the Government in December, 1962. In these circumstances his Lordship Mr. Justice Kailasam construed Section 269, as it stood before the Act of 1960, reading the amended section, also, and held that the petitioner was not bound to apply to the Central Government under Section 269 of the Old Act for approval, such approval being necessary, according to Mr. Justice Kailasam, only in the case of the provision, as amended. Not being a case arising under the new Act, what the provisions, as amended meant is not one which actually fell for decision in that case. Therefore it is that this case has been argued before me as one of first impression.

29. In the light of the above discussion, I find that Section 269(1) read with Section 637-A empowered the Central Government to impose the conditions it did declining to appoint Shri Ray as the Managing Director for any further period after the expiry of the initial three year period if the conditions imposed by it were not fulfilled.

30. The second question, which arises for consideration is whether the conditions imposed in this case were reasonable or were made capriciously. On this aspect of the matter a contention was advanced, as already noticed, that it was perfectly legal for Shri Ray to have made a profit by the sale of the Mill to the petitioner-com-

pany and that the Central Government was not empowered to require Shri Ray to impose the condition that Shri Ray should return the profit he had thus made. A few necessary facts alone bearing on this matter may have to be recounted.

31. The special resolution passed at the Annual General Meeting on 4th January, 1965 was to the following effect:—

"Resolved that the purchase in 1957 of the property consisting of land, buildings, plant and machinery including Generating Plant and Railway Siding (all that piece and parcel of property commonly called the Bone Mill) 'by the Company from Messrs. Raymon & Co. (India) Private Ltd., the Managing Agents of the Company' for the price of Rs. 6,50,000/- paid in the form of fully paid up equity shares of the Company of that value, with the consent of Controller of Capital Issues and which purchase was made with the consent and approval of the shareholders accorded at an Extraordinary General Meeting held on 7th July, 1957, be and is hereby approved, ratified and confirmed notwithstanding any technical defects or omissions in the previous resolutions, prospectus and statements and it is further confirmed that the said purchase was under all the circumstances then prevailing made for a very reasonable and proper price." (emphasis (here in ' ') added).

32. This shows that the purchase had been made only by Messrs. Raymon & Company (India) Private Limited, the Managing Agents of the petitioner-company. But there was a subsequent attempt to resile from this admission, namely, that the purchase was by the Managing Agents of the petitioner-company by trying to show that that was a mistake. This is an admission which it was permissible for the Central Government to take into account along with the other fact that the agreement to purchase the Bone Mill had been entered into by Shri Ray who was Managing Director of the petitioner-company. It being admitted that only 3½ Lakhs was paid for the said transaction Shri Ray had made a profit of over Rs. 3 Lakhs and this had not even been expressly disclosed in the prospectus. The relevancy of this circumstance is that in Form 25A, prescribed for an application under Section 269-A the prospectus is also one of those directed to be enclosed along with the application for grant of permission. It is admitted that it was not disclosed in the prospectus that the Bone Mill had been purchased for Rs. 3,25,000/- but sold to the petitioner-company for Rs. 3,75,000/-. In this context, the proper approach is not whether it was open to make a profit by the transaction but whether the profit had been made by him in his capacity as a Managing Director of the Company but

whether having regard to the total financial condition of the company and the way in which it was faring; the Company Law Board had authority to require the petitioner-company to collect from Shri Ray the amount of profit thus made if the petitioner-company wanted him to be appointed as a whole time Managing Director. On this question, therefore, the petitioner does not advance his case further by seeking to justify the profit which Shri Ray made for himself, characterising it as a profit which he was entitled to make by relying on Omnium Electric Palaces Ltd. v. Baines, 1914-1 Ch 332. On the other hand, Shri Sen, for the Central Government, made it quite clear that he was not seeking to justify the conditions imposed by the Central Government on the ground that Shri Ray had made an "illegal" profit. The Government was entitled none-the-less to think that it was "unconscionable" profit made by Shri Ray utilising his position as Managing Agent, director, and promoter, though made legally; it was well within their power, therefore, especially in the context of financial condition of the company and the way in which it was faring, to insist on the amount being refunded by Shri Ray (the petitioner-company collecting it back from him) in the event of his having been appointed as Managing Director.

It is in this light that the petitioner-company consenting to the conditions imposed in this regard by the Central Government becomes significant. The Central Government having refused such permission already was willing to reconsider the refusal only when the petitioner-company agreed to Shri Ray re-imbursing to the the extent of the gain made by him at the expense of the Company, the gain which was "unconscionable" in the view of the Central Government. Having agreed to get reimbursement of the said amount from Shri Ray the petitioner-company cannot turn round and question the validity of the imposition itself. I have said enough to show that the imposition of the conditions was quite valid: they were not capricious. The reasonableness of the conditions is reinforced by the petitioner-company not having demurred to it but, on the other hand, having accepted those conditions and allowed Shri Ray to function as Managing Director subject to these conditions.

33. It is also significant that it was not until the fag-end of the term of three years for which the appointment of Shri Ray was permitted, in the first instance (subject to the conditions imposed), that the petitioner-company began to make representations concerning the conditions imposed.

34. There is no force in the contention that the Company Law Board had no

power to impose the conditions once the Controller of Capital Issues, after considering the value of the Bone Mill had agreed to the issue of necessary capital. The questions that arise for consideration by the Company Law Board under Section 269(1) read with Section 637-A are different from what had to be considered by the Controller of Capital Issues.

35. I am least impressed by the argument of mala fides which has been advanced. Any attack of personal dishonesty leading to mala fides against certain officials, including the former Finance Minister, could not even be listened to unless these persons are made parties to the petition and thus given an opportunity to rebut this allegation. The whole question in this case, as I understand it, is one of the Central Government having the necessary power to impose those conditions. Once the Central Government had the power then the question of mala fides itself is not very relevant, especially in the context of the conditions being seen to be quite just and proper and also having been agreed to by the petitioner-company itself.

36. Reference was made to the unreported decision of this High Court in Rampur Distillery & Chemical Co. Ltd. v. Company Law Board, decided on 4th November, 1968 (LPA No. 40 of 1968) (Delhi) by their Lordships Mr. Justice Kapur and Mr. Justice Tatachari. This decision has no direct bearing on this case except to this extent, viz., that the decision of the Central Government in such matters was held to be justiciable. To nearly the same effect is the decision of the Supreme Court in Rohtas Industries v. S. D. Agarwal, 1969-1 SCC 325= (AIR 1969 SC 707). It was held by the Supreme Court that a discretion conferred upon by the Central Government under Ss. 235, 237-B of the Indian Companies Act 1956 should be exercised honestly and not for corrupt or ulterior purposes. The Authority must form the requisite opinion honestly and after applying its mind to the relevant material before it.

37. There is also a third aspect which Shri Sen brought to my notice, but there is no need to discuss it in the view I have taken. It was already noticed that despite the refusal of the Central Government to approve the resolution of the petitioner-company to grant permission to the petitioner-company to have Shri Ray beyond the three years' period originally approved subject to conditions, the petitioner-company none-the-less passed the resolution stating that Shri Ray would be their Managing Director for a period of five years. With reference to this matter the Central Government did not choose to take any action against the petitioner. Shri Sen contended, and not altogether without justification, that the petitioner-

company could not in the fact of such a resolution come to this Court for redress against the conditions imposed in the absence of any further action taken by the Central Government against the petitioner for continuing Shri Ray as Managing Director. Since I hold that the conditions were legal, properly imposed and also agreed to by the petitioner-company, this aspect need not detain us.

38. In the result the petition fails and is dismissed with costs.

Petition dismissed.

AIR 1970 DELHI 14 (V 57 C 3)

S N ANDLEY, J.

Virendra Saigal, Petitioner v. M/s. Sumatilal Jamnalal, Respondent.

Civil Revn. No. 482 of 1966 D/- 23-1-1969 from order of Sub-J.; 1st Class Delhi, D/- 30-4-1968.

(A) Arbitration Act (1940), Ss. 2 (c), 31 — Competent Court within meaning of S. 31 — It must be Court which could have entertained suit between parties wherein controversies were same as are subject-matter of arbitration. (Para 5)

(B) Arbitration Act (1940), Ss. 2 (c), 31(1) and (2) — Award filed in Court having no jurisdiction in matter to which reference related — Such filing would not give jurisdiction to Court under S. 31(2). (Para 5)

(C) Arbitration Act (1940), S. 31 (4) — Mere filing of application in Court irrespective of whether such Court has jurisdiction in matter to which reference relates would not fix that Court permanently as Court wherein all subsequent applications are to be filed. (Para 6)

(D) Arbitration Act (1940), Ss. 34, 31 (4) — Suit for accounts in Delhi Courts — Application under S. 34 for stay of suit — Held, application could not confer jurisdiction on Delhi Court under S. 31 (4). AIR 1953 Punj 129, Disting.; 1963-65 Pun LR 444 & ILR (1954) 1 Cal 418 & AIR 1961 Cal 659, Rel. on. (Para 7)

(E) Civil P. C. (1908), S. 11 — Decisions on question of jurisdiction operate as res judicata. AIR 1941 Cal 493 & AIR 1929 All 132, Dissent from.

Section 11 of the Civil P. C. prohibits the trial not only of a subsequent suit but also the trial of an issue in the subsequent suit. The first suit may be dismissed for want of jurisdiction by a particular Court and if the plaintiff subsequently files an identical suit in the same Court and if the principle of res judicata is not applied, then the Court trying the subsequent suit will again be bound to hear the parties on the question of jurisdiction when that plea is raised in the subsequent suit and,

upon dismissal of the subsequent suit also, it will be open to the plaintiff to repeat the process of filing identical suits one after another. In such a case or cases, Section 11, therefore, will undoubtedly apply and the trial on the question of jurisdiction in the subsequent suit or suits will certainly be precluded by reason of the decision on the question of jurisdiction in the first suit. AIR 1966 SC 1332 & AIR 1965 SC 1325, Ref.; AIR 1953 SC 65, Rel. on; AIR 1941 Cal 493 & AIR 1929 All 132, Dissent from. (Paras 10, 11)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 1332 (V 53) =

(1966) 3 SCR 300, Sheodan

Singh v. Daryao Kunwar

(1965) AIR 1965 SC 1325 (V 52) =

1965-2 SCR 661, Chittoori

Subhanna v. Kudappa Subbanna

(1963) 65 Pun LR 444, Great Arts

Private Ltd. v. Har Gopal Kapur

(1961) AIR 1961 Cal 659 (V 48) =

65 Cal WN 913, Harbans Singh

v. Union of India

(1954) AIR 1954 Cal 506 (V 41) =

58 Cal WN 819, Newton Hickie

v. Official Trustee of West

Bengal

(1954) ILR (1954) 1 Cal 418,

Choteylal Shamlal v. Cooch Behar

Oil Mills Ltd.

(1953) AIR 1953 SC 65 (V 40) =

1953 SCR 377, Mohanlal v. Benoy

Kishna

(1953) AIR 1953 Punj 129 (V 40) =

55 Pun LR 137, Swastika Scientific

Engineering Co. of Ambala Cantt.

v. Union of India

(1941) AIR 1941 Cal 493 (V 28) =

73 Cal LJ 410, Meghraj Golab

Chand, Firm v. Chandra Kamal

(1929) AIR 1929 All 132 (V 16) =

10 LR A Rev 173, Jwala Debi

v. Amir Singh

B. B. Gupta, for Petitioner X X

Mehra, for Respondent.

JUDGMENT:— There were certain transactions as to shares between the parties to this petition. Disputes arose between the parties. Concerning those disputes, the petitioner on May 3, 1963 filed a suit for accounts in the Court of Commercial Judge, Delhi, against the respondent (as defendant No. 1) and one K. K. Behl (as defendant No. 2). K. K. Behl was made a party defendant on the allegation that he was an agent of the respondent and that through him, the respondent was carrying on business in Delhi. Upon service of the summons of this suit, the respondent filed an application under Section 31 of the Arbitration Act for stay of the suit on the allegation that there was an agreement between the parties for reference of any disputes arising between them to arbitration. This application was dismissed on the ground that K. K. Behl

aforesaid, who was a party to the suit as defendant No. 2 was not a party to the alleged agreement for reference of disputes to arbitration.

2. Upon the dismissal of this application, the respondent filed his written statement and, inter alia, challenged the jurisdiction of the Delhi Courts to entertain the suit. This challenge was on two grounds— (1) that no part of the cause of action had arisen within the jurisdiction of the Delhi Court and (2) that there was an agreement between the parties whereby exclusive jurisdiction had been conferred on the Courts in Bombay. An issue was framed on the basis of this objection and the trial Court, by its order dated April 30, 1964, held in favour of the respondent on both the grounds. The petitioner filed an appeal, being Miscellaneous Civil Appeal No. 1 of 1965, which was disposed of by the Additional District Judge, Delhi, by his order dated January 3, 1966. The Additional District Judge dismissed the appeal but only on the ground that no part of the cause of action had arisen in Delhi. He did not agree with the conclusion of the trial Court that there was an agreement between the parties conferring exclusive jurisdiction on the Bombay Courts.

3. It was then that the petitioner on September 12, 1966, filed an application in the Court of the Senior Subordinate Judge, Delhi purporting to be under Section 33 of the Arbitration Act. In paragraph 8 of this application, the petitioner alleged that the transaction in dispute had originated by way of offers from Delhi; that the petitioner had made payments at Delhi and that the respondent had received payments at Delhi. It was further urged by the petitioner in paragraph 9 of this application that the first application under the Arbitration Act had been made by the respondent in the Delhi Courts and, upon the basis of these allegations, it was asserted that the Delhi Courts alone had jurisdiction under sub-section (4) of Section 31 of the Arbitration Act. It appears that during the pendency of this application, in which no appearance was put in on behalf of the respondent, the disputes between the parties had been referred to Arbitrators in Bombay who had made their award. The petitioner, therefore, withdrew this application and filed another application under Sections 14 and 33 of the Arbitration Act in the Court of the Subordinate Judge 1st Class, Delhi, on November 19, 1966 and it is this application which has given rise to this revision. In this application, it was stated by the petitioner that the award had been made on November 7, 1966 and that the award had been given notwithstanding the pendency of the earlier application dated September 12, 1966. It was prayed that the arbitrators, who are named in paragraph 9 of

the application, be directed to file their award along with the depositions and other documents produced before the arbitrators. Cause of action for invoking the jurisdiction of the Delhi Court was alleged to be based upon the aforesaid application under Section 34 of the Arbitration Act which had been made by the respondent in the aforesaid civil suit which had been filed by the petitioner in Delhi and the earlier application dated September 12, 1966, which had been filed by the petitioner under Section 33 of the said Act but was withdrawn. On November 22, 1966, in the absence of the respondent, a notice was issued by the Court to the arbitrators to file their award and, it is not disputed, that the arbitrators did forward their award to the said Court pursuant to this notice. When the respondent filed his answer to this petition, he objected to the jurisdiction of the Delhi Court to entertain it and it was, inter alia, alleged that the aforesaid decision of the learned Additional District Judge dated January 3, 1966, operated as res judicata between the parties in so far as the issue of jurisdiction was concerned. On these pleadings, the trial Court framed the following issues:—

"(1) Whether the question of jurisdiction of this Court has already been decided between the parties? If so, its effect.

(2) If it is proved that this Court has no jurisdiction, whether this petition is triable by this Court?

(3) Relief."

The trial Court decided both the Issues in favour of the respondent by its order dated April 30, 1968 and it is against this order that the petitioner has filed this revision under Section 115 of the Code of Civil Procedure.

4. In so far as the said application under Section 34 of the Arbitration Act by the respondent in the suit filed by the petitioner is concerned, the contention of Mr. K. K. Mehra, learned counsel for the respondent, is that this application was not an application either regarding the conduct of the arbitration proceedings or in relation to the reference and, therefore, the filing of this application cannot confer jurisdiction on the Delhi Court under Section 31 of the Arbitration Act. With regard to the application dated September 12, 1966, it is the respondent's contention that the application itself having been filed in a Court which was not competent to entertain it, the provisions of sub-section (4) of the said section could not be invoked for holding that the application dated November 19, 1966 had been filed in a Court having jurisdiction.

5. Section 2 of the Arbitration Act defines "Court" to mean a Civil Court having jurisdiction to decide the questions forming the subject matter of the reference if the same had been the subject

matter of a suit. Therefore, a competent Court within the meaning of Section 31 of the Act must be a Court which could have entertained a suit between the parties in which the controversies were the same as are the subject matter of the arbitration. Section 31 of the Act is in these terms:—

"(1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.

(2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court.

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed and to no other Court.

(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court."

Sub-section (1) provides for the filing of an award. The award can be filed in any Court having jurisdiction in the matter to which the reference relates. The "Court" referred to in Section 31 is a "Court" as defined by Section 2. Sub-section (2) of Section 31 speaks of Courts which have jurisdiction to decide all questions regarding the validity, effect or existence of an award or an arbitration agreement and it provides that these questions shall be decided by the Court in which the award under the agreement has been or may be, filed, and by no other Court. Mr. Desh Bandhu Gupta, learned counsel for the petitioner, has contended that in fact the award has been filed in the Delhi Court and, therefore, that fact by itself is enough to confer jurisdiction on the Delhi Court within the meaning of Sub-section (2) of Section 31. When sub-section (2) of Section 31 talks of an award which has been filed in any Court, it refers back to sub-section (1) of Section 31 and, therefore, the filing of the award has to be in a Court having jurisdiction in the matter to which the reference relates. In other words, if an award has in fact been filed in any Court which has no jurisdiction in

the matter to which the reference relates, such filing would not give jurisdiction to the Court under sub-section (2) of Section 31.

6. Then we come to sub-section (4) of Section 31 which provides that where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court. Reliance by the petitioner on the filing of the previous application dated September 12, 1966 in the Delhi Court appears to me to be clearly misconceived because one of the conditions necessary to be fulfilled is that the earlier application must have been filed in a Court competent to entertain it. The mere filing of an application in any Court irrespective of whether such Court has jurisdiction in the matter to which the reference relates would not fix that Court permanently as the Court in which all subsequent applications are to be filed. As I have stated above, the question whether the application dated September 12, 1966, had been filed in a competent Court having jurisdiction was not agitated before the Court because that application was withdrawn by the petitioner for reasons which have already been stated above before the respondents pleaded to it. In the result, in my view, the petitioner cannot rely upon the previous application dated September 12, 1966 for the purpose of claiming jurisdiction in the Delhi Court.

7. The next question then is whether the filing of the application under Section 34 of the Arbitration Act by the respondent in the suit for accounts filed by the petitioner against him is an application which is contemplated by sub-section (4) of S. 31 of the Act. Mr. Desh Bandhu Gupta, learned counsel for the petitioner, has placed his reliance on AIR 1953 Punj 129 in re: Swastika Scientific Engineering Co. of Ambala Cantt. v Union of India. In this case the plaintiff had filed a suit on January 2, 1949 for recovery of a specific amount in an Ambala Court. The defendant filed an application under Section 34 of the Arbitration Act for stay of the proceedings and on the same date he also filed his written statement. The proceedings were stayed and, thereafter, the matter went into arbitration. It appears from the judgment that an application was made by the defendant himself for extension of time in the Court of the Senior Subordinate Judge, Delhi. Thereafter, the award was made and objections to the award were filed in the Ambala Court. One of the objections was that the Ambala Court had no jurisdiction to decide these objections on the ground that

the application for extension having been made in the Delhi Court, that Court, alone would have jurisdiction. It was not disputed in this case that the Ambala Court had jurisdiction to entertain and decide the suit which had been filed before it. Therefore, the Ambala Court was undoubtedly a Court having jurisdiction in the matter to which the reference related within the meaning of sub-section (1) of Section 31. In the view of the learned Judge, the arbitration proceedings remained subject to the control of the Ambala Court as it could set aside the order of stay so as to restart the suit which would result in making all proceedings before the arbitrators invalid under Section 35 and, therefore, the Delhi Court would not get jurisdiction merely by the unilateral act of the Dominion of India and thereby oust the jurisdiction of the Ambala Court in regard to the award. This case is clearly distinguishable from the present case as in the present case, the application for stay which has been made under Section 34 of the Arbitration Act had been dismissed and the suit had been held to be filed in a Court not having jurisdiction. Therefore, in the present case, the Delhi Court would not be a Court having jurisdiction under Section 31(1) of the said Act. The aforesaid case cannot, therefore, assist the petitioner.

A similar question arose in a case reported in 1963-65 Pun LR 444, in re Great Arts Private Ltd. v. Har Gopal Kapur, where a similar contention was repelled. Reliance was placed on a decision of the Calcutta High Court reported in ILR (1954) Cal 418 in re: Choteylal Shamlal v. Cooch Behar Oil Mills Ltd. In the Calcutta case, an application for stay of a suit under Section 34 of the Arbitration Act had been made in the Cooch Behar Court and it was contended that the Cooch Behar Court would be the exclusive forum for the filing of the award under Section 14 of the Arbitration Act. It was observed:

"Section 34 does not provide for an application to a Court as defined under Section 2(c). Section 34 provides for an application to the judicial authority before whom a legal proceeding is pending for stay of that proceeding.

The section purposely uses the expression "judicial authority". The application is made not to the court but to the judicial authority before whom a proceeding is pending.

In my judgment, an application for stay made to a judicial authority under Section 34 of the Act is not an application under the Act in a reference in a Court competent to entertain it as contemplated by Section 31(4) of the Act.

An application for stay of a legal proceeding to the judicial authority before whom it is pending is always an applica-

tion under the Act to a judicial authority competent to entertain it. The judicial authority, however, need not necessarily be a court competent under Section 2(c) to decide the question forming the subject matter of the reference and it is impossible to hold that the judicial authority becomes the exclusive arbitration Court on the making of the application for stay."

This decision of the Calcutta High Court was followed in a subsequent decision of the same Court which is reported in AIR 1961 Cal 659. In re: Harbans Singh v. Union of India, where the following observations have been made:—

"Both Sections 31 and 34 of the Arbitration Act are enacted to avoid conflict and scramble. But the nature of conflict and scramble, intended to be avoided is different in the two sections. Section 34 which provides for stay of suit, is intended to avoid conflict between the public tribunal and the private tribunal intended to be set up by the arbitration agreement. While the conflict intended to be avoided by Section 31 is the conflict between different Courts in respect to arbitration proceedings pursuant to a reference.

Two conditions must be fulfilled to give the Court exclusive jurisdiction under Section 31(4) of the Arbitration Act. First, an application must be made in the court under the Arbitration Act and, second, the application must be made "in any reference". Application under Section 34 is no doubt an application under the Arbitration Act. But it is not an application under the Act in a reference in a Court competent to entertain it as contemplated by Section 31(4) of the Act.

The phrase "in any reference" in Section 31(4) means "in any matter of a reference" and covers an application not merely during the pendency of the reference but also before the reference has taken place. Applications made under Sections 8 and 20 are well within Section 31(4) of the Act, even though these applications are made before any reference has taken place. But an application for stay of suit under Section 34 is not an application belonging to the same category. It has nothing to do with any reference. It is only intended to make the arbitration agreement effective and prevent a party from going to Court contrary to his own agreement that the dispute is to be adjudicated by a private tribunal."

In my view, the rule laid down in (1963) 65 Pun LR 444, and the aforesaid two Calcutta decisions is the correct rule and I, therefore, hold that the filing of the application under Section 34 by the respondent in the civil suit for accounts filed by the petitioner is not such an application which could confer jurisdiction on the Delhi Courts under sub-section (4) of Section 31 of the Act.

8. The next question is whether the decision of the learned Additional District Judge on the issue of jurisdiction in the suit for accounts filed by the petitioner against the respondent operates as *res judicata*. Section 11 of the Code of Civil Procedure talks not only of the decision in a suit being *res judicata* in a subsequently instituted suit provided the other conditions are satisfied but it contains a prohibition against the trial of the same issue in a subsequent suit. The petitioner contends that decision on an issue as to jurisdiction cannot operate as *res judicata* in a subsequent suit because the principle according to the petitioner is that the principle of *res judicata* does not apply to decisions about jurisdiction of a Court. Reliance is placed on the following observations of the Supreme Court in the case reported in AIR 1966 SC 1332, in *re Sheodan Singh v. Daryao Kunwar*:—

"In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial Court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder of parties or mis-joinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional Court-fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any) the decision not being on the merits would not be *res judicata* in a subsequent suit."

I do not think this case helps the petitioner. What the Supreme Court decided was that where a suit has been dismissed otherwise than on merits, then such dismissal will not operate as *res judicata* in a subsequent suit. What had happened in the Supreme Court case was that four appeals which had been consolidated were pending in the High Court. Two of these appeals were dismissed by the High Court—one as being time barred and the other on the ground of failure of the appellant's father to apply for translation and printing of the record as required by the rules of the High Court. The result of the dismissal of these two appeals was that the decision of the lower Court which was on the merits remained. The question arose whether the dismissal of these two appeals would result in the remaining two appeals being hit by the principle of

res judicata. It was contended that the dismissal of these two appeals was not after consideration on merits. The Supreme Court observed:—

"In these circumstances though the order of the High Court itself may not be on the merits, the decision of the High Court dismissing the appeals arising out of suits Nos. 77 and 91 was to uphold the decision on the merits as to issue of title and therefore, it must be held that by dismissing the appeals arising out of suits Nos. 77 and 91 of the High Court heard and finally decided the matter for it confirmed the judgment of the trial Court on the issue of title arising between the parties and the decision of the trial Court being on the merits the High Court's decision confirming that decision must also be deemed to be on the merits. To hold otherwise would make *res judicata* impossible in cases where the trial Court decides the matter on merits but the appeal court dismisses the appeal on some preliminary ground thus confirming the decision of the trial Court on the merits. It is well settled that where a decree on the merits is appealed from, the decision of the trial Court loses its character of finality and what was once *res judicata* again becomes *res sub judice* and it is the decree of the appeal Court which will then be *res judicata*. But if the contention of the appellant were to be accepted and it is held that if the appeal court dismisses the appeal on any preliminary ground, like limitation or default in printing, thus confirming in toto the trial court's decision given on merits, the appeal court's decree cannot be *res judicata*, the result would be that even though the decision of the trial Court given on the merits is confirmed by the dismissal of the appeal on a preliminary ground there can never be *res judicata*. We cannot, therefore, accept the contention that even though the trial Court may have decided the matter on the merits there can be no *res judicata* if the appeal court dismisses the appeal on a preliminary ground without going into the merits, even though the result of the dismissal of the appeal by the appeal court is confirmation of the decision of the trial court given on the merits. Acceptance of such a proposition will mean that all that the losing party has to do to destroy the effect of a decision given by the trial court on the merits is to file an appeal and let that appeal be dismissed on some preliminary ground, with the result that the decision given on the merits also becomes useless as between the parties. We are therefore, of opinion that where a decision is given on the merits by the trial Court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing, it must be held that such dismissal when it con-

firm the decision of the trial Court on the merits itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal."

9. The next case cited is reported in AIR 1941 Cal 493, in re: Meghraj Golab Chand, Firm v. Chandra Kamal where a learned Single Judge has observed that the principles of *res judicata* do not apply to decisions about the jurisdiction of the Court. Another decision upon which reliance has been placed for this proposition is reported in AIR 1929 All 132, in re: Jwala Debi v. Amir Singh, where a learned Single Judge has held that a question of jurisdiction, although it may be raised by the defendant, is a question that virtually arises between the plaintiff and the Court itself and it has been contended that a decision as to jurisdiction, therefore, is not binding on the parties in a subsequent litigation.

10. It is difficult for me to accept the proposition stated as widely as it has been in the Calcutta and the Allahabad cases cited hereinbefore. Section 11 of the Code of Civil Procedure prohibits the trial not only of a subsequent suit but also the trial of an issue in the subsequent suit. The issue of jurisdiction in the previous civil suit was raised on the pleadings of the parties and was decided. On principle, I do not see why section 11 does not apply to the retrial of an issue as to jurisdiction in a subsequent suit. If the contention of the petitioner is to be accepted, it will lead to startling results. The first suit may be dismissed for want of jurisdiction by a particular Court and if the plaintiff subsequently files an identical suit in the same Court then, according to the agreement which has been advanced on behalf of the petitioner, the Court trying the subsequent suit will again be bound to hear the parties on the question of jurisdiction when that plea is raised in the subsequent suit and, upon dismissal of the subsequent suit also, it will be open to the plaintiff to repeat the process of filing identical suits one after another. In my view, in such a case or cases, Section 11 of the Code of Civil Procedure will undoubtedly apply and the trial on the question of jurisdiction in the subsequent suit or suits will certainly be precluded by reason of the decision on the question of jurisdiction in the first suit.

11. I may here refer to a Division Bench decision of the Calcutta High Court reported in AIR 1954 Cal 506, in re: Newton Hickie v. Official Trustee of West Bengal, where it has been observed at page 509:—

"At one time it was thought that the rule of constructive '*res judicata*' did not apply to the question of jurisdiction, but the matter has now been set at rest by the decision of the Supreme Court in

'Mohan Lal v. Benoy Kishna' AIR 1953 SC 65."

The aforesaid Supreme Court decision contains an observation by Ghulam Hasan J.—

"Even an erroneous decision on a question of law operates as '*res judicata*' between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as '*res judicata*'. A decision in the previous execution case between the parties that the matter was not within the competence of the executing Court even though erroneous is binding on the parties."

In view of these observations, the contention which has been raised on behalf of the petitioner that decisions on question of jurisdiction do not operate as *res judicata* cannot be accepted.

12. The petitioner has further relied upon another decision of the Supreme Court reported in AIR 1965 SC 1325, in re: Chittori Subhanna v. Kudappa Subanna, and upon the observation that a direction in the preliminary decree cannot operate, in terms of Section 11, Code of Civil Procedure or on general principles, as *res judicata*, for the simple reason, that the direction is not based on the decision of any matter in controversy between the parties and is given in the exercise of the power vested in the Court under Order 20, Rule 12(1)(c). It is difficult for me to see the relevancy of this case in so far as the decision of the point before me is concerned.

13. In the result, I do not find any merit in this revision which is dismissed with costs.

Revision dismissed.

AIR 1970 DELHI 19 (V 57 C 4)

I. D. DUA, C. J. AND S. K. KAPUR, J.

Shri Patanjal and another, Petitioners v. M/s. Rawalpindi Theatres Private Ltd. Delhi, Respondent.

Civil Revn. No. 418 of 1968, D/- 9-4-69, from Order of Commercial Sub-J.; Ist Class, Delhi, D/- 13-8-1968.

(A) Arbitration Act (1940), Ss. 2(a), 20 — Valid arbitration agreement — What constitutes — Persons not parties cannot enforce agreement — Fact that person claiming under a party is empowered to move judicial authority is not material — (Specific Relief Act (1877), Ss. 27 (b), 23 (b)).

In order to constitute a valid arbitration agreement, among other things, there should be a valid agreement, the terms of which are reduced to writing and the parties thereto should be *ad idem*; in other

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words, the agreement of the parties should be established so that they can be held to be bound by it, though the written instrument or instruments, if there are more than one containing the terms of agreement, need not necessarily be signed by the parties bound by it. It is lawful to establish oral acceptance of the terms by the parties to the agreement, though the terms agreed must be reduced to writing. The subject-matter of the reference and the authority of the arbitrator in the reference arising out of an agreement between the parties has, therefore, to be traced to the agreement of reference only. Third persons who are not parties to the arbitration agreement or to the contract containing an arbitration clause and not claiming under such parties, are not bound by such agreement. And not being bound, they would, as a general rule, be disentitled to enforce the agreement.

(Para 8)

Only a person who is a party to a contract can sue on it. The existence of statutory or equitable exceptions to this rule do not impinge upon its general fundamental character. Of course, if the subject-matter of the arbitration agreement is capable of assignment, then the assignee would step into the shoes of his assignor and be both bound by it and entitled to enforce it, but for this purpose, Court should look to the law relating to assignment of contractual rights and obligations and also to see whether in a given case, the assignee has exercised his right as such.

(Para 8)

The fact that a person claiming under a party to an agreement is empowered to move the judicial authority, does not establish that all outsiders can claim a right to enforce an arbitration agreement to which they are not parties under the law. It is only those persons who claim under a party to an arbitration agreement who should, in addition to the parties themselves, be held entitled to claim its benefit and also be held bound by the obligations imposed thereby. Case law discussed.

(Para 10)

(B) Arbitration Act (1940), S. 34 — Scope — Under this section a person cannot be directed to be made party to arbitration proceedings.

Section 34 like Section 4 of the English Act, merely confers on the judicial authority before which legal proceedings have been commenced by a party to an arbitration agreement in respect of any matter agreed to be referred to arbitration, to stay those proceedings when moved by any other party to the agreement or any other person claiming under him in respect of the matter to be referred. On the basis of this section the Court cannot direct that a person be made a party to the arbitration proceedings.

(Para 10)

Cases Referred: Chronological Paras
(1967) AIR 1967 Punj 241 (V 54) =
C R No. 417-D of 1965 D/-
17-8-1966, Rawalpindi Theatres
(P) Ltd. v. Patanjal 5
(1962) AIR 1962 SC 406 (V 49) =
1962-3 SCR 702, Abdul Kadir
Shamsuddin v. Madhav Pra-
bhakar 5
(1960) AIR 1960 Punj 368 (V 47) =
62 Pun LR 306, Gian Cbandra
Hirday Mohan v. Prem Narain
Mahinder Mohan 9
(1955) AIR 1955 Nag 126 (V 42) =
ILR (1955) Nag 321, Chouthmal
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(1946) 1946-2 All ER 54 =
1946 Ch 320, Shayler v. Woolf 9, 10
(1929) 1929 WN 152, Aspell v.
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(1883) ILR 6 All 322 = 11 Ind App
20 (PC), Chaudhri Hira Singh
v. Chaudhuri Ganga Sahai 9
M. L. Bagai, for Petitioners; H. R.
Sawhney with C. V. Francis, for Res-
pondent.

I. D. DUA, C. J.:— This revision under Section 115 of the Code of Civil Procedure against the order of the learned Commercial Subordinate Judge 1st Class, Delhi, dated 13-3-1968 has been placed before this Bench because of the importance of the question raised.

2. The learned Subordinate Judge has by the impugned order set aside the award dated 29-3-1967 on the ground that the arbitrator was guilty of misconduct because no notice was given to the party against whom ex parte proceedings were taken by him. The matter was, however, remitted back to the arbitrator for proceeding afresh from the stage when Shri Patanjal and Shri Om Parkash Mehra had last appeared before him. The arbitrator was further directed to make Shri W. N. Chowdhary a party to the arbitration proceedings so that all the interested parties may be represented.

3. Before proceeding with the contentions raised before us, it is desirable to briefly recapitulate the facts and circumstances giving rise to the controversy before us. On 21-7-1962, Shri Om Parkash Mehra wrote a letter to M/s. Rawalpindi Theatres (P) Ltd., Chandni Chowk, Delhi (Ex. P. 5) which it is necessary to reproduce in extenso:—

"I write to confirm that I am the rightly appointed legal representative of M/s. Shanti Niketan Films, Bombay, Producers of the film 'Warrant' and Financiers of M/s. Padam Films, Delhi, the Distributor of the Picture 'Warrant' for Delhi, & U. P. Circuits, I am enclosing herewith a letter of Authority issued by the above party in my favour.

I further confirm that I am entering in-
to this arrangement with you after con-

sulting Mr. Patanjal, the Prop, of the said firm M/s. Shanti Niketan Films, Bombay, the Producers and this decision is within his knowledge.

"I further confirm that you have agreed to write your letter dated 21-7-1962 to the Motion Pictures Association, Delhi informing them that you are withdrawing your claim against the picture 'Warrant' and enabling the release of this picture on my assuring you as under:—

1. That I shall pay to Shri W. N. Chowdhry, 781, Nicholson Road, Kashmere Gate, Delhi, a sum of Rs. 9,500/- from the Distributors share becoming due from 'Warrant' of two weeks run at Delite Theatre, New Delhi and Imperial Cinema, Paharganj.

2. I declare that there is absolutely no lien of any type on the said share becoming due from above Theatre and that the said share shall not be utilised in any way, whatsoever, other than meeting your dues as above said.

I declare that you have agreed to write the above said letter to the Motion Pictures Association, Delhi on my assurances and representation and that if I had not assured you as above, you would not have written the said letter to the Motion Pictures Association Delhi. It is understood that I am responsible to make good the deficit, if any, to cover Rs. 9,500/-. In case of dispute, R. L. Duggal of 29-D, Ramnagar, New Delhi will be the sole arbitrator.

for Shanti Niketan Films, Bombay
Sd/- Om Prakash Mehra,
Received the above mentioned
letter. dated 21-7-1962 in favour
M. P. A. Delhi by me for its deli-
very to the M. P. A.
Sd/- OM."

The main question argued before us relates to the meaning and scope of the assurance No. 1 in this letter, according to which Shri Om Prakash Mehra promised to pay to Shri W. N. Chowdhary a sum of Rs. 9,500/- from the Distributors share becoming due from 'Warrant' of two weeks run at Delite Theatre, New Delhi, and Imperial Cinema, Paharganj. According to the petitioners' counsel, Shri W. N. Chowdhary not being a party to the arbitration agreement, the arbitrator cannot make an order for payment of Rs. 9,500/- in favour of Shri W. N. Chowdhry, whereas the respondents' learned counsel Shri H. R. Sawhney has contended that Shri W. N. Chowdhary is, for all practical purposes, a party to the arbitration agreement and, in any event, he is an assignee of the subject-matter of the contract and, therefore, entitled to claim payment of the amount in question by means of arbitration proceedings. In November, 1963, an application under Section 20 of the

Indian Arbitration Act was presented by M/s. Rawalpindi Theatres (P) Ltd., in the Court of the Senior Subordinate Judge, Delhi, impleading therein Shri Patanjal and Shri Om Prakash Mehra as respondents. It was averred in that application that Shri J. N. Chowdhary was the Managing Director of the applicant-company and was authorised to appoint Attorneys on behalf of the said company. By a Special Power of Attorney dated 20-3-1963, the said Shri J. N. Chowdhary had appointed Shri W. N. Chowdhary as a Special Attorney to take steps for recovery of the amount due to the applicant-company from respondent No. 1.

Needless to point out that Shri Patanjal was respondent No. 1 in those proceedings. The power of attorney granted by Shri J. N. Chowdhary authorised Shri W. N. Chowdhary to take such legal steps for enforcement of the claim of M/s. Rawalpindi Theatres (P) Ltd. as may be considered right and proper. That application was, according to the express averments contained therein, signed and verified by Shri W. N. Chowdhary who was stated to be fully conversant with the facts of the case and able to depose to matters relating to the dispute from his personal knowledge. In paragraph 22 of the application, assurance No. 1 in the agreement dated 21-7-1962 was repeated and in paragraph 25, it was complained that the respondents mentioned in the application had failed to perform their part of the agreement and had not paid the amount due to the applicants M/s. Rawalpindi Theatres (P) Ltd. under the agreement dated 21-7-1962. It was prayed that the agreement dated 21-7-1962 be ordered to be filed in the Court and steps for an award being made by the arbitrator, as provided by Section 20 of the Indian Arbitration Act, be taken. This application was signed by Shri W. N. Chowdhary for applicants Rawalpindi Theatres (Private) Ltd. as their attorney. The following four issues were framed on the merits:—

"1. Whether the plaintiff-company is registered under the Indian Companies Act?

2. Whether the petition has been filed, signed and verified by a duly authorised person on behalf of the plaintiff-company?

3. Whether there is a valid arbitration agreement existing between the parties appointing Shri R. L. Duggal, as the sole arbitrator?

4. If issue No. 2 is proved, whether the dispute be not referred to the arbitration as alleged."

The learned Commercial Subordinate Judge (Shri A. K. Jain) on 11-6-1964 ordered that the arbitration agreement Ex. P. 5 be filed and the matter in dispute be referred to the sole arbitration of

Shri R. L. Duggal. In the order, it was observed, *Inter alia*, that the application had been signed and verified by Shri W. N. Chowdhary, a person duly authorised on behalf of the company which was duly registered under the Indian Companies Act and it was added, to quote the exact words, "there is a valid arbitration agreement existing between the plaintiff and the respondent, appointing Shri R. D. Duggal, as the sole arbitrator."

4. On appeal, the learned Additional District Judge (Shri J. S. Mandher) by order dated 31-3-1965 reversed the order of the learned Commercial Subordinate Judge and dismissed the application referring the matter to arbitration on the ground that there were serious allegations of fraud against the appellant and admittedly even a criminal complaint had been filed in the Court of a Magistrate of 1st Class.

5. On revision in the Punjab High Court (C. R. No. 417-D of 1965), H. R. Khanna, J. by his order dated 17-8-1966 = (AIR 1967 Punj 241), set aside the order of the learned Additional District Judge and restored that of the Court of first instance. In the course of the hearing of the revision, the attention of the learned Judge was drawn to the statement of Shri W. N. Chowdhary, the Director and Special Attorney of the petitioner-company, in which he had stated in cross-examination that the complaint filed by the company against the opposite party had been dismissed in default and that in the complaint it had been alleged that the opposite party had played a fraud and cheated the petitioner-company regarding the amount due on the agreement. After noticing the ratio of the Supreme Court decision *Abdul Kadir Shamsuddin v. Madhav Prabhakar*, AIR 1962 SC 406, cited both in the appeal before the learned Additional District Judge and on revision in the High Court, and other decisions cited before H. R. Khanna, J. the learned Judge observed as follows:—

"It is stated that the dispute between the parties now is that the respondents had undertaken to pay Rs. 9,500/- in accordance with the agreement reproduced above and as the respondents have not paid that amount there is a dispute which needs adjudication. The dispute now between the parties, according to the learned counsel, is only with respect to the payment of Rs. 9,500/-. Reference in this connection has been made to the statement of W. N. Chowdhary, Director and Special Attorney of the petitioner, who has come into the witness-box as P. W. 3 and who has deposed that the dispute between the parties was that the respondents were not paying the money to the witness. It would appear from the above that the dispute, which needs

adjudication and which is sought to be referred to the arbitrator, is only about the claim of Rs. 9,500/- which, according to the petitioner, the respondents were bound to pay in terms of the agreement referred to above. Such a dispute can validly be referred to arbitrator and the court below, in my opinion, was not justified in reversing the decision of the trial Court in this respect."

After this decision, the arbitrator apparently entered on the reference and in March, 1967, he filed an application under Section 28 of the Arbitration Act in the Court of the learned Commercial Subordinate Judge. Shri D. C. Aggarwal, for extending time for making and signing the award by about two months. Incidentally, it may be pointed out that earlier in November, 1964, M/s. Rawalpindi Theatres (P) Ltd., had filed an application under Section 28 of the Indian Arbitration Act in the Court of the Commercial Subordinate Judge (Shri A. K. Jain) for extension of time for making the award and for condoning the delay. In that application, it was averred as follows:—

"The petitioner-company is only late by five days in filing this petition if it is held that this application should have been filed before the expiry of four months' time. The applicant was prevented by the delay in the decision of the appeal by Hon'ble Additional District Judge. The delay may, therefore, be condoned and this Hon'ble court may be pleased to order that the award be made by the arbitrator by the 15th of February, 1965."

This application was dismissed on 27-4-1965 by the learned Commercial Subordinate Judge on the ground that the application filed under Section 20 of the Arbitration Act had been dismissed by the learned Additional District Judge on appeal. On the application by the arbitrator, an *ex parte* order was made by the learned Commercial Subordinate Judge on 7-3-1967 which reads as under:—

"This is an application under Section 28 of the Arbitration Act filed by Shri R. L. Dugal, sole arbitrator. It is alleged that after learning from the petitioner-company that the appeal to the High Court in Petition No. 417-D of 1965 = (AIR 1967 Punj 241), had been dismissed, he issued notices to the parties on 19-9-1966, and 8-10-66, and that the petitioner appeared in pursuance of the notice but the respondents had not been served. Thereafter, the claimant petitioner obtained an order for substituted service and it is said that a notice was published in the Times of India calling upon the respondents to appear before the arbitrator on 14-2-1967. The arbitrator says that the respondents put in appearance on 14-2-1967 through Shri Sham Sunder

Gautam, Advocate. In these circumstances, there is good reason for extension of the time. So, time is extended for making the award till 7-5-1967."

6. In April, 1967, an application was presented in the Court of the Commercial Subordinate Judge by Shri R. L. Duggal, Arbitrator under Sections 14 and 17 of the Arbitration Act stating that he had signed and published his award dated March 29, 1967 and that he was therewith filing the award and the arbitration proceedings in Court. It was prayed that notices be issued to the parties of the filing of the award and the matter be proceeded with according to law. Objections under Sections 30 and 33 of the Arbitration Act were raised to the award and the pleadings of the parties gave rise to four issues on the merits. Including, whether the arbitrator had no jurisdiction to determine the claim of Shri Chowdhary whether the arbitrator was guilty of misconducting himself or the proceedings, and whether M/s. Rawalpindi Theatres (P) Ltd. were entitled to a decree in terms of the award.

The learned Commercial Subordinate Judge upheld the jurisdiction of the arbitrator to award the sum of Rs. 9,500/- to Shri W. N. Chowdhary because of the agreement of reference as also because of the statement of claim. It was, however, held that the proceedings taken by the arbitrator against the respondents ex parte were vitiated on account of failure on the part of the arbitrator to give notice to the respondents about the extension of time granted by the Court and about his intention to proceed on a particular date and also his failure to give further notice to the respondents of his intention to proceed ex parte if they failed to appear on that date. On this view, the award was set aside. The learned Commercial Subordinate Judge also held that the decree could not be passed in favour of Shri W. N. Chowdhary who was neither a party to the reference nor to the arbitration proceedings and was, therefore, disentitled to enforce the award.

M/s. Rawalpindi Theatres (P) Ltd. were, however, held entitled to have a decree passed in terms of the award, though such a decree would, according to the Court, be infructuous being in favour of Shri W. N. Chowdhary and not of M/s. Rawalpindi Theatres (P) Ltd. The case was remitted back to the arbitrator for proceeding with the arbitration after giving proper notice to the respondents from the stage when the respondents had last appeared before him. The arbitrator was also directed to make Shri W. N. Chowdhary a party to the arbitration proceedings to ensure a proper representation of all the interested parties before

him because Shri Chowdhary was virtually the only affected party under the agreement of reference which had been upheld up to the High Court. It is this order which is now assailed before us, but the challenge is confined to the direction to implead Shri Chowdhary. Neither party has questioned the correctness of the order setting aside the award and remitting it back to the arbitrator.

7. Shri M. L. Bagai, the learned Advocate for Shri Patanjal and Shri Om Parkash Mehra has very strongly argued that the Court below has acted without jurisdiction and in any event, with material illegality and irregularity in the exercise of its jurisdiction in directing the arbitrator to make Shri W. N. Chowdhary a party to the arbitration proceedings. Having held that Shri W. N. Chowdhary was neither a party to the reference nor to the arbitration proceedings, and, therefore, not entitled to enforce the award, it was beyond the competence of the Court below to direct the arbitrator to implead Shri Chowdhary to the arbitration proceedings before him. The submission seems to me to be well founded.

8. The Arbitration Act of 1940 being a consolidating and amending Act on the law relating to arbitration, we have to look to the provisions of that Act for discerning the legal position. "Arbitration agreement" in this Act means a written agreement to submit present or future difference to arbitration, whether an arbitrator is named therein or not and "reference" as defined therein, means a reference to arbitration. Capacity to make an arbitration agreement seems to me to be co-extensive with the capacity to contract under the law. In order to constitute a valid arbitration agreement, among other things, there should be a valid agreement, the terms of which are reduced to writing and the parties thereto should be ad idem: in other words, the agreement of the parties should be established so that they can be held to be bound by it, though the written instrument or instruments, if there are more than one containing the terms of agreement, need not necessarily be signed by the parties bound by it. It is lawful to establish oral acceptance of the terms by the parties to the agreement, though the terms agreed must be reduced to writing. The subject-matter of the reference and the authority of the arbitrator in the reference arising out of an agreement between the parties has, therefore, to be traced to the agreement of reference only. From the legal position just stated, it follows that third persons who are not parties to the arbitration agreement or to the contract containing an arbitration clause and not claiming under such parties, are not bound by such agreement. And not being bound, they would, as a

general rule, be disentitled to enforce the agreement.

The language of Section 20 of the Arbitration Act seems also to support this view. This section empowers the parties to an arbitration agreement, when differences have arisen, which are covered by it, to apply to a Court having jurisdiction praying that the agreement be filed in Court. Indeed, it is also the general fundamental rule that only a person who is a party to a contract can sue on it. The existence of statutory or equitable exceptions to this rule do not impinge upon its general fundamental character. of course, if the subject-matter of the arbitration agreement is capable of assignment then the assignee would step into the shoes of his assignor and be both bound by it and entitled to enforce it, but for this purpose one has to look to the law relating to assignment of contractual rights and obligations and also to see whether in a given case, the assignee has exercised his right as such.

9. Having stated the legal position as I understand it, I may turn to the decisions cited at the Bar. Shri Bagal has, in support of his submission, placed reliance on a Single Bench decision of the Punjab High Court sitting on Circuit at Delhi in *Gian Chandra Hirday Mohan v. Prem Narain Mohinder Mohan*, AIR 1960 Punj 366, the head-note of which, so far as relevant, reads thus:—

"C made a gift of a house exclusively belonging to him in favour of his nephew G. Later C filed a suit for cancellation of the gift. The parties agreed to refer the dispute to arbitration. The arbitrator instead of confining himself to the matter in dispute proceeded to decide as to how the property was to devolve after C's death. The plaintiff who were neither party to the suit nor the reference, were given a share in the property under the award. 4. *Decree on the basis of the award was passed*. On C's death the plaintiffs, basing their claim on the award and the decree passed thereon, brought a suit for a share in the rents and profits of the house which was in exclusive possession of G."

Held, (1) that the plaintiffs had no locus standi to file the suit. As they were not parties to the earlier suit or to the reference, they were not bound by the award or the decree and, therefore, they could not claim any right under the award or the decree; (1883) ILR 6 All, 322 (PC), and AIR 1955 Nag 126, Rel. on."

The Nagpur decision in *Chouthmal v. Ramchandra*, AIR 1955 Nag 126, has also been cited by Shri Bagal. It has been observed, in this decision that arbitrators have no power to go outside the reference and create trust or give directions regarding thereto and even if they do so, the

Court should exclude that portion of the award from the decree. Shri Sawhney has placed his reliance on the language of Section 34 of the Arbitration Act and on an English decision reported as *Shayler v. Woolf*, (1946) 2 All ER 54. In the English decision cited, the Court of Appeal, affirming the Court below held that the covenant before it had been expressly assigned and that the arbitration clause, not being a personal covenant, was also assignable. As Shri Sawhney has placed principal, if not exclusive, reliance on this decision, we consider it appropriate to reproduce the relevant part of the judgment given by Lord Greene, M. R., with whom Morton and Somervell, L. JJ. agreed. Thus said the Master of the Rolls:—

"That only leaves one point and that is the arbitration clause. It is said that the contract cannot be assignable because of the existence of the arbitration clause, inasmuch as such a clause is in its nature not assignable or is only assignable (it is said) where the assigns are expressly mentioned in the clause itself or the contract which contains the arbitration clause is itself expressly declared to be assignable. In my opinion, those propositions are incapable of support in the wide way in which they are stated; nor does any of the authorities quoted to us in support of them really touch the point.

The question whether an arbitration clause prevents a contract from being assignable must depend on the intention of the parties, and the nature of the contract will, of course, be very important. Quite apart from an arbitration clause, if the nature of the contract is one which makes it incapable of assignment, owing to its personal nature, there is no question, of course, of the assignability of the arbitration clause; but that an arbitration clause is assignable in its nature seems to me to be quite clearly contemplated by the Arbitration Act, 1889, Section 4, and it has been recognised in this Court in one of the authorities referred to, namely, *Aspell v. Seymour*, (1929) WN 152; Digest Supp.

As I have said, apart from this arbitration clause, the agreement in this case is, in my opinion, quite clearly assignable. That is because, on its true construction, it is an assignable contract, that being the intention of the parties gathered from the document when read in the light of its subject-matter and the surrounding circumstances. It seems to me that the result of that must necessarily be that the arbitration clause also follows the assignment of the subject-matter of the contract. There is nothing, I conceive, in principle or authority which would prevent that from taking place.

The consequence is that, in my opinion, this was a contract assignable by Mrs.

Peacock and, as it was assigned by her in her conveyance to the present plaintiff, the benefit of the contract is now vested in him and he is entitled to sue upon it."

This decision was concerned with Section 4 of the Arbitration Act 1889 (52 & 53 Vict. C. 49), an English statute, which empowered the Court to stay proceedings where there was a submission. According to that section, if any party to a submission or any person claiming through or under him commenced any legal proceeding in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, then any party to such legal proceeding should apply to that Court to stay the proceedings. In an assignable contract, when assignment was held to have been made, the assignee was, in the reported decision, held entitled to the benefit of the contract and entitled to sue upon it. It is difficult to understand how the ratio of this case helps Shri Sawhney.

10. Section 34 of the Indian Arbitration Act, like Section 4 of the English Act, merely confers on the judicial authority before which legal proceedings have been commenced by a party to an arbitration agreement in respect of any matter agreed to be referred to arbitration, to stay those proceedings when moved by any other party to the agreement or any other person claiming under him in respect of the matter agreed to be referred. On the basis of this section, the direction of the Court below that Shri W. N. Chowdhary be made a party to the arbitration proceedings is not easy to sustain.

The fact that a person claiming under a party to an agreement is empowered to move the judicial authority, does not establish that all outsiders can claim a right to enforce an arbitration agreement to which they are not parties under the law. It is only those persons who claim under a party to an arbitration agreement who should, in addition to the parties themselves, be held entitled to claim its benefit and also be held bound by the obligations imposed thereby. Shri Chowdhary, it is quite clear on the present record, never claimed to assert his right as an assignee from M/s. Rawalpindi Theatres (P) Ltd. On this view, it is unnecessary to express any considered opinion on the question whether Section 4 of the English Arbitration Act and Section 34 of the Indian Act are completely identical in their effect and scope.

The submission forcefully pressed by Shri Sawhney on the authority of 1946-2 All ER 54, that Shri W. N. Chowdhary must be held to have been assigned the rights of M/s. Rawalpindi Theatres (P)

Ltd. under the terms of Ex. P. 5 is not easy to uphold and I find no justification for the submission that the terms of Ex. P. 5 purport to assign the right of M/s. Rawalpindi Theatres (P) Ltd. under the contract to Shri W. N. Chowdhary. No other transaction serving as an assignment has been relied upon. The argument that the conduct of M/s. Rawalpindi Theatres (P) Ltd. and that of Shri W. N. Chowdhary, in the course of the present litigation, should be held to amount to an assignment in favour of Shri W. N. Chowdhary is equally devoid of substance. It is noteworthy that Shri Chowdhary has nowhere, during the long course of this chequered litigation, claimed any right in himself as an assignee and indeed except as an Attorney for M/s. Rawalpindi Theatres (P) Ltd. up till now, he has never even pretended to claim any right in his own personal capacity as distinct from his capacity as Attorney representing and prosecuting the claim of M/s. Rawalpindi Theatres (P) Ltd.

11. As a last resort, Shri Sawhney has submitted that this revision should be thrown out because there is no jurisdictional infirmity and the impugned order cannot be held to suffer from any illegality or material irregularity in the exercise of the lower Court's jurisdiction. I am unable to accept this contention. If Shri W. N. Chowdhary is not a party to the arbitration agreement and if for this reason, he is not entitled to claim adjudication of his personal right, then obviously, the direction given by the Court below is without jurisdiction, and is certainly tainted with a serious illegality and a material irregularity in the exercise of the jurisdiction vested in the Court below by law.

12. The petitioner's objection that after setting aside the award, the Court below could not remit the case back to the arbitrator, is clearly misconceived and seems to me to be contrary to the settled view, and indeed Shri Bagai, after half-heartedly pursuing it, gave up the attempt.

13. For all the foregoing reasons, we allow this revision and delete the direction from the lower Court's order that the arbitrator should implead Shri W. N. Chowdhary as a party to the arbitration proceedings. It would of course be open to the arbitrator to adjudicate upon the rights of the parties to the arbitration agreement and it would certainly be open to him to decide whether or not the amount of Rs. 9,500/- had been paid to Shri W. N. Chowdhary as agreed to by Shri Om Parkash Mehra and if the amount has not been so paid, what is its effect on the rights and liabilities of the parties to the agreement and to give the necessary relief to them in accordance

with law. There would be no order as to costs.

14. S. K. KAPUR, J.:— I agree.
Petition allowed.

AIR 1970 DELHI 26 (V 57 C 5)

I. D. DUA, C. J.

Shri Charanjil Lal, Appellant v. Sushil Chander Bharal, Respondent.

C. Misc. No. 195-J of 1969 in S. A. No 435 of 1968, D/- 20-3-1969.

(A) Civil P. C. (1908), O. 41, Rr. 19 and 17 — Sufficient cause — Appeal put lower down on daily cause-list — Appellant seeing no possibility of his case being taken up on that date and leaving court precincts — Dismissal in default — Duty of court — Duty of parties and their counsel — Application for restoration — General principles stated.

When a case on the daily cause-list is reached in due course, the counsel or the party, is expected to be present. The fact that one or more of earlier cases are adjourned by the Court, is no justification for absence of the counsel in the subsequent cases. In the event of the counsel being absent, the court is to exercise its judicial discretion on the facts and circumstances of each case whether to proceed with it or to wait for the counsel and if so, for how long. There is no hard and fast rule of general application and every case poses its own peculiar problem to be solved by the Court in its judicial discretion. The Court is always reluctant to dismiss cases in default too readily and that course is adopted only as a last resort. (Para 3)

The question whether a party was prevented from appearing by sufficient cause, has to be considered from a practical point of view by striking a just and proper balance between legitimate claims of litigating parties on the one side and on the other side, the duty of the Court to see that all litigants before it are treated equally, and that the quality of the judicial process, including inter alia, the reasonably expeditious disposal of cases, does not suffer. The Courts, have to exercise their functions in a way which fulfils the need for consistency, for equality and for certainty. The judicial administration must be objective and strictly impartial dominated by sense of fairness to all, eliminating every influence proceeding from extra-judicial personal emotions and instinctive prejudices.

While the Courts should ordinarily be reluctant to dismiss cases in default too hastily and they should wait for a reasonable time so as to expect the lawyers to come from the Bar room that should not

mitigate against the normal rule that parties to the litigation and/or their counsel are expected to be present when the case is called for hearing so that the Court proceeds with the hearing without being made to wait for unreasonable length of time. This is a duty which the parties and the Courts owe to the judicial process in our Republic. (Para 3)

A case appearing in the daily cause list — however long the list — serves as a notice to the parties and their counsel that they should be ready with the hearing. It is wrong to assume that a case lower down on the daily list is, for that reason alone, not intended to be heard or so unlikely to be heard that the counsel engaged to conduct the case need not be present in the Court premises. This however, does not mean that applications for restoration of cases dismissed in default have to be treated with undue rigidity. The question of sufficient cause demands a generous approach, and if there is no grave negligence and the counsel can be considered to have honestly intended, with due sense of anxiety, to be present, on the hearing but was prevented by a sufficient cause from doing so, the case should be restored. The mistake contributing to the absence should be bona fide, reasonably leading to the default, and a counsel, to rely on such mistake, must be shown to have acted with due care and attention expected of a member of the Bar. (Para 4)

Where there was default even on the part of the respondent the argument normally advanced against restoration on the ground of a valuable right having accrued to the respondent by reason of the dismissal in default loses some of its cogency. (Para 5)

(B) Houses and Rents — Delhi Rent Control Act (59 of 1958), S. 39 — Second appeal — Competency — Appeal must involve substantial question of law — (Civil P. C. (1908), Ss. 100-101).

Under S. 39, second appeal is competent only if it involves a substantial question of law. Fixation of interim rent by the Tribunal, on the facts and circumstances of the instant case, could by no means be said to suffer from any infirmity involving a substantial question of law. To reassess material on record is wholly beyond the power of a Court of second appeal under S. 39. (Para 8)

V. D. Mahajan, for Appellant; D. P. Khurana, for Respondent.

ORDER:— S. A. O. 435 of 1968 was dismissed in default on 2-1-1969. Neither party was represented in this Court on that day. The appellant has applied for setting aside the dismissal in default and for restoring the appeal to its original number and for its hearing on the merits. This application has been presented under

Order 41, Rule 19, read with Section 151, Code of Civil Procedure. The averments made in this application are as under:—

"1. That the above-mentioned appeal was fixed for hearing in the Court of the Hon'ble Chief Justice on 2-1-1969. It was No. 10 in the list. This appeal was on the cause list since 5th December 1968.

2. That the appellant-petitioner had been attending the Court diligently throughout. Even on 2-1-1969, he attended the Court. At 12 A.M., the petitioner enquired from the Reader attached to the Hon'ble Chief Justice as to whether there was any possibility of his case being taken up and he was told that there were very many big cases above him and there was absolutely no possibility of his case being taken up on that date. The petitioner also made enquiries from the persons whose cases were fixed before him and he was told that their cases were big ones and would take a lot of time. It was under these circumstances that the petitioner left the Court on 2-1-1969.

3. That when the petitioner went to the Court the next day, he was told that his appeal had been dismissed in default along with others.

4. That the petitioner submits that he was prevented by sufficient cause from appearing when the appeal was called on for hearing. The absence of the petitioner at the crucial moment was not intentional. It was a bona fide mistake on his part. The petitioner had been attending the Court for many days and had attended the court even on the day on which his appeal was dismissed. x x x x."

This application is strenuously opposed by the respondent and paragraph 2 thereof is controverted in the following words:—

"2. Para 2 of the application is incorrect and denied. Facts stated by the appellant are an afterthought story. In fact, the appellant did not at all come and attend this Hon'ble Court on 2-1-1969. He (appellant) has proved to be very negligent and careless in conducting his case. Moreover, the appellant has not explained any thing about his counsel's absence. The cause explained by the appellant cannot be said to be a sufficient cause, therefore, the application under reply merits dismissal with costs."

In paragraph 4 of the reply, it has been averred that the proceedings in this litigation are being prolonged in order to avoid payment of long outstanding arrears of rent and that the appellant has not yet complied with the order made by the Additional Rent Controller under Section 15 (2) of the Delhi Rent Control Act.

2. Neither in the application for restoration nor in the arguments before me has it been clarified by the learned counsel for the appellant-petitioner whether it was the counsel or the petitioner-appel-

lant himself who had asked the Reader of this Court about the possibility of the appeal being taken up on 2-1-1969. It has also not been specified as to which counsel or party, whose cases were listed above the case in hand in the daily cause list for 2-1-1969, was approached and whether enquiries were made by the appellant himself or by the counsel. The Reader of this Court categorically denies the assertion and, according to him, this is not his practice. In this Court, the clients do not, as a matter of practice, approach the Reader on such points. In any event, at 12 noon on 2-1-1969, when the Court was in session, it was hardly possible for any one to cause disturbance in the Court by talking to the Reader on a matter like this, as suggested on behalf of the appellant. I am accordingly not impressed by the aforesaid averments in the application which cannot be accepted. This, however, does not mean that if true, they would have necessarily constituted sufficient cause as contemplated by Order 41, Rule 19 of the Code, and I decline, on this occasion, to express any considered opinion on this question.

3. An attempt has been made by Shri Mahajan to show, during the course of his arguments, that some cases on the daily board on 2-1-1969 actually appeared again in the cause list on some subsequent days and this, according to the counsel, establishes that the present case was dismissed in default without disposing of or dealing with on merits all the prior cases on the list on that day. I have not been able to appreciate or understand the precise submission. If it means that unless all the other cases on the daily cause list for the day in question are finally disposed of on the merits, no case can be legally dismissed in default, then this submission must be repelled. When a case on the daily cause list is reached in due course, the counsel or the party, as the case may be, is expected to be present so that its hearing proceeds in accordance with law. The fact that one or more of earlier cases are adjourned by the Court, does not by itself serve as a justification in law for the absence of the counsel in the subsequent cases when they are called for hearing in due course. In the event of the counsel being absent, the Court is to exercise its judicial discretion on the facts and circumstances of each case whether to proceed with it or to wait for the counsel and if so, for how long. There is no hard and fast rule of general application and every case poses its own peculiar problem to be solved by the Court in its judicial discretion, making due allowances for normal human failings, but fully ensuring the proper functioning of the Court without undue interruptions and without unduly consuming the time of the Court in only waiting for the parties.

This Court, I must point out, is always reluctant to dismiss cases in default too readily and this course is adopted only as a last resort.

The question whether a party was prevented from appearing by sufficient cause, has to be considered from a practical point of view by striking a just and proper balance between the legitimate claims of the litigating parties on the one side, in the background of the human imperfection, giving rise to the saying that, to err is human, and on the other side, the duty of the Court to see that all litigants before it are treated equally, and that the equality of the judicial process, including inter alia, the reasonably expeditious disposal of cases, does not suffer. The Courts, it may be borne in mind, have to exercise their functions in a way which fulfils the need for consistency, for equality and for certainty. The judicial administration must be objective and strictly impartial dominated by sense of fairness to all, eliminating every influence proceeding from extra-judicial personal emotions and instinctive prejudices.

As observed earlier, the Courts should ordinarily be reluctant to dismiss cases in default too hastily and they would be well advised to wait for a reasonable time so as to expect the lawyers to come from the Bar room if their cases are suddenly called before expected. This, however, does not militate against the normal rule that parties to the litigation and/or their counsel are expected to be present when the case is called for hearing so that the Court proceeds with the hearing without being made to wait for unreasonable length of time. This is a duty which the parties and the Courts owe to the judicial process in our Republic.

4. It has also been faintly suggested that as there were 30 cases on this Court's daily cause list for 2-1-1969, the petitioner appellant's counsel could reasonably assume that more than about 10 cases could not have been reached and he could, therefore, safely keep away without any reasonable risk of his case being disposed of in default. This suggestion is misconceived and such an impression seems to be without any rational basis. A case appearing in the daily cause list however long the list—serves as the notice to the parties and their counsel that they should be ready with the hearing, and unless the list itself so points out, it is wrong to assume that a case lower down on the daily list is, for that reason alone, not intended to be heard or so unlikely to be heard that the counsel engaged to conduct the case need not be present in the Court premises. The argument of human approach is, on the facts and circumstances of this case, to be merely stated to be

rejected. This, however, does not mean that applications for restoration of cases dismissed in default have to be treated with undue rigidity. They must, in my view, be dealt with according to law with a consciousness that consistently with the above approach, cases should, as far as possible, be disposed of on the merits. The question of sufficient cause thus demands a generous approach, and if there is no grave negligence and the counsel can be considered to have honestly intended, as shown by his conduct, with due sense of anxiety, to be present, on the hearing, but was prevented by a sufficient cause from doing so, the case should be restored. The mistake contributing to the absence should on this approach, be bona fide, reasonably leading to the default, and a counsel, to rely on such mistake, must be shown to have acted with due care and attention expected of a member of the Bar.

5. The grounds stated in the application would not in an ordinary case seem to me to attract Rule 19 of Order 41 of the Code because it is somewhat difficult to hold proved that the appellant was prevented by a sufficient cause from appearing when the appeal was called on for hearing on 2-1-1969. However, in this case, I find as observed earlier, that there was default even on the part of the respondent. The argument normally advanced against restoration on the ground of a valuable right having accrued to the respondent by reason of the dismissal in default, seems to me to lose some of its cogency in this case on account of the respondent's absence.

It appears to me that some members of the Bar who do not normally practise in this Court, have not realised the effect of the change brought about by the establishment of a separate High Court of Delhi with its very much increased strength of Judges. When some Judges of the Punjab High Court used to come here from Simla or from Chandigarh to hear and dispose of cases from the Union territory of Delhi, the position of the Bar of the Circuit Bench was slightly different and all the members of the Circuit Bar could not be professionally kept busy solely in this Court throughout the year.

With the creation of a separate Court for Delhi, the position has greatly changed and the High Court Bar Association claims to have several hundred members, out of whom quite a large number of them can be kept profitably busy exclusively in this Court. This Bar, in its efficiency, sense of responsibility and status, is second to none in our country and it is time that those who practise at the Bar of this Court take suitable steps generally to remain present in the Court-premises during the Court-hours on days when they have professional work in this Court. If the counsel engaged in this Court are

too busy to cope with the work single-handed, it is only fit and proper for them to have juniors to relieve them. There is no dearth of promising and deserving junior members of the Bar in this Court and their engagement would train the younger Bar and help the too-busy seniors as also the Court, in time of need. This course seems not only essential in the interest of the litigating public, but it would also facilitate the necessary assistance to the Court in the discharge of its judicial functions, and of course it is consistent with the position of responsibility, prestige and dignity of the Bar.

Hoping that the situation in this Court would soon change, I set aside the impugned dismissal in default as a special case and restore the appeal to its original number. But this instance is not to be cited as a precedent in future. I may, however, also suggest that those members of the Bar who do not, as a general rule, restrict their professional activities to the Bar of this Court and who come here occasionally to conduct cases would be well-advised, in the interests of their own clients, to have associated with them some member of the Bar of this Court who is ordinarily available during Court-hours so that they do not risk dismissal of their cases in their absence.

6. I have heard the parties on the merits of the appeal. The respondent in this Court had applied for ejectment of this tenant (appellant in this Court) on a two-fold ground: one of those grounds being non-payment of arrears of rent. Under Section 15(2) of the Delhi Rent Control Act, the Additional Rent Controller made an order that the tenant should pay arrears of rent at the rate of Rs. 120/- p.m. with effect from 1-1-1965 within one month from the date of his order which was made on 5-3-1968.

7. On appeal, the learned Rent Control Tribunal fixed the interim rent at the rate of Rs. 80/- p.m. and directed the tenant to deposit the arrears with effect from 1-1-1965 at the rate of Rs. 80/- p.m. within one month from the date of his order which was made on 23-9-1968.

8. On second appeal in this Court, all that the learned counsel for the appellant has been able to argue is that fixation of this interim rent is not justified on the facts and circumstances of this case. I am wholly unable to sustain this submission because under Section 39 of the Delhi Rent Control Act of 1958, second appeal is competent only if it involves a substantial question of law. Fixation of interim rent by the Tribunal, on the facts and circumstances of this case, can by no means be said to suffer from any infirmity involving a substantial question of law.

The appellant's counsel has merely tried to persuade me to reassess the material on the record and to come to my own conclusion, but as just observed, this is wholly beyond my power as a Court of second appeal under Section 39 of the Delhi Rent Control Act.

9. The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 DELHI 29 (V 57 C 6)

FULL BENCH

I. D. DUA, C.J., S. K. KAPUR AND
HARDAYAL HARDY, JJ.

Flying Officer S. Sundarajan Petitioner
v. Union of India and others Respondents.
Criminal Writ Petn. No. 20 of 1968, D/-
17-3-1969.

(A) Constitution of India, Art. 141 — Question neither raised nor discussed in Supreme Court judgment — Principle of binding nature cannot be deduced by implication — (Civil P. C. (1908), Preamble — Precedents — Supreme Court decision).

Under Art. 141 of the Constitution, the law declared by the Supreme Court is binding on all the courts and therefore, even the principles enunciated by the Supreme Court including its obiter dicta, when they are stated in clear terms, have a binding force. But when a question is neither raised nor discussed in a judgment rendered by the Supreme Court, no principle of a binding nature can be deduced from it by implication.

(Para 21)

(B) Constitution of India, Art. 226 — Conviction and sentence before court-martial — Habeas Corpus petition — Court need not in every case call for the record to examine legality of conviction — Proceedings, however, not entirely immune from court's scrutiny — Writ not issued for examining mere errors of procedure — Provision under R. 15 of the Air Force Rules, one of procedure — Non-compliance not affecting jurisdiction will not vitiate trial and ultimate conviction — Prayer disallowed. (Criminal P. C. (1898), S. 491); (Air Force Act (1950), S. 189 — Air Force Rules, 1950, R. 15).

While dealing with a petition for a writ of habeas corpus the court is not bound to call for the record and proceedings of every case in which a court of competent jurisdiction or a duly convened and constituted court-martial has recorded a finding of guilt and passed a sentence of imprisonment and examine the legality of conviction and sentence. This is not to say that the proceedings of a court-martial are entirely immune from scrutiny by

the High Court. This had been so even before the Constitution and the writs of habeas corpus were issued under Section 491 of Criminal P. C. when the jurisdiction of the court-martial concerned was under challenge. The enquiry was however, directed to ascertain whether the person held in custody was subject to military law or the court itself was properly convened and constituted. That jurisdiction continues to exist in the High Court even today. Art. 226 of the Constitution cannot be said to have enlarged the ambit of that jurisdiction in any way. The remedy of a writ of habeas corpus is not available to test the propriety or legality of the verdict of a competent court. The court is not entitled to go into the regularity of steps taken by the court-martial in the course of trial or by the confirming authority in the finding and the sentence which do not go to their jurisdiction and confirming. Interference is possible only where the irregularity or illegality affects the jurisdiction of the court-martial or the confirming authority.

(Paras 21, 22 & 26)

The petitioner alleged that the violation of R. 15 of the Air Force Rules and the denial of opportunity to the delinquent vitiated the proceedings before the court-martial and hence a writ of habeas corpus should be issued to set him at liberty.

Held, that R. 15 was only a sort of preliminary investigation by the Commanding Officer with a view to ascertain whether a prima facie case existed to justify the detention of the accused in custody beyond the period of 48 hours prescribed in R. 14. Any irregularity at that initial stage might have a bearing on the veracity of witnesses examined at the trial or on the bona fides of Commanding Officer or on the defence that might be set up by the accused at the trial; but the irregularity could by no means be regarded as affecting the jurisdiction of the court to proceed with the trial. Hence, even if violation of R. 15 were to be assumed, the non-observance of the Rule was not such as to vitiate the trial and ultimate conviction of the petitioner. AIR 1969 SC 414 & AIR 1950 SC 27 Ref. & AIR 1968 Delhi 156 & Cr. Writ No. 1-D of 1963, D/-13-5-1963 (Punj) and AIR 1967 SC 1335 & (1917) 2 KB 254 Rel. on.

(Paras 32, 33, 35 & 36)

(C) Constitution of India, Art. 226 — Habeas corpus — Petition may be by a person other than the prisoner. (Criminal P. C. (1898), S. 491).

It is well settled that a person illegally imprisoned or detained in confinement without legal justification is entitled to apply for a writ of habeas corpus, but it is not essential that the application should proceed directly from him. Proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an ille-

gal imprisonment may also be instituted by a person other than the prisoner (in the instant case by the wife) who may have some interest in him. (1850) 15 QB 988 & (1860) 30 LJ MC 19 & Halsbury's Laws of England, 3rd Edn. Vol. 11 Foll.

(Para 39)

(D) Air Force Act (1950), S. 189 — Air Force Rules, 1950, Rr. 48(b) and 15 — Charges framed at the stage of R. 15 not final — Addition, alteration or omission of charges possible at subsequent stages under R. 48(b).

(Para 37)

(E) Constitution of India, Art. 226 — Certiorari — Petition if can be moved by person not directly affected or aggrieved by order (Quaere.) — Case Law Ref.

(Para 44)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 414 (V 56) =	
Writ Petn. No. 118 of 1968 D/-	
20-9-1968 = 1969 Cri LJ 663, Som	
Datt Datta v. Union of India	2
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(1967) AIR 1967 SC 1335 (V 54) =	
1967 Cri LJ 1204 = (1967) 2 SCR	
271. Ghulam Sarwar v. Union	
of India	22
(1964) AIR 1964 Mys 159 (V 51) =	
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sity of Mysore	43
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(1950) AIR 1950 SC 27 (V 37) =	
51 Cri LJ 1383 = 1950 SCR 88,	
A. K. Gopalan v. State of Madras	23
(1917) 1917-2 KB 254 = 86 LJ KB	
1514, Rex v. Governor of Lewes	
Prison Ex Parte Doyle	25
(1870) 5 QB 466 = 39 LJMC 145,	
R. v. Surrey Justices	40
(1860) 30 LJMC 19 = 6 H & N	
193, In re Thompson	39
(1850) 15 QB 988 = 117 ER 731,	
Cobbett v. Hudson	39

Mrs. Shyamala Pappu, Miss Bindra Thakur, for Petitioner; O. P. Malhotra, for Respondents.

HARDAYAL HARDY, J.:— The petitioner S. Sundarajan who is under going a term of imprisonment in Central Jail Kanpur as a result of his conviction by a General Court-martial on charges of criminal misappropriation of monies belonging to the Air Force Public Fund Accounts moved this petition for a writ of habeas corpus under Article 226 of the Constitu-

tion and Section 491 Criminal Procedure Code, 1898 through his wife Shrimati Saraswati on the ground that his detention and conviction are illegal.

2. When Rule nisi was issued by the Motion Bench the petitioner's counsel had cited an unreported decision of the Supreme Court in *Som Datt Datta v. Union of India* (Writ Petn. No. 118 of 1968, D/- 20-9-1968) = (Since reported in AIR 1969 SC 414). The case was therefore, ordered to be heard by a Full Bench of three Judges. That is how the case was laid before us.

3. The petitioner's allegations broadly are that he was working as Senior Accounts Officer at No. 4 Base Repair Depot Air Force, Kanpur since June 1966 under the command of Group Captain A. S. Srivastava. During the course of his employment in the said depot some defalcations came to light whereupon the authorities ordered two Courts of Enquiry to be assembled. The reports submitted by the Courts of Enquiry held Group Captain A. S. Srivastava to be responsible for irregularities in accounts. However on 15-6-1968 the petitioner was served with a charge-sheet consisting of 31 charges alleging criminal misappropriation of various sums of money totalling Rs. 29,000/- by him.

4. The petitioner complains that when he was ordered to appear before the Commanding Officer the charges were merely read over to him and no effective opportunity was given to him to meet those charges. He submits that under sub-r. (a) of R. 15 of the Air Force Act Rules, 1950, it is incumbent on the commanding Officer to hear the accused in defence of each charge and also to give him full opportunity to cross-examine any witness against him before any further proceedings are taken. But no such opportunity was given to the petitioner; all that the Commanding Officer did thereafter was to have a summary of evidence prepared and to follow it up in due course by the arraignment of the petitioner for trial before a court-martial.

5. The petitioner alleges that he brought this lapse in procedure to the notice of the authorities as soon as the court-martial was convened and also to the notice of the Court at the commencement of the trial pointing out that the trial could not proceed as the requirement of Rule 15 had not been complied with. The petitioner further alleges that he had also pointed out that in respect of charges 5 and 6 he had not been heard at all. He had also submitted that unless he was tried jointly with Group Captain A. S. Srivastava no justice could be rendered in the case. He however contends that his objections were overruled although the Judge-Advocate had clearly directed the

members of the Court that if they came to the conclusion that Rule 15 had not been complied with the Court would have no jurisdiction to try the case.

6. The petition also refers to two other irregularities at the trial; one relates to his alleged confessional statement having been admitted in evidence while the other relates to his defence witness Flt. Lt. S. C. Bhately having been cross-examined by the Prosecutor although he had been summoned only to prove the records of the Courts of Enquiry.

7. In the return to the Rule, besides traversing the petitioner's averments on facts, a preliminary objection has been taken to the maintainability of the petition on the ground that the remedy of habeas corpus is not available to a prisoner who is serving a legal sentence passed by a Court-martial and that the petitioner's conviction having been properly recorded after a valid trial and confirmation, the matter is entirely within the jurisdiction of the confirming authority and cannot be challenged before this Court in exercise of its power under Article 226 of the Constitution.

8. On merits, the petitioner's allegations about non-compliance with the requirements of Rule 15 have been denied and it is contended that the said Rule was complied with in letter and spirit and its compliance was duly proved at the trial by the petitioner's own witness Flt. Lt. S. C. Bhately.

9. The return admits that charges 5 and 6 were admitted subsequently to the charges that had previously been framed by the Commanding Officer, but it is contended that charges preferred before a Commanding Officer are tentative in nature and may be altered, amended or added to in the final charge-sheet on which the accused person is brought to trial before Court-martial.

10. As regards petitioner's allegations against involvement of A. S. Srivastava, the return affidavit states that the Court of Enquiry had no doubt taken the view that the officer had not properly carried out periodical check of Public Fund Accounts as he should have done and there was lack of supervision on his part; but as a result of due investigation, the Central Bureau of Investigation had come to the conclusion that there was no evidence on which the charge of misappropriation or making of false entries in documents could be substantiated against him. In the circumstances, the entire blame fell on the petitioner and as such there was no question of any joint trial of the petitioner with Group Capt. Srivastava.

11. With regard to the admission of the petitioner's confessional statement in evidence, it is stated that the same was

admitted by the Court after taking into account the relevant circumstances and evidence and on holding that it was voluntary. As respects cross-examination of Flt. Lt. S. C. Bhately, it is asserted that the witness having been examined by the petitioner on oath the prosecution was fully justified in cross-examining him.

12. The affidavit in support of the return, also shows that the findings and sentence passed by the Court-martial were duly confirmed by the Chief of the Air Staff and promulgated according to law and it was after such confirmation and promulgation that the petitioner was committed to Central Jail Kanpur to undergo the terms of five years rigorous imprisonment awarded to him by the Court-martial.

13. The petitioner maintains in his rejoinder affidavit that this Court has jurisdiction to examine the legality of conviction and detention which were not in accordance with the procedure established by law. He has also amplified his earlier submission regarding non-compliance with Rule 15 by stating that before the Air Officer Commanding only seven prosecution witnesses, including the petitioner were marched in and charges were given to the petitioner in their presence. All the seven witnesses were simultaneously asked what they had to say in the matter and since the evidence of each witness was not recorded separately there was obviously no opportunity to cross-examine them. On the other hand elaborate statements were made by as many as twenty witnesses at the stage of summary of evidence and subsequent trial.

14. As regards charges 5 and 6, the petitioner contends that there is no provision for amending or adding to the charges that had already been framed and that the very act of addition to the charges at a subsequent stage showed the mala fides of the respondents.

15. I have already stated that in the return the petitioner's allegations about non-compliance with the provisions of Rule 15 have been controverted and it is stated that the requirements of that Rule were fully satisfied. As this is challenged before us by the petitioner's counsel we should have ordinarily declined to go further into this matter. But considering the importance of the question raised in the preliminary objection taken by the respondents, we allowed the counsel for the parties to address arguments on the point as to how far it was open to this Court, while dealing with a petition for a writ of habeas corpus to go into the legality of a conviction and sentence recorded by a duly convened and constituted court-mar-

tial and also on the scope of Rule 15 of the Air Force Act Rules 1950.

16. The petitioner's counsel conceded that normally a writ of habeas corpus cannot issue to question the correctness of a decision of a court of competent jurisdiction for it is not a writ of error nor does a High Court in habeas corpus proceedings, strictly speaking, sit as a court of appeal or of general superintendence to review the order of conviction. She however submitted that, that was the position in law before the advent of the Constitution when it was recognised all round that a writ of habeas corpus could not be granted to a person committed to prison after he had been convicted by a duly constituted Court-martial and the proceedings and sentence were confirmed by a competent authority. The inclusion of Article 21 in the Constitution, however brought about a radical change in the situation inasmuch as the said Article in terms provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. If it was therefore held that the procedure prescribed by Rule 15 of the Air Force Act Rules 1950, had not been complied with in the instant case, the order of conviction passed by the Court-martial would not stand in the way of the petitioner's right to regain his liberty as in that case his conviction and detention could not be held to be in accordance with the procedure established by law.

17. Learned counsel further submitted that in exercise of its powers under Article 226 of the Constitution it is always open to this Court to order that the records of a particular case be removed to it on a writ of certiorari with a view to enable it to examine the legality of the proceedings and to quash the order if it is satisfied that a case had been made out for the exercise of its powers in that behalf.

18. She submitted that although the petition in the present case purported to be for a writ of habeas corpus, it was in reality a petition for a writ in the nature of certiorari, as its object was to call up and to quash the proceedings before the General Court-martial. In this connection the learned counsel invited our attention to the abovecited judgment of the Supreme Court. The petitioner in that case was found guilty of charges under Sections 304 and 149 Indian Penal Code and sentenced to six years R.L. and cashiered. His conviction and sentence were confirmed by the confirming authority under Section 164 of the Army Act, 1950. The petitioner then moved the Supreme Court under Article 32 of the Constitution and obtained a rule asking the respondents to show cause why a writ in the nature of certiorari should not be issued.

THE All India Reporter

1970

Goa, Daman and Diu J. C.'s Court

AIR 1970 GOA, DAMAN AND
DIU 1 (V 57 C 1)

V. S. JETLEY, J. C.

State, Appellant v. Emerciano Lemos,
Respondent.

Criminal Appeal No. 3 of 1969 D/-
13-3-1969.

(A) Penal Code (1860), S. 84 — Evi-
dence Act (1872), S. 105 — Accused plead-
ing insanity at time of act — Nature of
burden of proof, indicated. (Para 6)

The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Penal Code. The accused may rebut it by placing before the court all the relevant evidence—oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged. AIR 1964 SC 1563 Relied on. (Paras 6, 8)

Held, that the prosecution evidence — oral and circumstantial — helped the accused in this case and he had been able to rebut the presumption that he was not

insane at the time of the assaults on the particular day. AIR 1969 SC 15 & AIR 1961 SC 998 & AIR 1964 SC 1563, Distinguished. (Para 8)

(B) Penal Code (1860), S. 84 — Schizophrenia — Characteristics of.

A patient suffering from schizophrenia has delusions which are bizarre in nature. There is often impulsive and senseless conduct on his part as a result of hallucinations or delusions. The whole personality completely disintegrates. The patient often is in a state of wild excitement, is destructive, violent and abusive. He may impulsively assault anyone without the slightest provocation. The delusions are of a persecutory nature. When a patient is having an attack of schizophrenia not infrequently he attacks those against whom he has grievances, real or imaginary. (Paras 6, 7)

(C) Penal Code (1860), S. 84 — Presumption — Test of responsibility stated.

Every man is presumed to be sane. This presumption does not apply to a man whose case is governed by Section 84. Section 84 mentions the legal test of responsibility in case of alleged unsoundness of mind. It is by this test, as distinguished from medical test, that the criminality of the act is to be determined. This section, in substance, is the same as the McNaghten Rules. These Rules in spite of long passage of time are still regarded as the authoritative statement of the law as to criminal responsibility. (Para 10)

(D) Criminal P. C. (1898), S. 286 — Duty of Prosecutor where he is satisfied that case is covered by S. 84, Penal Code — (Penal Code (1860), S. 84).

Where the Public Prosecutor was satisfied that the case of the accused was covered by Section 84, he should make a bold statement that he cannot support the prosecution. Government Pleaders and Public Prosecutors owe a duty to the

courts, and that duty is that when they are convinced that the prosecution case cannot be supported, they should state so fearlessly and boldly regardless of instructions to the contrary. (Para 11)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 15 (V 56)=
1969 Cri LJ 259, Jai Lal v. Delhi Administration 8
(1964) AIR 1964 SC 1563 (V 51)=
1964 (2) Cri LJ 472, Dahyabhai v. State of Gujarat 8
(1961) AIR 1961 SC 998 (V 48)=
(1961) 2 Cri LJ 43, State of M. P. v. Ahmadulla 8
(1949) AIR 1949 Cal 182 (V 36)=
50 Cri LJ 255, Ashiruddin Ahmed v. King 2, 9
(1947) AIR 1947 Pat 222 (V 34)=
48 Cri LJ 143, Narain Sahl v. Emperor 9
(1928) AIR 1928 Cal 238 (V 15)=
30 Cri LJ 247, Karma Urang v. Emperor 8, 9
S. Tamba, Govt. Pleader, for State;
B. F. D'Souza, for Respondent.

JUDGMENT:— This is an appeal under Section 417 of the Code of Criminal Procedure filed on behalf of the State, praying for the reasons mentioned therein, that the acquittal of the respondent-accused be set aside. The accused in this case was charged with offences under Section 302 and some other sections of the Indian Penal Code. The learned Additional Sessions Judge, Panaji, after considering the prosecution evidence came to the conclusion that the accused was of an unsound state of mind at the time of the commission of the offences charged with and therefore, he directed his acquittal. He also passed an order under Section 471 of the Code of Criminal Procedure in pursuance of which the accused was detained in safe custody. The State felt that this acquittal was not justified and consequently moved this Court in appeal.

2. The prosecution case is that the accused and his family and also the brother of the accused and his family were occupying two parts of the common family house. The two brothers were not on talking terms for the last ten or twelve years. Gabriel Lemos was their neighbour and also a distant relation. He was involved in a law suit with the wife of the accused, wherein a prohibitory order was passed against his wife. This order was obtained about four months before the incident on 16th October, 1967, when the accused killed the wife of Gabriel Lemos, and injured others. The accused was employed as a seaman and had returned about 8 days prior to 16th October, 1967.

On 15th October, 1967, at about 6 p.m. the accused visited the house of Delicosa Mazarello, his brother's wife, and smash-

ed one of the windows. He also threw stones at the house of Gabriel Lemos. On 16th October, 1967, at about 7 p.m. when Delicosa Mazarello had gone to a neighbour's house with a view to requesting her to sleep with her and her daughters during the night the accused started banging the windows of her house which were closed; her children ran out of the house through the front door out of fear when the accused, without any provocation or warning, assaulted all of them with the stick, stones and bottles that he had with him. They sustained injuries and were taken to Hospicio Hospital at Margao for treatment. The accused, soon after this assault, started throwing stones at the house of Gabriel Lemos, and when Gabriel Lemos came out he attacked him with a stick. He also attacked Gabriel Lemos' wife, by name Ramira, with a stick, resulting in severe injuries on her head and other parts of her body. She was removed to this hospital where she died after about five days.

The police were in the vicinity and when they heard the noise they came there and saw the accused in a violent state throwing stones at the people who had gathered there. The police warned the accused not to behave in that manner but notwithstanding the warning he started throwing stones even at the police. He was later caught from behind by constable Agapito Almeida, but he escaped from his grip and thereafter hit this constable with a knife he had in his hands. The constable received injuries on his left arm. The accused even attempted to pick up another knife from the ground in order to give further knife blows to the constable but the latter ran away. In the meanwhile the accused was overpowered and arrested by other policemen. He was tied with ropes and taken to this hospital and, from there, on 18th November, 1967, he was taken to the Mental Hospital. He was discharged therefrom on 11th June, 1968. The police, after necessary investigation, charged the accused under Section 302 and other sections of the Indian Penal Code. The learned Committing Magistrate committed the case to the Court of Session. The learned Additional Sessions Judge, after considering the prosecution evidence, came to the conclusion that the accused caused the death of Ramira Lemos and assaulted his own nieces and the police constable but as he was suffering from schizophrenia and as he was of unsound state of mind he did not know the nature of his act or what he was doing was wrong or contrary to law. In this view of the matter relying on the provisions of Section 84 of the Indian Penal Code, he directed his acquittal.

3. In the statement recorded by the learned Additional Sessions Judge under

Section 342 of the Criminal Procedure Code, the accused pleaded that he was unaware of what had taken place on 15th or 16th October, 1967. The accused led no defence on his behalf.

4. The prosecution evidence may be briefly discussed.

Sebastiao Mazarello (P. W. 1) is a panch witness of the scene of the offence. He is M. B. B. S. having graduated from the Grant Medical College, Bombay. He is a neighbour of the accused and according to him the accused was suffering from mental disorder for the last 5 or 6 years. The accused is about 65 years old and this witness is about 66 years old and, being his neighbour, he knows him from his childhood.

Agapito Almelda (P. W. 2) is a constable who went to the scene of the offence on hearing the noise. He saw a number of people at the scene of the offence and he found the accused pelting stones at them. This was about 7.30 p.m. According to him, he and other constables told the accused that they were police officers and that he should stop throwing stones, but he continued to throw stones at them. The Police then decided to arrest him but before that the accused assaulted him with a knife on his arm. In cross-examination he stated that the accused was in "a furious state". He lodged the first information report (Exh. 4) and, in that report, there is a statement by him that the police were informed by some people that one mad person by name Emerciano Lemos had attacked Gabriel Lemos, his wife Ramira Lemos and some others. This report also mentions that when he visited the scene of the offence he found the accused standing in front of his house armed with a knife and a big stick challenging the public that he would kill if any one went forward to stop him. It is further mentioned that Head Constable Antonio Barracho and Police Constable Madeurao Rane remained at the scene of the offence with a view to preventing the accused from further violent action. In the column "Brief facts of offence", in this report, it is stated that "the accused person in a fit of madness went amuck and attacked the villagers and also attacked the complainant with knife."

Delicosa Mazarello (P. W. 3) is the sister-in-law of the accused. According to her, the accused and her husband who are brothers were not on good terms. She deposed to the incident which took place on 15th October, 1967, when the accused smashed a window of her house. She also deposed to the incident on 16th October, 1967, when she saw her daughters Nora, Sensi and Blandina, injured and bleeding. They told her that they had been assaulted by the accused in their house. She found the accused standing in

front of his house threatening the people and throwing stones at them.

Nora Lemos (P. W. 4) is a niece of the accused. She deposed that the accused, without any warning, assaulted her and her two other sisters with a stick and she saw a pile of stones, sticks and bottles near the steps of their house. Her sister Sensi, according to her, was hit by the accused with a bottle. She also deposed that the accused had returned to the village about a week prior to the incident on 16th October, 1967, and that during the last two years before the incident she had met the accused a number of times in his house but the accused never assaulted her or any other family member. She saw the Police encircling the accused and firing rounds in the air before the accused was caught from behind and tied with ropes.

Dr. Jose Sarto Menezes (P. W. 5) performed post-mortem of the deceased Ramira and according to him the cause of the death was the head injury resulting in the fracture of the skull. She had also received other injuries on her body.

5. The evidence of Dr. Guiri Camotim (P. W. 6) is particularly important on the question of the mental state of the accused. He was medical superintendent, Mental Hospital, Panaji, in October, 1967, when the accused was admitted in that hospital on 18th October, 1967, at about 11 p.m. The record relating to admission of the accused shows that he was brought by the Police and that his hands and feet were tied by iron chains. This witness examined the accused and according to him he was suffering from schizophrenia for about 6 months prior to his admission in this hospital. He found him overtalkative and incoherent upto 31st October, 1967. He was discharged on 11th June, 1968, after necessary medical treatment. In cross-examination he deposed that schizophrenia sometimes makes a patient to act violently and in an uncontrollable manner. He gathered from enquiries that from 1963 the accused had suffered from schizophrenia and that he had been treated in U.K. According to him the duration of schizophrenia is normally for weeks, months or even years together and on some occasions during this period the patient becomes violent. He also stated that there are lucid periods but when a patient has an attack of schizophrenia he is guided by hallucinations and delusions; he is not then in a position to distinguish right from wrong and is incapable of knowing the nature of his acts. This witness also added that after the attacks cease the patient can recollect what he had done.

Ramesh Malkarnekar (P. W. 8), is a Junior Medical Officer at Hospicio Hospital at Margao. He found certain injuries on the accused after the incident on 16th

October, 1967. He also found that he was violent.

Gabriel Lemos (P. W. 10) is a neighbour of the accused. According to him the accused and he are not on good terms for a number of years. It is in his evidence that for about four months before the incident he had obtained a prohibitory order restraining the wife of the accused from extending the boundaries of her house and that the accused after his arrival from abroad about 8 days before the incident used to insult and threaten his wife that she would be killed. He referred to the incident on 16th October, 1967, when he found the accused throwing stones at his house and later assaulting him and his wife with a stick. This is the substance of the prosecution evidence.

6. It is necessary in the first place to consider the provisions of Section 84 of the Indian Penal Code and also Section 105 of the Evidence Act. Under Section 84 nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. Section 105 of the Evidence Act, to the extent it is material for the present purpose, provides that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code or within any special exceptions, is upon him, and the court shall presume the absence of such circumstances. Section 84 relates to a general exception. Illustration (a) of Section 115 reads— "A, accused of murder alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A". It follows from this illustration and also the said Section 105 that it is for the accused to discharge the burden of proof that he did not know the nature of the criminal acts committed by him. In Modi's 'Medical Jurisprudence and Toxicology' different kinds of schizophrenia have been described. As will appear therefrom, a patient suffering from schizophrenia has delusions which are bizarre in nature. There is often impulsive and senseless conduct on his part as a result of hallucinations or delusions. The whole personality completely disintegrates. The patient often is in a state of wild excitement, is destructive, violent and abusive. He may impulsively assault anyone without the slightest provocation. The delusions are of a persecutory nature.

7. The facts gathered from the prosecution evidence are:— (1) that the accused was suffering from schizophrenia for the last 5 or 6 months before the two incidents on 15th and 16th October, 1967; (2) that in the past during the last two years before the incidents on these dates, he did

not assault his nieces or any other family member; (3) that on 15th October, 1967, without any provocation, he smashed one of the windows of the house of his brother and threw stones at the house of Gabriel Lemos; (4) that on 16th October, 1967, he assaulted his nieces, Gabriel Lemos and his wife with sticks and bottles without any provocation from them; (5) that immediately after the assault on 16th October, 1967, he was seen with a knife and stick in his hands indiscriminately throwing stones and challenging and threatening the people who had collected there that he would kill them; (6) that he hit constable Agapto Almeida with a knife on his arm when the latter tried to overpower him; (7) that he was regarded by the people who had collected there and also by the Police as a mad person who had run amuck; (8) that the Police had to encircle the accused and fire rounds in the air before he was caught from behind and tied with ropes and iron chains; (9) that schizophrenia sometimes makes a patient act violently and in an uncontrollable manner; (10) that a prohibitory order had been obtained by the deceased Ramira Lemos wife of Gabriel Lemos about four months before the incidents on 15th and 16th October, 1967; and (11) that the accused had returned from abroad a week before the incidents. Mr. S. Tamba, learned Government Pleader, relies mainly on the evidence of Gabriel Lemos that after returning from abroad the accused used to insult and threaten that he would kill the wife of Gabriel Lemos. Gabriel Lemos and the accused admittedly are not on good terms and beyond the uncorroborated testimony of Gabriel Lemos there is no other evidence to show that before these incidents, the accused threatened to kill the wife of Gabriel Lemos. Gabriel Lemos cannot be regarded as a disinterested witness. The niece of the accused by name Nora Lemos (P. W. 4), has not deposed to these insults and threats. The prosecution have also not examined any other neighbour on this point.

Barring the evidence of Gabriel Lemos there is no other evidence to rebut the argument of Mr. Bernard D'Souza, learned counsel for the accused, that the provisions of Section 84 of the Indian Penal Code are attracted in this case. According to Mr. S. Tamba, the accused had a motive to assault the wife of Gabriel Lemos because of the prohibitory order obtained against the wife of the accused. This may or may not be so but when a patient is having an attack of schizophrenia not infrequently he attacks those against whom he has grievances, real or imaginary. He considers that he is persecuted, when in fact he is not. It is a case of impulsive insanity. He was at that time a man at his worst, little above animals. Mr. B. D' Souza argues

that if the accused were in a sound state of mind, he would not attack constable Agapito Almeida with a knife. He would not be challenging and threatening the people who had collected there and throwing stones at them indiscriminately. He would have remained content with assaulting the deceased Ramira and her husband who had given him some cause, but would not assault his young nieces who had given him no cause. He had never assaulted them in the past. He would have concealed the stick, knife, stones and bottles used in attacking the deceased Ramira and others, but all these weapons of attack were found at the scene of the offence. He stood in front of his house like a mad man with a knife in his hand threatening the people who had collected there. He was regarded as a mad man by the people who had collected there and the police. He did not tell anyone that he had attacked the deceased Ramira and her husband Gabriel Lemos because of the prohibitory order obtained against his wife. He would not have been tied with ropes and chains. He did not run away. He was treated of schizophrenia at London before he returned to his village. The antecedent and subsequent conduct of the accused, according to Mr. B. D'Souza, shows that the accused was incapable of knowing the nature of his criminal acts or that he was doing what is either wrong or contrary to law. The medical evidence also supports the statement of the accused.

8. Mr. Tamba relies on 'Jai Lal v. Delhi Administration' AIR 1969 SC 15, 'State of Madhya Pradesh v. Ahmadulla', AIR 1961 SC 998, and 'Dahyabhai v. State of Gujarat', AIR 1964 SC 1563, in support of his contention that the accused did not discharge the burden of proof imposed upon him, in terms of illustration (a) to Section 105 of the Evidence Act.

Mr. B. D'Souza relies on 'Karma Urang v. Emperor', AIR 1928 Cal 238 'Ashiruddin Ahmed v. King', AIR 1949 Cal 182 and 'Narain Sahi v. Emperor', AIR 1947 Pat 222, in support of his contention that the facts established prove that the burden of proof was discharged by the accused.

The decisions cited may be briefly reviewed. The facts of AIR 1969 SC 15 are clearly distinguishable and Mr. B. D'Souza is right when he submits that this decision is not helpful. The appellant in the special appeal before the Supreme Court entered the house of his neighbour Somawati on November 25th, 1961, at about 1.45 p.m. and stabbed her daughter Leela aged 1 and half years with a knife. He inflicted five stab wounds, on different parts of her body. The injury on her back proved fatal. Leela died in the hospital at about 4 p.m. The appellant then returned to his house and bolted the front door. A crowd collected near

the front door and raised an alarm. After sometime the appellant went out by the back door and stabbed another neighbour Parabati and then Raghubir who tried to intervene on her behalf. Raghubir and others tried to apprehend him. He then ran back to his house, bolted the door and started throwing brickbats from the roof. He was later arrested by the police. The appellant in this case had a long standing grudge against Baburam, uncle of the child Leela. This enmity was said to be the motive of the attack by the appellant on Leela. The defence plea in this case was of insanity. According to the evidence noticed by their Lordships of the Supreme Court, on the morning of November 25th, 1961, the mind of the appellant was normal. He went to and from his office all alone. He wrote a sensible application asking for casual leave for one day. Nobody noticed any symptoms of mental disorder at that time. He left the office at about 11.30 a.m. and returned home alone. At 1.45 p.m. he stabbed Leela, Parabati and Raghubir with a knife. He concealed the knife and a search for it proved fruitless. At 2.45 p.m. the investigating officer came, arrested the appellant and interrogated him. He was then found normal and gave intelligent answers. On the same day he was produced before the Magistrate. His brother was then present but the Magistrate was not informed that he was insane. The state of his mind before and after the crucial time when the stabbing took place was that of a normal man and, therefore, the provisions of Section 84 were not attracted. He did not lack the requisite mens rea. Mr. B. D'Souza is right when he states that the general burden is on the prosecution to prove beyond doubt not only the actus reus but also the mens rea. The conduct of the appellant in the case at the bar on 15th and 16th October, 1967, and thereafter was not that of a sane man.

In AIR 1961 SC 998, the established facts were that the accused bore ill-will to the deceased and the murder was committed at dead of night when he could not be seen. He took a torch with him and then stealthily entered the house of the deceased by scaling over a wall. There was further the mood of exaltation which the accused exhibited after he had put the deceased out of her life. The Supreme Court held that it was a crime not committed in a sudden mood of insanity but one that was preceded by careful planning and exhibiting cool calculation in execution and directed against a person who was considered to be the enemy. There was no mood of exaltation on the part of the accused after the assault on 16th October, 1967. There was no careful planning as in the case dealt with by the Supreme Court. The obtaining of the prohibitory

order was not an act which should have made him act like a mad man. The motive seemed to be trivial and inadequate. This decision also does not help the State.

In AIR 1964 SC 1563, the entire conduct of the appellant from the time he killed his wife up to the time the Sessions proceedings commenced was inconsistent with the fact that he had a fit of insanity when he killed his wife. He did not like his wife. He wrote a letter to his father-in-law to the effect that he did not like her and that he should take her away to his house. The father-in-law promised to come. He expected him to come on April 9th, 1959, and tolerated the presence of his wife in his house till then. The father-in-law did not turn up on or before April 9th, 1959 and therefore, the accused in anger and frustration killed his wife. The existence of the weapons in the room, the closing of the door from inside, his reluctance to come out of the room till the Mukhl came seemed to indicate that it was a premeditated murder and that he knew that if he came out of the room before the Mukhl came he might be man-handled.

The Supreme Court summed up the doctrine of burden of proof in the context of plea of insanity in the following propositions:— (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial; (2) there is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Penal Code. The accused may rebut it by placing before the court all the relevant evidence—oral, documentary, or circumstantial. The burden of proof upon him is no higher than that rests upon a party to civil proceedings; and (3) even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged. The prosecution evidence—oral and circumstantial—helps the accused in this case and, I think, he has been able to rebut the presumption that he was not insane at the time of the assaults on 16th October, 1967. The aforesaid decisions of the Supreme Court do not help the State in establishing that the case of the accused is not covered by Section 84 of the Indian Penal Code.

9. It is not necessary to deal with the facts in AIR 1928 Cal 239, except that it may be sufficient for the present purpose to apply one of the common tests laid down by the learned Judges of the Calcutta High Court. That test is to ask, in the circumstances, whether he would have committed the act if a policeman would have been at his elbow. This authority is cited by Mr. B. D'Souza in order to show that the accused did not even spare constable Agapito Almeida when he hit him with a knife on his arm and that even if Police were present, he would have assaulted the deceased Ramira and others.

In AIR 1949 Cal 182, the accused was clearly of unsound mind and acting under the delusion of his dream, he made a sacrifice of his son believing it to be right. He was therefore entitled to the benefit of Section 84. In spite of the confession made by him which was later retracted. In AIR 1947 Pat 222 a distinction is made between legal insanity and medical insanity and a standard to be applied in determining legal insanity is indicated. According to this decision, where a plea of insanity is raised under Section 84, the Court has to consider two issues:—

(1) Whether the accused has established that at the time of committing the act he was of unsound mind; and (2) If he was of unsound mind, whether he has established that the unsoundness of mind was of a degree and nature to satisfy one of the knowledge tests laid down by the section. I agree with Mr. B. D'Souza that these requirements are satisfied in this case. Unsoundness of mind is a matter of inference from his previous act, subsequent act and behaviour.

10. I agree with Mr. B. D'Souza that the presumption that the accused was insane at the crucial time has been rebutted. Every man is presumed to be sane. This presumption does not apply to a man whose case is governed by Section 84. The learned Additional Sessions Judge was satisfied that the case of the accused was governed by this section, and this conclusion of his receives support from the prosecution evidence. It may be stated in this case that the prosecution did not examine the investigating officer. He might have further supported the case of insanity in view of what is stated in the first information report. This omission is serious. Section 84 mentions the legal test of responsibility in case of alleged unsoundness of mind. It is by this test, as distinguished from medical test, that the criminality of the act is to be determined. This section, in substance, is the same as the McNaghten Rules. These Rules in spite of long passage of time are still regarded as the authoritative statement of the law as to criminal responsibility. It is not the case of the prosecution that the

accused was drunk at the crucial time. He seemed to be under delusion and hallucination when he assaulted the deceased Ramira and others. A person labouring under delusion and hallucination is to be in the same position as an insane man. This is not a case of a morbid man thirsting for human blood. This is a case of sudden impulsive insanity which had its roots in schizophrenia. He seemed to have an attack of schizophrenia on 15th October when he started smashing a window and throwing stones. It is a pity that he was insane at the crucial time. It is a greater pity that Ramira was killed, but though this be an act of madness, yet the evidence does not show that there was method in his madness. The presumption of innocence of the accused is further reinforced by his acquittal by the trial court. This presumption also applies to a man whose case is governed by Section 84. He should be given the benefit of this section. In the view taken of this matter the appeal against acquittal fails and is accordingly rejected. The decision of the learned Additional Sessions Judge is maintained.

11. I would like to make some general observations before closing this case. In the notes on arguments maintained by the learned Additional Sessions Judge, the learned Public Prosecutor stated:—

"If the court feels that the accused was unsound of mind at the time he committed this offence, he should be taken in safe custody so as not to put in risk the lives of others".

It may be that the learned Public Prosecutor was satisfied that the case of the accused was covered by Section 84; in that case he should have made a bold statement that he should not support the prosecution. Government Pleaders and Public Prosecutors owe a duty to the courts, and that duty is that when they are convinced that the prosecution case cannot be supported, they should state so fearlessly and boldly regardless of instructions to the contrary. In this connection I may cite the classic observation of Crompton J., when he dealt with the suggested doctrine at the bar that counsel was the mere mouthpiece of his client:—

"Such, I do conceive, is not the office of an advocate. His office is a higher one He gives to his client the benefit of his learning, his talents and his judgment. He has a prior and perpetual retainer on behalf of truth and justice".

Appeal dismissed.

AIR 1970 GOA, DAMAN AND DIU 7 (V 57 C 2)

V. S. JETLEY, J. C.

State, Appellant v. Socorro Jesus Dias, Respondent.

Criminal Appeal No. 6 of 1968, D/- 24-4-1969.

Criminal P. C. (1898), Ss. 403 (1), 530 (q) and 423 — Charge under S. 52 Post Office Act (1898) and S. 409 Penal Code — Order of acquittal by Magistrate — Trial by Magistrate in respect of offence under S. 52 is void under S. 530(q) — Retrial for charge under S. 52 not barred.

Where an accused is charged under S. 52 of Post Office Act and S. 409 I.P.C. and the Magistrate without committing the accused to the Court of Session to stand his trial for offence under S. 52, or without discharging him under S. 207-A (6) Cr. P. C. proceeds with the trial and acquits the accused, a retrial in respect of the offence under Section 52 is legal, the trial in respect of that offence being void by virtue of S. 530 (q) Cr. P. C. as it is exclusively triable by Court of Session. Offences under S. 52, Post Office Act and S. 409, Penal Code are distinct offences and though S. 403 (1) Cr. P. C. will bar the second trial of offence under S. 409 I. P. C., it will not bar the retrial in respect of offence under S. 52 Post Office Act, the emphasis in S. 403 Cr. P. C. being on a Court of competent jurisdiction and a Magistrate when he tries the offence under S. 52 is certainly not a Court of competent jurisdiction. Case law discussed. (Para 8)

Cases Referred: Chronological Paras

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| (1968) AIR 1968 Orissa 33 (V 55)= | |
| 1968 Cri LJ 333, Nand Kishore v. Mayadhar | 6, 7 |
| (1966) AIR 1966 SC 911 (V 53)= | |
| 1966 Cri LJ 700, Thakur Ram v. State of Bihar | 8 |
| (1966) AIR 1966 All 349 (V 53)= | |
| 1966 Cri LJ 737, State of U. P. v. Prabhat Kumar | 6, 7 |
| (1964) AIR 1964 SC 1673 (V 51)= | |
| 1964 (2) Cri LJ 606, State of U. P. v. Sabir Ali | 5 |
| (1963) AIR 1963 SC 1531 (V 50)= | |
| 1963 (2) Cri LJ 418, Ukha Kolhe v. State of Maharashtra | 9 |
| (1960) AIR 1960 Mys 86 (V 47)= | |
| 1960 Cri LJ 496, State of Mysore v. Dattatraya | 5 |
| (1957) AIR 1957 SC 592 (V 44)= | |
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| (1955) AIR 1955 Mad 129 (V 42)= | |
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(1939) AIR 1939 Lah 513 (V 26) =
41 Pun LR 198, Ram Pershad v.
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5

(1919) AIR 1915 Pat 70 (V 6) =
20 Cri LJ 526, Mahomed Saleh
v. Emperor

6, 7

L. C. Gama, Public Prosecutor, for Appellant; Eduardo Faleiro, for Respondent.

ORDER: This is an appeal by the State under section 417 of the Code of Criminal Procedure wherein acquittal of the respondent, an employee in the Post Office, Panjim, is challenged on the ground that it is erroneous.

2. I may glance for a few moments at the background of the facts out of which the present appeal arises. The broad facts are that a complaint was lodged against the respondent that he committed theft of the Bombay G. P. O. Insured letter no. 478 for Rs. 500/-. The complaint was also under section 409 of the Penal Code. The learned Magistrate framed the charge against the respondent under section 409 of the Penal Code and also under section 52 of the Indian Post Office Act, 1898. The trial proceeded against the respondent and after examining a number of witnesses the learned Magistrate directed the acquittal of the accused by his judgment dated 27th January, 1968. He came to the conclusion that "it is not definitely proved that it was the accused who has misappropriated the insured letter for Rs. 500/- addressed to Feliciano Cardoso". He also came to the conclusion that "there is a doubt whether he received it from the hands of P. W. 2 on 22nd March, 1966". P. W. 2 is a Post Master who is said to have given the insured letter along with other postal documents, to the respondent while proceeding on short leave.

3. Mr. Leo Gama, learned Public Prosecutor, does not press the appeal in regard to acquittal of the respondent of an offence under section 409 of the Indian Penal Code but, as will appear from the memo of appeal, the grievance of the State is that the acquittal of the respondent of an offence under S. 52 of the Indian Post Office Act, 1898, is void and therefore should be set aside. This Act was brought into force in this territory on 1st September, 1962, vide notification S. O. 2735 bearing the same date. Mr. Gama presses the acquittal appeal, relying on the provisions of section 530 (a) of the Code of Criminal Procedure (hereafter referred to as "the Code"). The offence under Section 52 is triable exclusively by the Court of Session by virtue of Section 29 (2) read with Schedule II of the Code.

4. Section 52 reads thus: "Whoever, being an officer of the Post Office, commits theft in respect of, or dishonestly misappropriates, or, for any purpose whatsoever, secretes, destroys, or throws

away, any postal article in course of transmission by post or anything contained therein, shall be punishable with imprisonment for a term which may extend to seven years, and shall also be punishable with fine". Section 409, Indian Penal Code, to the extent it is material for the present purpose, speaks of entrustment with property or with any dominion over property in capacity of a public servant and when such public servant commits criminal breach of trust in respect of that property he is punishable under that section. The definition of "criminal breach of trust" is contained in section 405 Indian Penal Code. Dishonest misappropriation is one of the essential ingredients of this definition. A comparison of section 52 and section 409 would seem to show that section 52 is wider in scope than section 409. The offence under section 52 is of a special nature and apart from dishonest misappropriation which is a common ingredient, it also includes theft, secretion, destruction or throwing away of postal articles.

5. Mr. Gama relies on 'State of Mysore v. Dattatraya' AIR 1960 Mys 86 in support of his contention that the acquittal of the respondent of an offence under section 52 was void. In this connection he invites my attention to section 530 (p) of the Code. This section provides that if any Magistrate, not being empowered by law in this behalf, tries an offender, his proceedings shall be void. It is common ground that the learned Magistrate was not empowered to try the respondent of an offence under S. 52. This offence could only be tried by the Court of Session. The respondent, in the Mysore case, was charged with offences under sections 409 and 477 of the Penal Code. He was acquitted by the Judicial Magistrate of both offences. The State preferred an appeal. The offence under section 477 is exclusively triable by the Court of Session, but the Magistrate was competent to try the offence under section 409 Indian Penal Code. The trial was challenged on the ground that the proceedings were void. The learned Judges of the Mysore High Court held that it is only so much of the proceedings as relate to the offence under section 477 Indian Penal Code that are rendered void, by reason of section 530 (p) of the Code, and not the proceedings in regard to the offence under S. 409 Indian Penal Code. The learned Judges on merits did not interfere with the acquittal in respect of the offence under section 409 Indian Penal Code but as regards acquittal of an offence under section 477, the same was set aside and retrial ordered. This authority is directly to the point and it does assist the contention of Mr. Gama that the trial

in respect of an offence under section 52 is void and, therefore, acquittal is illegal.

The State of U. P. v. Sabir Ali, AIR 1964 SC 1673 is the second decision relied upon by Mr. Gama. In this case the offender was charged with an offence under section 15 (1) of the U. P. Private Forests Act, 1948. This offence was only triable by Magistrates, Second or Third Class. The offence was tried by Magistrate First Class. As jurisdiction of Magistrate First Class was excluded by section 29 (1) of the Code, it was held by the Supreme Court that the trial was void under section 530 (p) of the Code. The third decision relied upon by Mr. Gama is 'In re Subramania Achari,' AIR 1955 Mad 129. This decision construes sections 403 and 537 of the Code and not section 530 (p) of the Code. The question of applicability of section 403 of the Code has been raised by Mr. Faleiro, learned counsel for the respondent, and this aspect of the case would be considered at its proper place.

The fourth decision is 'M. P. State v. Veereshwar Rao', AIR 1957 SC 592. It also relates to the applicability of S. 403 of the Code. The Supreme Court held in this case that the offence of criminal misconduct punishable under section 5 (2) of the Prevention of Corruption Act is not identical in essence, import and content with an offence under section 409 of the Indian Penal Code. Therefore there can be no objection to a trial and conviction under section 409 of the Penal Code even if the accused had been acquitted of an offence under section 5 (2) of the Prevention of Corruption Act. Section 403 of the Code was inapplicable. The principle of this decision is helpful. The offence under section 52 is also not identical in essence, import and content with an offence under section 409 of the Penal Code except for criminal misappropriation which is a common ingredient. The fifth and the last decision relied upon by Mr. Gama is 'Ram Pershad v. Dhanna', AIR 1939 Lah 513. In this case the complaint disclosed an offence under section 477 of the Penal Code while the accused was tried and acquitted under section 420 of the Penal Code. The trial Magistrate had no jurisdiction to try an offence under section 477. The proceedings before the trial Magistrate were therefore declared void and a retrial of the accused was ordered in regard to an offence under section 477.

6. Mr. Faleiro, learned counsel for the respondent, makes two submissions — (1) that there is only one offence though punishable under sections 409 and 52; and (2) in the alternative, if there are two distinct offences, the facts on the record are the same and therefore section 403 of the Code of Criminal Procedure will apply. In support of these two

submissions he relies on 'Thakur Ram v. State of Bihar' AIR 1966 SC 911; 'State of U. P. v. Prabhat Kumar', AIR 1966 All 349; 'Sunderlal Bhagaji v. State' AIR 1954 Madh Bha 129; 'Muhammad Saleh v. Emperor' 20 Cri LJ 526 : (AIR 1919 Pat 70) and 'Nandkishore v. Mayadhar' AIR 1968 Orissa 33. Section 403 of the Code embodies the principle of *autrefois convict* and *autrefois acquit*. It gives effect to the maxim that no person should be twice disturbed for the same cause. Section 403 (1) provides that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

The emphasis in this sub-section is on "a Court of competent jurisdiction". The learned Magistrate, when he tried the offence under section 52 was certainly not "a Court of competent jurisdiction" and, therefore, section 403 is inapplicable in terms. I do not agree with Mr. Faleiro that the complaint lodged makes out only one offence, though punishable under section 409 of the Penal Code and section 52 of the Post Office Act. The complaint relates to theft of the insured letter containing Rs. 500/- from the Post Office at Carmona between 22nd March, 1966 to 28th March, 1966. The offences under these two sections are distinct offences and section 403 does not bar the second trial of an offence under S. 52. The second submission that the facts on the record are the same is also without substance. The complaint does not mention dishonest misappropriation, although reference is made to section 409. The charge mentions misappropriation of the insured letter but makes no reference to theft in terms, although section 52 is expressly mentioned therein. The decisions cited by Mr. Faleiro are clearly distinguishable.

7. In AIR 1966 SC 911, the Supreme Court discussed the implications of sections 206, 207, 435, 437 and 403 of the Code. What was stated in that case was that when a case is brought before a Magistrate in respect of an offence exclusively or appropriately triable by a Court of Session what the Magistrate has to be satisfied about is whether the material placed before him makes out an offence which can be tried only by the Court of Session or can be appropriately tried by that Court or whether it makes out an offence which he can try or whether it does not make out any offence at all. It was also stated that

the ultimate duty of weighing the evidence in a committal proceeding is cast on the Court of Session which has the exclusive jurisdiction to try an accused person.

Thus, where two views are possible about the evidence in a case before the Magistrate, it would not be for the Magistrate to evaluate the evidence and strike a balance before deciding whether or not to commit the case to a Court of Session. It may be stated that the Magistrate is not bound to commit an accused person to stand his trial in the Court of Session, where the case is triable exclusively by the Court of Session, if he is of the opinion that the evidence and documents disclose no grounds for committing the accused person for trial, but in that case, he has to record his reasons and discharge him, unless it appears to him that such person should be tried before himself, in which case he shall proceed accordingly. This is what section 207-A (6) contemplates. The learned Magistrate did not act under this section. He seemed to have lost sight of the fact that the offence under section 52 was exclusively triable by the Court of Session and it is through error as rightly argued by Mr. Gama, that he proceeded to try the accused without committing him to the Court of Session to stand his trial of the offence under section 52, or without discharging him under section 207-A (6). This decision of the Supreme Court, with respect, has no direct bearing on the question under consideration, except for the observation that section 403 (1) bars the trial of the person, not only for the same offence but also for any other offence based on the same facts.

AIR 1966 All 349, also relates to construction of section 403 of the Code. In this case the accused was tried under section 25 of the Indian Arms Act and was acquitted. There was a subsequent trial on same facts under section 411 of the Penal Code. It was held that this trial was not barred under any of the sub-sections (1), (2) or (5) of Section 403 of the Code. The learned Judge said that though some of the important ingredients of both the offences are common, it cannot be said that all the ingredients of the offence under section 411 of the Penal Code are common with the one punishable under section 25 of the Arms Act. This decision is not to the point. In AIR 1954 Madh Bha 129, the criteria regarding competency of Courts were explained. This case also is with reference to section 403 of the Code, which is inapplicable. According to this decision, the competency of the Court to try the subsequent case is not determined by the nature of the proceedings but by the

power of the Magistrate to entertain them.

The facts in 20 Cr. L. J. 526 : (AIR 1919 Pat 70) are also distinguishable. There, the accused was tried under section 363 of the Penal Code and was acquitted. Upon an application by the complainant, the learned Sessions Judge directed fresh inquiry to be made in order to ascertain whether the offence under section 363 or 368 or any other section of the Penal Code had been committed by the accused. It was held by the Patna High Court that the order directing further inquiry should not have been made, inasmuch as kidnapping is an essential element in offences under sections 365, 366 and 368, and the accused having already been acquitted of that offence, he could not be put on trial for the same offence, nor could he be convicted under Ss. 365, 366 or 368, unless and until the prosecution established that he committed the offence of kidnapping. The case under section 368 is exclusively triable by the Court of Session. Lastly, in AIR 1968 Orissa 33, cited by Mr. Faleiro, it was held in the context of section 530 (p) of the Code that the trial without jurisdiction is void. Retrial, in this case, was not ordered as the learned Single Judge came to the conclusion that it would result in miscarriage of justice.

8. The aforesaid decisions relied upon by Mr. Faleiro have no direct bearing on the question of incompetency of the Magistrate to try the offence under section 52, except for the observation in Nandkishore's case decided by the Orissa High Court on desirability of retrial. The learned Magistrate erroneously assumed jurisdiction in regard to the offence under section 52. He was not competent to try it and the proper course which he should have followed was to have either committed the accused to the Court of Session to stand his trial or to have discharged him under section 207-A (6) after recording reasons. I agree with Mr. Leo Gama that the trial of the offence under section 52 is void and ineffectual. The error committed by the learned Magistrate goes to the root of the trial. What is void ab initio cannot be quashed any more than it can be upheld. The proceedings in regard to the trial of an offence under section 52 are a nullity. In 'Alice in Wonderland' the Executioner refused to execute the Cheshire Cat on the ground that "you cannot cut off a head unless there is a body to cut it off from". Section 403 of the Code would bar the trial of an offence under S. 409 of the Penal Code. The learned Public Prosecutor therefore does not seek retrial of this offence. What he seeks—and rightly—is retrial of the offence under section 52.

9. Mr. Faleiro next submits that the retrial, if any, should be on the basis of the evidence already on the record. This submission is not without substance. It is not fair to the respondent that the prosecution should be allowed to produce fresh evidence. The object of retrial is to render legal the proceedings that have taken place and not to give further opportunity to the prosecution to fill in the gaps. In *'Ukha Kolhe v. State of Maharashtra'* AIR 1963 SC 1531, it was observed by the Supreme Court that retrial is not to be ordered merely to enable the prosecution to adduce additional evidence for filling up lacuna. Retrial is to be directed in exceptional cases. Mr. Faleiro also pleads the delay as an argument against retrial. It was because of the mistake of the Court that the trial proceeded in regard to the offence under section 52 which was exclusively triable by the Court of Session. The law is well settled that a party should not suffer because of the mistake on the part of the Court. There is not a long delay but short delay in this case need not come in the way of retrial. The charge in this case expressly referred to S. 52, and this *ex facie* indicated lack of jurisdiction. It is in the ends of justice that there should be retrial.

10. In the view taken of this case, the acquittal of the respondent of the offence under Section 52 of the Indian Post Office Act, is hereby set aside and the appeal allowed. It is directed that the respondent should stand his trial of the offence charged under this section. The learned Sessions Judge may send this case for retrial to a Magistrate other than the Magistrate who directed acquittal of the respondent. It would be open to that Magistrate to consider after hearing the arguments whether on the evidence already on the record there are grounds for committing the accused to stand his trial under this section. Order accordingly.

Appeal allowed.

AIR 1970 GOA, DAMAN AND DIU 11 (V 57 C 3)

R. S. BINDRA, ADDL. J. C.

Agencia Commercial Internacional Ltda and others, Appellants v. Custodian of Banco Nacional Ultramarino and others, Respondents.

Apelacao Nos. 3217, 3333, 3334, 3336, 3434 of 1964, 3466, 3467, 3477, 3487, 3493 of 1965 D/- 15-4-1969.

(A) Goa, Daman and Diu (Banks Reconstruction) Regulation (2 of 1962) Pre. and Ss. 5, 6, 7 — Regulation is *intra vires* the powers of President under Art. 240(1) of the Constitution — Art. 245 (2) saves it

from charge of invalidity on ground of extra territorial operation — President was justified in making a Regulation for reconstruction of branches of B. N. U., vesting the rights and obligations of those branches in the custodian and settlement of their accounts — (Constitution of India Arts. 51, 240 and 245).

Goa, Daman and Diu (Banks Reconstruction) Regulation (2 of 1962) is *intra vires* the powers of President under Art. 240 of the Constitution. Under Art. 240(1) of the Constitution, the President has the absolute and sovereign authority to make any regulation respecting the Union territories provided the regulation is for the peace, progress and good government of the territory concerned and is not in conflict with any provision of the Constitution. Since in terms of sub-article (2) of Article 240 a regulation promulgated by the President under Article 240(1) has the same force and effect as an Act of Parliament, the Regulation No. II of 1962 cannot be deemed to be invalid on the sole ground that it would have extra-territorial operation. Article 245(2) saves it from the charge of invalidity on that account. Hence, it follows that the President could have transferred, by means of a regulation made under Article 240, the rights and obligations of B. N. U. acquired and incurred through its branches in Goa to the Custodian for the purpose of reconstruction of those branches.

(Para 14)

The Regulation was an all comprehensive measure respecting the rights and obligations of the branches of B. N. U. in the erstwhile Portuguese India. The Regulation was obviously meant to afford relief to the persons who held the currency notes circulated in Goa, Daman and Diu either by the Portuguese administration in India or the B. N. U. and also to that sizable section of the community which had credit balances in their accounts with those branches. If in affording relief to such categories of persons the Regulation provided that the amount due to the branches by its debtors shall vest in the Custodian and the latter shall also have the authority to realise them, no fault can be found with such a legislative measure. What the Regulation meant to achieve was to restore the various branches of B. N. U. to that state in which they were prior to their closure on 20th of December 1961 and then to square up their accounts through the instrumentality of the custodian. The President had therefore the right to authorise the custodian to realise the assets acquired by B. N. U. through its branches in Goa, Daman and Diu.

(Para 15)

The debts due by the various defendants to the branches of the B. N. U. are properties and the law governing the contracts giving rise to such debts would be

that of the country in which the elements of the contract are most densely grouped and with which factually the contract is most closely connected. Such law obviously is the law prevalent in the territories of Goa, Daman and Diu and not the one obtaining in Portugal where the head office of B. N. U. is situate. Since the Custodian now seeks the performance of the contracts relevant to the debts due by the defendants, it is the law now in operation which will govern the disputes between the parties. Therefore, the provisions of the Regulation are unassailable in the background that President had the undoubted right to enact those provisions.

(Para 16)

In banking transactions it is well settled that (i) the obligation of a bank to pay the cheques of a customer rests primarily on the branch at which he keeps his account and the bank can rightly refuse to cash a cheque at any other branch, and (ii) a customer must make a demand for payment at the branch where his current account is kept before he has a cause of action against the bank. The rule is the same, whether the account is a current account or whether it is a case of deposit. Either way, there must be a demand by the customer at the branch where the current account is kept, or where the deposit is made and kept, before the bank need pay, and for these reasons the 'situs' of the debt is at the place where the current account is kept and where the demand must be made. These propositions of law afford additional justification for the President to make a regulation for reconstruction of the branches of B. N. U. and settlement of their accounts. AIR 1955 SC 590 Applied.

(Para 17)

The well-established banking practice that the loan raised by a customer from a particular branch of a bank has to be repaid at the same branch also furnished a necessity for reconstruction of the branches of B. N. U. in Goa, Daman and Diu, to enable the debtors of B. N. U. to discharge their obligations if they so desired, as also to create an authority which could take steps to recover the unpaid amounts from recalcitrant debtors.

(Para 18)

(B) Goa, Daman and Diu (Banks Reconstruction) Regulation (2 of 1962), S. 5(1) — Scope and interpretation of — What vests in custodian are the rights acquired and obligations undertaken by the B. N. U. through its branches in Portuguese territories in India — (Civil P. C. (1908) Pre.) — Interpretation of statutes — Two interpretations possible — That which helps in achieving object of regulation to be preferred.

When S. 5(1) of the Regulation speaks of rights and obligations of the branches of B. N. U. in the territories of Goa, Daman and Diu, those rights and obliga-

tions should be understood to mean the rights acquired and the obligations undertaken by the B. N. U. through its branches in those territories. The real intention behind Section 5 (1) of the Regulation was to transfer to the Custodian the rights acquired by B. N. U. through its various branches in the territories of Goa, Daman and Diu. The literal interpretation of the provision has to be rejected only because it would make the Regulation altogether futile. Such an interpretation, therefore, cannot commend itself to the court, especially when the other interpretation gives life and purpose to the Regulation and helps in achieving its stated and known objectives. AIR 1957 SC 628 & AIR 1959 SC 352 Rel. on.

(Para 22)

(C) Evidence Act (1872), S. 58 — Civil P. C. (1908) O. 12 R. 6 — Uniform law on bills of exchange and promissory notes, Arts. 2, 34, 53, 70 and 77 — Scope — Suit on basis of bills of exchange and promissory notes not in possession of plaintiff and deemed to be lost — Execution of instruments admitted by defendant — Non-production of instruments in Court is of no consequence and plaintiff can be granted relief — If, on facts that defendants were immune from second suit at hands of endorsees of those instruments in view of Arts. 2, 34, 53, 70 and 77 of Uniform Law.

The custodian appointed under Section 4 of Regulation (2 of 1962) in respect of the branches of B. N. U. in Goa brought suits against the defendants on the basis of bills of exchange and promissory notes executed in favour of the branches of the Bank. The negotiable instruments could not be produced by the plaintiff in court as they had been removed by the officials of B. N. U. elsewhere at the time of occupation of Goa by the Indian forces. The plaintiff had given in the plaint particulars of those documents and the execution of these instruments had been admitted by the defendants.

Held, (i) that as the execution of the negotiable instruments had been admitted by the defendants their non-production in court was of no consequence. They have to be deemed as good as lost and so the Court could adjudge the rights of the parties arising out of those negotiable instruments on the footing that they had been executed and accepted, and the sureties furnished respecting them, in the manner set out in the respective plaints.

(Para 23)

(ii) that the defendants who were parties to the instruments were immune from another suit at the hands of the endorsees of those instruments from B. N. U. the holder thereof, in view of the combined operation of Arts. 2, 34, 53, 70 and 77 of the Uniform law on bills of exchange and promissory notes.

(Para 24)

(D) Civil P. C. (1908) O. 6, Rr. 4 and 5 and O. 10, R. 2 — Recording of parties' statements for elucidation of doubtful points in pleadings contemplated by Indian Code not permissible under Portuguese Code — Defendant can clarify his defence only through pleading and in no other manner — Portuguese Civil Procedure Code. (Para 27)

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- In Apelacao No. 3217/64
Bernardo dos Reis, for Appellant;
S. Tamba, for Respondent.
In Apelacao No. 3333/64
S. Tamba, for Appellant; Pinto de
Menezes, for Respondent.
In Apelacao No. 3334/64
S. Tamba, for Appellant; Bernardo
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for Respondent.
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for Respondent.
In Apelacao No. 3487/65
M. B. D'Costa, for Appellant; S. Tamba,
for Respondent.
In Apelacao No. 3493/65
M. B. D'Costa for Appellant; S. Tamba
for Respondent.

JUDGMENT:— This judgment will dispose of a batch of 10 appeals bearing Nos. 3217, 3333, 3334, 3336, 3434, 3466, 3467, 3477, 3487 and 3493. Appeals Nos. 3466, 3467, 3477, 3487 and 3493 are of the year 1965 and the rest were instituted in the previous year 1964. They arise out of an equal number of suits which were instituted by the Custodian of the branches of Banco Nacional Ultramarino, hereinafter referred to as the

B. N. U. against the various sets of defendants in the Civil Courts at Vasco da Gama, Panjim and Margao. Appeal No. 3217 of 1964 has arisen out of a suit dealt with by Shri Ataide Lobo at Panjim, the appeals Nos. 3333, 3336 and 3334 of 1964 are directed against judgments, each dated 17-7-1964, of Shri E. S. Silva, the Comarca Judge at Margao, while the rest of the 6 appeals pertain to the suits decided by Shri Justino Coelho, also the Comarca Judge at Margao. The justification for dealing with all the appeals in this common judgment is furnished by the facts that practically speaking only questions of law arise for determination in all the appeals and that those questions of law are identical. Further, the facts of all the ten cases were also of the same nature and the parties' counsel were agreed that all the ten appeals may be disposed of by a common judgment.

2. The facts of the suit culminating in appeal No. 3477 of 1965, I believe, would furnish a good sample of the facts of the rest of the suits. I have therefore, decided to set out only the facts of that case. The special facts of other suits requiring distinct treatment shall be dealt with at the appropriate stage in this judgment.

3. The B. N. U. with head office in Lisbon had branches in all the Portuguese colonies excepting Angola. We are concerned with its branches at Vasco da Gama, Margo and Panjim, all in Goa. On or about 20th of December 1961, the date on which the territories of Goa, Daman and Diu were liberated and integrated with India, the authorities of B. N. U. removed all the valuable assets which its various branches in Goa were possessed of. To meet the resultant situation the then Military Governor of the territories assumed control over the said branches and appointed Shri B. R. Gadre, an officer of the State Bank of India, as the Custodian for the purpose of taking over and administering the affairs of those branches. Subsequently, the President of India promulgated the Goa, Daman and Diu (Banks Reconstruction) Regulation No. II of 1962, hereinafter called the Regulation, to provide for the reconstruction of the branches of the B. N. U. in Goa, Daman and Diu and of Caixa Economica de Goa in the interest of general public. In terms of Section 4(1) of the Regulation another Custodian was appointed to achieve the objectives of the Regulation. It is he who filed the suit out of which appeal No. 3477 of 1965 has arisen. It was pleaded that the Vasco da Gama branch of the B. N. U. had opened in favour of the defendant Georgina Filomena de Figueiredo on 27-1-1960 a current account for a period of six months, renewable, up to the limit of 900,000\$ 00 Esc. This loan account, it was alleged further, was guaranteed by a bill of exchange, of the

same date, drawn by the debtor's mother Amalia Rodrigues Gomes e Figueiredo. The place meant for date of maturity was left blank in the bill of exchange but that bill was accepted by the debtor Georgina, and Shri Jose Filomeno de Figueiredo signed that bill in his capacity as surety. On 18-12-1961 the debit balance in the account was 887400\$70 escudos. The loan account, it was pleaded in para 7 of the plaint, was closed on 20th of December, 1961 and so the debit balance became demandable. The bill of exchange, it was alleged, was not in the possession of the Custodian and that probably it had been removed to Portugal.

4. The surety Jose Antonio having died, his mother Amalia Rodrigues was declared to be his universal heirress by a deed dated 1-7-1960 prepared in the office of the notary public at Margao. As at present, it was alleged, Georgina, the original debtor, and her mother Amalia Rodrigues are jointly and severally liable to pay the entire debt now amounting to Rs. 147900.11 with interest thereon at the rate of 4 per cent per annum, besides quarterly commission of 1/4th per cent and expenses.

5. The defendants admitted in their joint written statement that an overdraft account as alleged in the plaint had been opened by Georgina, that Amalia had guaranteed the loan by executing a bill of exchange, that Amalia's son had signed that bill in his capacity as surety, and that the balance due in the account was of the order pleaded by the plaintiff. The right of the Custodian to file suit for recovery of the debit balance was, however, denied and seriously challenged. It was alleged, in the first instance, that the Regulation "is a historic document without any juridical value and, as such, is unenforceable so far as the branches of Banco Nacional Ultramarino in the State of Portuguese India are concerned." It was next stated that the branches of B. N. U. had no legal personality of their own and despite the autonomy they may have enjoyed in their day to day work they did not have any rights or liabilities of their own. Those branches, it was added, had been set up by B. N. U. as organs for local administration and to exercise such powers as the B. N. U. may grant them. The rights and obligations of those branches are in fact rights and obligations of the parent body, viz., B. N. U. It was vehemently denied that the branches of B. N. U. could be reconstructed by means of the Regulation or administered by a Custodian. Since the branches did not have assets or liabilities of their own, the Custodian could not have sued for the recovery of the amount in dispute because the amount was really due to the B. N. U. It was emphasised that it is within the knowledge of plaintiff that B. N. U. had closed all its branches

in the territories of Goa, Daman and Diu on the eve of liberation and had transferred all their assets, including the relevant documents, to Lisbon with the object of continuing the functions of the branches from that station. It was pointed out that B. N. U. had warned all its debtors in general and the defendant Georgina in particular by a letter dated 29th of January 1962 that the present plaintiff is not its representative and that payments made to him concerning an amount due to B. N. U. would not discharge the obligation. Assuming, without conceding, that the plaintiff was a lawful representative of B. N. U., the defendants alleged further, it was essential for the maintainability of the suit that the document on which the suit is based should be produced in Court, and since the plaintiff concedes that he is not in a position to produce that document the suit has to be dismissed. Likewise, the defendants alleged further, it was obligatory on the plaintiff to produce the bill of exchange which is clearly a negotiable instrument and transferable by endorsement before he could claim any relief on the footing thereof. In para 19 of the written statement it was alleged that a bill of exchange which does not contain an entry about the time of payment is deemed payable at sight and that the bill of exchange executed by Amalia does fall in that category. On the basis of these submissions it was prayed that the suit should be dismissed with costs.

6. In his replication the Custodian pleaded that B. N. U. was a currency issuing bank and also happened to discharge the functions of Government Treasury. With the liberation of Goa on 20th of December 1961, it was alleged, the branches of B. N. U. were closed with the consequence that thousands of persons who had deposited money in those branches and another several thousands of holders of Portuguese currency notes in Goa, Daman and Diu were left to meet their own fate. It was to alleviate the sufferings of such citizens that the Central Government of India, in its capacity as sovereign power respecting Goa, exchanged the Portuguese currency notes of a value exceeding rupees nine crores for the Indian currency. However, the persons who had deposited money and other valuables with the branches of B. N. U. could not be paid and it was to relieve their distress that the President promulgated the Regulation under Art. 240 of the Indian Constitution. It was mentioned in Section 3 of the Regulation, the plaintiff pointed out, that in view of the closure of the branches of B. N. U., the transfer of a substantial portion of their assets out of India on or about the 20th of December 1961, and the consequential difficulties experienced by the

depositors that the said branches shall, as from that day, be re-constructed in the interest of the general public in accordance with the provisions contained in the body of the Regulation. In terms of Section 5 of Regulation, it was mentioned, all the assets, rights, powers, as well as obligations and the liabilities, of the branches stood transferred to and vested in the Custodian with effect from 20th of December 1961. The Custodian was given authority to enforce the contracts made in favour of the branches.

Another fact emphasised in the replication was that according to established banking practices all the deposits received by a particular branch of the bank are repaid by the same branch and none other and that the loan received from a particular branch has to be repaid to the same branch. This latter practice was emphasised obviously to meet the defendants' allegation that rights and liabilities were actually those of B. N. U. and not of its branches and as such the Custodian in his capacity as the administrator of the branches could not have sued for recovery of the amount raised from the Goan branches of the B. N. U. In refuting the allegation of the defendants that the Regulation is ridiculous or opposed to all principles of law, it was pleaded that the Regulation actually represents a normal juridical act done in exercise of sovereign authority of an independent State.

In para 34 of the replication it was pleaded that the amount due from Georgina in the current account opened by her at Vasco da Gama could be recovered in terms of Section 51 of the Portuguese Civil Procedure Code, hereinafter referred to as the Code, without the production of bill of exchange, which, it was contended, was only in the nature of security or guarantee for the re-payment of the debit balance in that account. Repelling the defendants' objection founded on non-production of bill of exchange it was alleged that the date of maturity having not been entered in the bill it was payable at sight and as such it should have been presented for payment within one year, and that having not been done it was no longer open to the holder of the bill, obviously, the B. N. U., to take any legal action on the basis thereof. In the last para of the replication reference was made to Section 7 of the Code which provides that the branches can sue or be sued when the suit arises out of a transaction done by them. If the branches of B. N. U. could institute a suit, claimed the plaintiff, respecting an agreement made by it with a customer, the Custodian appointed under the Regulation can likewise institute such a suit because of the various provisions of the Regulation including Section 7(2) thereof.

7. In their rejoinder the defendants pleaded that however absolute may be the powers of the President of the Republic of India he could not have by recourse to the Regulation resuscitated or re-constructed the branches of B. N. U., after they had been admittedly closed on 20th of December 1961 unless he had been given power to that effect by the head office of B. N. U. In that context, it was asserted, the claim of the plaintiff to recover the amount in dispute is simply unintelligible. By exchanging Portuguese currency notes for the Indian currency and making payments to the various depositors of B. N. U. it was pleaded, the Central Government of India had simply discharged its obligations as the occupying power. That action on the part of the Central Government, it was insinuated, could not have given authority to that Government to recover moneys from the debtors of B. N. U. unless authority to that effect had been conceded to it by the head office of B. N. U. The banking practice to re-pay the debt to the branch from which it had been raised was conceded and it was added that, that practice could be availed of by the plaintiff only if the branches of B. N. U. in Goa continued to exist. Since those branches by common agreement had ceased to exist with effect from 20th of December 1961, there was no obligation on either of the defendants to make payment to the Custodian who had no authority to receive the money on behalf of B. N. U. It was alleged further that there is no legal provision justifying the claim for repayment of loan guaranteed by a bill of exchange or promissory note without presenting or returning the same. It was alleged further that the Custodian being not a representative of B. N. U. any payment made to him will not discharge the liability of the defendants either on the basis of the original agreement or the bill of exchange which guaranteed the re-payment of the loan advanced under that agreement.

8. All the suits dealt with by Shri Coelho were decreed fully against the original debtor as well as the guarantor and surety. The decree in each case was based on the findings that the branches of B. N. U. could have sued or be sued respecting the transactions done through them in terms of Section 7 of the Code, that the transaction culminating in the suit instituted by the Custodian is one which had been done through the branch at Vasco da Gama, that the Custodian now validly represents that branch of B. N. U., and that when the Regulation speaks of the rights and obligations of the branches of B. N. U. in the territory of Goa, they must be understood to be the rights acquired and the obligations undertaken by the B. N. U. through its branches

in that territory. It was also held by Shri Coelho that the branches having been admittedly closed with effect from 20th of December 1961 the debit amount in the account of the defendants had become demandable and so the suit for its recovery could be instituted. It was held further that the expropriation of the rights of B. N. U. respecting its assets mentioned in the Regulation is fully justified by the principles of private international law and that there was no necessity in law of paying any compensation to B. N. U. in that respect because the value of its assets is far less than its liabilities in the territory of Goa. The court held, further that the Custodian is the legitimate successor to the expropriated assets of B. N. U. or its branches in the territory of Goa and as such any payment made to him (the plaintiff) respecting those assets would amount to complete discharge of the obligation. Finally, it was held that the plaintiff was under no legal obligation to return the bill of exchange as the price for claiming the decree because it was commonly agreed that, that bill was in the possession of B. N. U. at Lisbon and the plaintiff was not responsible for such a state of affairs. In this respect reliance was placed on Section 705 of the Portuguese Civil Code. Moreover, it was pointed out, the suit was not founded on the bill of exchange but only on the balance of overdraft account which had been secured by that bill and as such the plaintiff was under no legal compulsion to produce the bill before the suit could be decreed.

9. Shri Silva dismissed both the suits in their entirety on the following grounds:

(1) The branch of B. N. U. of which the plaintiff describes himself as a legal representative is not the real beneficiary of the amount in suit, that amount being the ownership of the B. N. U., and not that of the branch. The branch has neither autonomy nor juridical personality of its own;

(2) The plaintiff has no authority of B. N. U. to recover the amount;

(3) Since admittedly the promissory note is in possession of the head office (at Lisbon) of B. N. U. it is necessary that B. N. U. should be summoned to satisfy it about the plaintiff's claim to the amount mentioned in the promissory note. However since the plaintiff is not out to summon the B. N. U., the suit is not maintainable;

(4) The contract on the basis of which the suit is founded has not been legally terminated and as such the amount due is not demandable; and

(5) The promissory note does not represent merely the guarantee of the loan advanced as contended by the plaintiff but the title to the agreement of loan itself and so unless the promissory note is pro-

duced the obligation arising out of it cannot be discharged.

It may be mentioned that Shri Silva gave a definite finding that the plaintiff was a legitimate party to the suit because of the various provisions of the Regulation.

10. Shri Ataide Lobo adopted the middle course. He found no justification for decreeing the suit against the guarantor, as had been done by Shri Coelho, nor to dismiss the suit against the principal debtor as done by Shri Silva. He, therefore, decreed the suit against the principal debtor and dismissed it against the guarantor. His findings may be summarised as under:—

(1) Since the loan had been advanced by the Panjim branch of B. N. U. the sum involved belonged to that branch;

(2) The plaintiff who is a legitimate party to the suit is entitled to recover the money in terms of Section 5 of the Regulation;

(3) The bill of exchange does not represent the basic agreement respecting the loan but it is a guarantee for repayment of that loan;

(4) Hence simply for the reason that the plaintiff is unable to produce the bill of exchange the suit against the principal debtor based on the original agreement of loan cannot be thrown out;

(5) However, as the plaintiff cannot produce the bill of exchange, he cannot avail of the guarantee furnished by that document, and so the suit against the guarantor merits dismissal; and

(6) The loan account stood closed with effect from 20th of December 1961 and as such the amount due from the principal debtor is demandable.

11. Eight out of the ten appeals being dealt with in this judgment were filed by the defendants who are represented in this Court by S/Shri M. B. D'Costa, Pinto de Menezes and B. Reis. This set of counsel, broadly speaking, raised only two points. Firstly, it was contended that, what vests in the Custodian under Section 5(1) of the Regulation are the rights of the branches of B. N. U. and that since the debts due by the various defendants were the ownership not of those branches but of B. N. U., the plaintiff cannot sue for recovery of those debts. The second point canvassed was that unless the bills of exchange and the promissory notes are produced in court no claim on the footing thereof can be made by the Custodian. Since the first question is more basic and goes to the root of each of the ten suits I have decided to discuss that in the first instance.

12. A few words about the historical necessity of the Regulation may first be stated. The preamble of the Regulation recites that it is a Regulation to provide

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Gujarat High Court

AIR 1970 GUJARAT 1 (V 57 C 1)

FULL BENCH

P. N. BHAGWATI, C. J., N. K. VAKIL
AND D. A. DESAI, JJ.

Testeels Ltd., Petitioner v. N. M. Desai
Conciliation Officer and another, Respondents.

Special Civil Appln. No. 433 of 1964,
D/- 5-4-1968.

(A) Constitution of India, Arts. 32 and 226 — Every Administrative Officer exercising quasi-judicial functions to make speaking orders notwithstanding that he is not a tribunal within the meaning of Arts. 136 and 227 — AIR 1966 Guj 175 and Spl. Civil Appln. No. 638 of 1965, D/- 7-9-1965 (Guj) held overruled by AIR 1967 SC 1606—(Industrial Disputes Act (1947), S. 33(2)(b) — Order disposing of an application under, to be a speaking order).

Both on principle and on authority, every administrative officer exercising quasi-judicial functions is bound to give reasons in support of the order he makes. A conciliation Officer exercises quasi-judicial function while hearing and disposing of an application by the employer under the proviso to S. 33(2)(b) of the Industrial Disputes Act by which he seeks the approval of the Conciliation Officer for discharging its employee during the pendency of an Industrial Dispute before the said Authority. Hence, he is bound to make an order either giving his approval or refusing it stating reasons in support thereof. Where the order said nothing more than that the Officer did not approve of the action of the employer, held, that the order was liable to be quashed. (Paras 2, 9 & 14)

Examining the question on principle, there are two reasons why every quasi-judicial order must be a speaking order.

The necessity of giving reasons flows as a necessary corollary from the rule of law which constitutes one of the basic principles of the Indian Constitutional set-up. The administrative authorities having a duty to act judicially cannot therefore decide on considerations of policy or expediency. They must decide the matter solely on the facts of the particular case, solely on the material before them and apart from any extraneous considerations by applying pre-existing legal norms to factual situations. Now the necessity of giving reasons is an important safeguard to ensure observance of the duty to act judicially. It introduces clarity, checks the introduction of extraneous or irrelevant considerations and excludes or, at any rate, minimises arbitrariness in the decision-making process. (Para 3)

Another reason which compels making of such an order is based on the power of judicial review which is possessed by the High Court under Art. 226 and the Supreme Court under Art. 32 of the Constitution. These Courts have the power under the said provisions to quash by certiorari a quasi-judicial order made by an Administrative Officer and this power of review can be effectively exercised only if the order is a speaking order. In the absence of any reasons in support of the order, the said courts cannot examine the correctness of the order under review. The High Court and the Supreme Court would be powerless to interfere so as to keep the administrative officer within the limits of the law. The result would be that the power of judicial review would be stultified and no redress being available to the citizen, there would be insidious encouragement to arbitrariness and caprice. If this requirement is insisted upon, then, they will be subject to judicial scrutiny and correction. (Para 4)

But quite apart from principle, there is authority for the proposition that every quasi-judicial decision must be supported by reasons. (Para 8)

Such an order even though interlocutory should show reasons on the face of it. (Para 11)

An argument that an administrative body which is not a tribunal within the meaning of Arts. 136 and 227 of the Constitution cannot be required to give reasons in support of the orders made by it in exercise of quasi-judicial functions was overruled. Just as there is a right of appeal against the decision of a tribunal under Art 136, there is a right of judicial review against the decision of a quasi-judicial review under Arts. 226 and 32 and the reasons which impel the necessity of giving reasons because there is a right of appeal under Art 136 must equally apply in spelling out the necessity of giving reasons when there is a right of judicial review under Arts. 226 and 32. If the right of appeal under Art. 136 would be stultified by absence of reasons equally would the right of judicial review under Arts 32 and 226 be stultified if no reasons are given. AIR 1958 SC 578 & AIR 1965 SC 1222 & AIR 1967 SC 1606 & AIR 1963 SC 677 & AIR 1967 SC 1427 & AIR 1966 SC 671 Foll. AIR 1966 Guj 175 & Spl. Civil Appn. No. 638 of 1965, D/- 7-9-1965 (Guj.) held overruled by AIR 1967 SC 1606. (Para 10)

(B) Constitution of India, Arts. 226 and 32 — Quasi-judicial order — Elements of.

A quasi-judicial decision involves the following three elements: (1) It is in substance a determination upon investigation of a question by the application of objective standards to facts found in the light of pre-existing legal rules; (2) It declares rights or imposes upon parties obligations affecting their civil rights; and (3) the investigation is subject to certain procedural attributes contemplating an opportunity of presenting its case to a party, ascertainment of facts by means of material if a dispute be on question of facts and if the dispute be on question of law, on the presentation of legal argument, and a decision resulting in the disposal of the matter on findings based upon those questions of law and fact. AIR 1963 SC 677 Followed. (Para 3)

(C) Industrial Disputes Act (1947), Ss. 33 (2)(b) Proviso and II — Application under Proviso to S. 33(2)(b) is not an interlocutory one — It is an independent proceeding.

An order made on an application by an employer for approval of his action discharging an employee which application is required to be taken out by reason of the proviso to S. 33(2)(b) of the Industrial Disputes Act because Conciliation proceedings were pending before that Officer, held, was not an interlocutory order.

It is totally distinct and separate proceeding which becomes necessary by reason of the ban imposed by the Legislature on the employer from discharging an employee during the pendency of the conciliation proceeding. The enquiry on such application is limited to the question of finding out if the employer had made out a prima facie case against the employee sought to be discharged. He would not be concerned to inquire as to what would be the effect of his order upon industrial peace between the employer and the employees, nor would he be guided in making the order by the merits of the industrial dispute pending conciliation before him. AIR 1960 SC 160 at p. 161, Followed.

(Paras 11 and 12)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 1427 (V 54) =	
(1967) 2 SCR 703, S. G. Jalsinghani v Union of India	3
(1967) AIR 1967 SC 1606 (V 54) =	
(1967) 3 SCR 302, Bhagat Raja v Union of India	2, 10
(1966) AIR 1966 SC 380 (V 53) =	
(1965) 3 SCR 411, Tata Iron and Steel Co. Ltd. v. S. N. Modak	12
(1966) AIR 1966 SC 671 (V 53) =	
(1966) 1 SCR 466, Madhya Pradesh Industries Ltd. v. Union of India	3
(1966) AIR 1966 Guj 175 (V 53) =	
(1965) 6 Guj LR 554, Pirbhai v. B. R. Manepatil	2
(1965) AIR 1965 SC 1222 (V 52) =	
(1965) 1 SCR 678, Govindrao v. State of Madhya Pradesh	1
(1965) Spl. Civil Appn. No. 638 of 1965, D/- 7-9-1965 (Guj), Trimbaklal Mohanlal v. M. K. Thakore	2
(1963) AIR 1963 SC 677 (V 50) =	
(1963) Supp 1 SCR 242, Jaswant Sugar Mills Ltd., Meerut v. Lakshmi Chand	2, 3, 12
Q96A, AIR, 1963, SC 1606 (V 54) =	
1962-2 SCR 339, Hari Nagar Sugar Mills Ltd. v. Shyam Sundar Jhun-jhunwala	9
(1960) AIR 1960 SC 160 (V 47) =	
(1960) 1 SCR 806, Punjab National Bank Ltd. v. All India Punjab National Bank Employee's Federation	17
(1958) AIR 1958 SC 578 (V 45) =	
1959 SCR 12, Express Newspaper (Private) Ltd. v. Union of India	3
(1952) 1952-1 KB 338 = 1952-1 All ER 122, Rex v. Northumberland Compensation Appeal Tribunal	7
(1947) 1947 KB 702 = 1947-1 All ER 851, Robinson v Minister of Town and Country Planning	7

K. S. Nanavati for I. M. Nanavati, for Petitioner; G. M. Vidyarthi, Asst. Govt. Pleader with K. L. Talsania, Addl. Govt. Pleader, (for No. 1) and N. J. Mehta, for C. T. Daru (for No. 2), for Respondents.

BHAGWATI C. J.:— This Reference raises a very important question in the field of administrative law. The question is whether an administrative officer discharging quasi-judicial functions is bound to give reasons in support of the order he makes. Is it required of him that he should make a speaking order? The question arises in reference to an order made by the conciliation officer under Section 33(2)(b) of the Industrial Disputes Act, 1947. A conciliation proceeding was pending before the conciliation officer in regard to an industrial dispute between the petitioner and its workmen. During the pendency of the conciliation proceeding, the petitioner discharged the second respondent who was one of the workmen employed in the factory of the petitioner after following the procedure prescribed by the Standing Orders. The discharge was for misconduct not connected with the industrial dispute pending before the conciliation officer and it was, therefore, necessary for the petitioner under the proviso to section 33(2)(b) to make an application to the conciliation officer for approval of the action taken by it. The petitioner accordingly made an application to the conciliation officer for approval of the order of discharge passed by the petitioner. The second respondent to whom notice of the application was issued contested the application on grounds which it is not necessary to mention for the purpose of the present decision. The conciliation officer by an order contained in a letter dated 6th March 1964 intimated to the petitioner that its action regarding discharge of the second respondent was not approved. Beyond stating that the action of discharge of the second respondent was not approved, the order did not give any reasons why the conciliation officer had decided not to approve petitioner's action of discharging the second respondent. The petitioner was aggrieved by the order made by the conciliation officer and it accordingly filed the present petition challenging the validity of the said order.

2. The petition originally came up for hearing before a Division Bench of this Court consisting of Bakshi and Thakor JJ. At the hearing before the Division Bench, five contentions were raised on behalf of the petitioner challenging the validity of the impugned order. Of them the first four contentions are material for the purpose of the present reference. The first contention was that the conciliation officer acting under Section 33(2)(b) exercises quasi-judicial functions, the second contention was that the conciliation officer while so acting is a tribunal within the meaning of Arts. 136 & 227 of the Constitution; the third contention was that even if the conciliation officer is not

a tribunal, he is still amenable to the jurisdiction of the High Court under Article 226 and the fourth contention was that since the conciliation officer is exercising quasi-judicial functions and is amenable to the jurisdiction of the High Court under Article 226, he is bound to make a speaking order or, in other words, he must give reasons in support of the order he makes. The Division Bench after hearing the advocates appearing on behalf of the parties came to the conclusion, relying on a decision of the Supreme Court in *Jaswant Sugar Mills Ltd., Meerut v. Lakshmi Chand*, AIR 1963 SC 677 that the conciliation officer acting under S. 33(2)(b) is under a duty to act judicially and his decision is, therefore, a quasi-judicial and not an administrative decision and he is accordingly amenable to the jurisdiction of the High Court under Art. 226 but he is not a tribunal within the meaning of Arts. 136 & 227. Disposing of thus the first three contentions, the Division Bench then proceeded to consider the fourth contention. Two decisions of two different Division Benches of this High Court were cited before the Division Bench on behalf of the respondents in support of the contention that a quasi-judicial authority is not bound to give reasons in support of its order and that the order is not vitiated by absence of reasons supporting it. One was a decision of a Division Bench consisting of J. M. Shelat C. J. as he then was, and myself in *Pirbhai v. B. R. Manepatil*, 1965-6 Guj LR 554 = (AIR 1966 Guj 175). The challenge in that case was against the determination of the Collector under Section 31 of the Bombay Stamp Act, 1958 and the decision of the Chief Controlling Revenue Authority under Section 53(2) of that Act. One of the grounds of challenge was that the determination of the Collector as also the decision of the Chief Controlling Revenue Authority were both quasi-judicial decisions and since neither of these two decisions was supported by any reasons, both these decisions were invalid. This ground of challenge was negatived by the Division Bench on the view that the functions discharged by the Collector and the Chief Controlling Revenue Authority were administrative and not quasi-judicial and therefore the premise on which the necessity for giving reasons was sought to be imported was lacking. But the Division Bench also proceeded to observe in a judgment given by me on behalf of the Division Bench:

"... neither principle nor authority requires that a quasi-judicial body giving its decision must give reasons in support of the decision. The only qualification to this rule is where an appeal is provided against the decision of the quasi-judicial body. In such a case the necessity of

giving reasons in support of the decision is imported because unless reasons are given, it would not be possible for the appellate authority to examine the correctness of the decision. But apart from such case, there is no obligation on a quasi-judicial body to give reasons in support of the decision arrived at by it so long as the decision is reached after observing the principles of natural justice."

These observations were clearly obliterated by strong reliance was placed upon them on behalf of the respondents. The other decision was a decision of a Division Bench consisting of Miahboy and Shah JJ. in Special Civil Appln. No. 638 of 1965, D/- 7-9-1965 (Guj) where the same view was taken in regard to an order made by the Regional Transport Authority granting temporary permit to one applicant in preference to another. Now both these decisions were given at a time when the Supreme Court had not decided the case of Bhagat Raja v. Union of India, AIR 1967 SC 1606, and the petitioner therefore contended that in view of the subsequent decision of the Supreme Court in Bhagat Raja's case, (AIR 1967 SC 1606) these two decisions could not be regarded as good law and it must be held that the necessity of giving reasons is one of the essential requirements of quasi-judicial process and a quasi-judicial authority must, therefore, give reasons in support of the order it makes on pain of its invalidity. The Division Bench was of the view that the decision of the Supreme Court in Bhagat Raja's case, AIR 1967 SC 1606 was confined to a case of a tribunal amenable to the appellate jurisdiction of the Supreme Court under Article 136 and it did not lay down any broad proposition that every quasi-judicial authority, whether a tribunal or not, must give reasons in support of its order and the aforesaid two decisions of this Court could not therefore be regarded as overruled either expressly or by necessary implication but there were certain observations in the Supreme Court decision which in the view of the Division Bench rendered it necessary to reconsider the ratio of these two decisions and the Division Bench, therefore, referred the following question to a larger Bench:

"Whether a conciliation officer, who is exercising quasi-judicial functions and is as such amenable to the jurisdiction of the High Court under Article 226, is bound to make a speaking order or, in other words, he must give reasons in the order."

We are of the view, both on principle and on authority, that every administrative officer exercising quasi-judicial func-

tions is bound to give reasons in support of the order he makes and since the conciliation officer was exercising quasi-judicial functions, he was bound to make a speaking order or, in other words, to give reasons in support of the impugned order. We will first examine the question on principle.

3. There are two strong and cogent reasons why we must insist that every quasi-judicial order must disclose reasons in support of it. The necessity of giving reasons flows as a necessary corollary from the rule of law which constitutes one of the basic principles of our constitutional set-up. Our Constitution posits a welfare State in which every citizen must have justice — social, economic and political and in order to achieve the ideal of welfare State, the State has to perform several functions involving acts of interferences with the free and unrestricted exercise of private rights. The State is called upon to regulate and control the social and economic life of the citizen in order to establish socio-economic justice and remove the existing imbalance in the socio-economic structure. The State has, therefore, necessarily to entrust diverse functions to administrative authorities which involve making of orders and decisions and performance of acts affecting the rights of individual members of the public. In exercise of some of these functions, the administrative authorities are required to act judicially. Now what is involved in a judicial process is well settled and as pointed out by Shah J. in Jaswant Sugar Mills's case, AIR 1963 SC 677 (supra), a quasi-judicial decision involves the following three elements:

(1) It is in substance a determination upon investigation of a question by the application of objective standards to facts found in the light of pre-existing legal rules;

(2) it declares rights or imposes upon parties obligations affecting their civil rights; and

(3) the investigation is subject to certain procedural attributes contemplating an opportunity of presenting its case to a party, ascertainment of facts by means of material if a dispute be on question of fact, and if the dispute be on question of law, on the presentation, of legal argument, and a decision resulting in the disposal of the matter on findings based upon those questions of law and fact.

The administrative authorities having a duty to act judicially cannot therefore decide on considerations of policy or expediency. They must decide the matter "solely on the facts of the particular case, solely on the material before them and apart from any extraneous considerations" by applying "pre-existing legal

norms to factual situations". The duty to act judicially excludes arbitrary exercise of power and it is, therefore, essential to the rule of law that the duty to act judicially is strictly observed by the administrative authorities upon whom it is laid. If any departure from the observance of the duty to act judicially could pass unnoticed, it would open the door to arbitrariness and make a serious inroad on the rule of law. To quote the words of the Supreme Court in *S. G. Jaisinghani v. Union of India*, AIR 1967 SC 1427: "... the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law." Now the necessity of giving reasons is one of the most important safeguards to ensure observance of the duty to act judicially. If the administrative officers can make orders without giving reasons, such power in the hands of unscrupulous or dishonest officers may turn out to be a potent weapon for abuse of power. But if reasons are required to be given for an order, it will be an effective restraint on such abuse as the order, if it discloses extraneous or irrelevant considerations or is arbitrary, will be subject to judicial scrutiny and correction. As observed by Subba Rao J., as he then was, in *Madhya Pradesh Industries Ltd. v. Union of India*, AIR 1966 SC 671, "A speaking order will at its best be a reasonable and at its worst at least a plausible one". The condition to give reasons introduces clarity, checks the introduction of extraneous or irrelevant considerations and excludes or, at any rate, minimises arbitrariness in the decision making process: it gives satisfaction to the party against whom the order is made and guarantees consideration of all relevant factors and discharge of his functions by the officer in accordance with the requirement of law. We may in this connection usefully quote the following passage from "American Administrative Law" by Bernard Schwartz at page 163:

"The value of reasoned decisions as a check upon the arbitrary use of administrative power seems clear

The right to know the reasons for a decision which adversely affects one's person or property is a basic right of

every litigant (and that whether the forum be judicial or administrative). But the requirement that reasons be given does more than merely vindicate the right of the individual to know why a decision injurious to him has been rendered. For the obligation to give a reasoned decision is a substantial check upon the misuse of power. The giving of reasons serves both to convince those subject to decisions that they are not arbitrary and to ensure that they are not, in fact, arbitrary. The need publicly to articulate the reasoning process upon which a decision is based, more than anything else, requires the Magistrate (judicial or administrative) to work out in his own mind all the factors which are present in a case. A decision supported by specific findings and reasons is much less likely to rest on caprice or careless consideration. As Judge Jerome Frank well put it in language as applicable to decision-making by administrators as by trial judges, the requirement of reasons has the primary purpose of evoking care on the part of the decider"

If the administrative officers having a duty to act judicially are required to set forth in writing the mental processes of reasoning which have led them to the decision, it would to a large extent help to ensure performance of the duty to act judicially and exclude arbitrariness and caprice in the discharge of their functions. The public should not be deprived of this only safeguard.

4. Another reason of equal cogency which weighs with us in spelling out the necessity for giving reasons is based on the power of judicial review which is possessed by the High Court under Article 226 and the Supreme Court under Article 32. The High Court under Article 226 and the Supreme Court under Article 32 have the power to quash by certiorari a quasi-judicial order made by an administrative officer and this power of review exercisable by issue of certiorari can be effectively exercised only if the order is a speaking order and reasons are given in support of it. If no reasons are given, it would not be possible for the High Court or the Supreme Court exercising its power of judicial review to examine whether the administrative officer has made any error of law in making the order. It would be the easiest thing for an administrative officer to avoid judicial scrutiny and correction by omitting to give reasons in support of his order. The High Court and the Supreme Court would be powerless to interfere so as to keep the administrative officer within the limits of the law. The result would be that the power of judicial review would be stultified and no redress being available to the citizen,

there would be insidious encouragement to arbitrariness and caprice. The power of judicial review is a necessary concomitant of the rule of law and if judicial review is to be made an effective instrument for maintenance of the rule of law, it is necessary that administrative officers discharging quasi-judicial functions must be required to give reasons in support of their orders so that they can be subject to judicial scrutiny and correction.

5. This has always been regarded as a most important reason in the United States for insisting that quasi-judicial decisions must show reasons on their face. To quote from Schwartz's "American Administrative Law" at page 166:

"In the United States, perhaps the most prominent reason advanced for the requirement of reasoned decisions is the role of such decisions in facilitating review by the courts. If the bases of administrative decisions are not articulated, it is most difficult for a reviewing court to determine whether the decision is a proper one. 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong', reads an oft-cited statement of Gardozo J. for judicial control to be of practical value, the administrative tribunal or agency, 'in making its order, should not make it an unspeaking or unintelligible order, but should in some way, state upon the face of the order the elements which had led to the decision'. The words quoted are from a noted judgment of Lord Cairns, L. C. in which he laid down the distinction between 'speaking' and 'unspeaking' orders, which has become of basic importance in present-day English administrative law. When Lord Cairns speaks of an 'unspeaking or unintelligible order', he obviously means an order which gives no reasons. If the administrator does not give reasons, he, in effect, disarms the exercise of the High Court's supervisory jurisdiction. In such a case, the Court cannot examine further than the face of the challenged decision, which, in Lord Sumner's famous phrase, 'speaks' only with 'inscrutable face of a sphinx'."

It is therefore necessary for giving full meaning and content to the power of judicial review conferred on the High Court and the Supreme Court by the Constitution that every administrative officer exercising quasi-judicial functions must make a speaking order, that is, give reasons in support of the order. If the order speaks only with the "inscrutable face of a sphinx" it would be impossible for the High Court and the Supreme Court to effectively exercise their power of judicial review by means of certiorari.

6. This view is not only supportable on principle but it is also in consonance

with the trend of juristic thought in the United States where there is considerable development in the field of administrative law in recent times. In the United States, as will be evident from the two passages from Schwartz's "American Administrative Law" quoted above, the American Courts have always insisted that administrative decisions should be speaking ones, that is, they must contain at least the findings upon which they are based and the reasons which have prevailed with them in introducing this requirement are the same two reasons which have found favour with us. It is also interesting to find that the administrative law in France has moved in the same directions. For a long time Conseil d'Etat consistently refused to require that the administration should give reasons for its decisions in the absence of a statutory provision imposing that requirement. But in a decision rendered by it in 1950 Conseil d'Etat opened, in the words of one commentator, "a first breach in the established jurisprudence under which, in the absence of a legal text requiring it the decisions of the administrative authorities need not be reasoned ones" and annulled an administrative decision in which no reasons were given. The *Commissaire du gouvernement* there advocated a bold departure from the prior case law and stated that the Conseil should require reasoned decision in every case in which the administrator was exercising quasi-judicial functions, even though the Legislature did not expressly impose such requirement. Otherwise, he asked, how could the Conseil really determine the validity of a challenged decision? In its decision adopting the approach of the *Commissaire*, the Conseil d'Etat stated that the obligation to give reasons was imposed "in order to enable the reviewing court to determine whether the directions and prohibitions contained in the law have been followed." This is the same reason which has motivated the American Courts in requiring that administrative decisions must contain findings that show their basis and it is the same reason which has appealed to us for taking the view that in India too, as in the United States and France, administrative officers exercising quasi-judicial functions must make speaking orders.

7. The position in England is of course different and therefore strongest reliance was placed upon it on behalf of the State. In England, though in the Liquor Licence Cases decided in the latter half of the nineteenth century the view was taken that the Licensing Justices who were empowered to refuse liquor licences on four specified grounds must specify the grounds for refusal in the order made by them and if they failed to do so, an order of mandamus would issue to compel them

to hear and determine the applications according to law, it appears that, as a general rule, no duty to give reasons in support of a quasi-judicial order is recognised by the Courts. The decisions in the Liquor Licence Cases are regarded as somewhat anomalous and the considered view has always been that a quasi-judicial authority is not subject to any duty to give reasons for its decision. The decision in *Robinson v. Minister of Town and Country Planning*, (1947) KB 702 clearly seems to suggest that even if the Minister exercises quasi-judicial functions, there is no obligation on him to give reasons for his decision. This view is also implicit in the decision of the Court of Appeal in *Rex v. Northumberland Compensation Appeal Tribunal*, (1952) 1 K. B., 338. In that case, the Court held that a quasi-judicial decision of an administrative tribunal could be quashed by certiorari for error of law where it "spoke" its error on its face. But where the decision was not contained in such a "speaking order", the court would not intervene. There is implicit in this decision the recognition of the possibility that a quasi-judicial authority may not make a speaking order. This being the position, the Donoughmore Committee on Ministers' powers in its report made in 1932 formulated the principle that a party is entitled to know the reasons for the decision, be it judicial or quasi-judicial, and recommended acceptance of this principle as a principle of natural justice. Pursuant to this recommendation the British Parliament when it came to enact the Tribunals and Inquiries Act, 1958 introduced Section 12 in that Act which now expressly requires that in certain circumstances, the administrative tribunals specified in the First Schedule as also the Ministers holding a statutory inquiry must give reasons for the decision. Thus what the Courts failed to achieve by the process of judicial construction had to be set right by Parliamentary legislation. But what the Parliament did serves to emphasize the necessity of giving reasons in support of a quasi-judicial decision.

8. So much on principle. But quite apart from principle, there is in our view clear authority for the proposition that every quasi-judicial decision must be supported by reasons. The germ of this principle is to be found in the decision of the Supreme Court in *Express Newspaper (Private) Ltd. v. Union of India*, AIR 1958 SC 578. In that case the validity of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 was challenged inter alia on the ground that the impugned Act did not provide for the giving of reasons for its decision by the Wage Board and thus rendered the petitioners' right to approach the Supreme Court for the en-

forcement of their fundamental rights nugatory. Dealing with this contention, N. H. Bhagwati J. speaking on behalf of the Supreme Court said:

"It is no doubt true that if there was any provision to be found in the impugned Act which prevented the Wage Board from giving reasons for its decision, it might be construed to mean that the order which was thus made by the wage board could not be a speaking order and no writ of certiorari could ever be available to the petitioners in that behalf. It is also true that in that event this Court would be powerless to redress the grievances of the petitioners by issuing a writ in the nature of certiorari and the fundamental right which a citizen has of approaching this Court under Art. 32 of the Constitution would be rendered nugatory."

The Supreme Court, however, took the view that there was no provision in the main Act which prevented the Wage Board from giving reasons for its decision and the challenge was negated on that ground. But these observations undoubtedly support the second reason which we have given for taking the view that reasons must be given in support of every quasi-judicial decision.

9. There is also another decision of the Supreme Court on the point and that is the decision in *Govindrao v. State of Madhya Pradesh*, AIR 1965 SC 1222. The appellants in that case claiming to be the descendants of former Ruling Chiefs in some districts of Madhya Pradesh applied under the Central Provinces and Berar Revocation of Land Revenue Exemption Act, 1948, for grant of money or pension as suitable maintenance for themselves. They held estates in two districts on favourable terms as *Jahgirdars*, *Maufidars* and *Ubaridars* and enjoyed exemption from payment of land revenue amounting in the aggregate to Rs. 27,828-5-0 per year. On the passing of the Act the exemption was lost and they claimed to be entitled to grant of money or pension under the provisions of the Act. They applied to the Deputy Commissioner who forwarded their applications to the State Government. These were rejected without any reasons being given therefor. The appellants filed a petition in the High Court of Madhya Pradesh under Article 226 for a writ of certiorari to quash the order of the State Government. On the petition being dismissed, the appellants preferred an appeal to the Supreme Court. One of the grounds of challenge before the Supreme Court was that the order of the State Government was invalid since the appellants had not been heard by the State Government before making the order and the order was not supported by any rea-

sons. The Supreme Court upheld this ground of challenge observing:

"The next question is whether Government was justified in making the order of April 26, 1955? That order gives no reasons at all. The Act lays down upon the Government a duty which obviously must be performed in a judicial manner. The appellants do not seem to have been heard at all. The Act bars a suit and there is all the more reason that Government must deal with such cases in a quasi-judicial manner giving an opportunity to the claimants to state their case in the light of the report of the Deputy Commissioner. The appellants were also entitled to know the reason why their claim for the grant of money or a pension was rejected by Government and how they were considered as not falling within the class of persons who it was clearly intended by the Act to be compensated in this manner. Even in those cases where the order of the Government is based upon confidential material this Court has insisted that reason should appear when Government performs curial or quasi-judicial functions (See *M/s. Hari Nagar Sugar Mills Ltd. v. Shyam Sundar Jhunjhunwala*, (1962) 2 SCR 339—(AIR 1961 SC 1669). The High Court did not go into any other question at all because it rejected the petition at the threshold on its interpretation of S. 5(3). That interpretation has been found by us to be erroneous and the order of the High Court must be set aside. As the order of Government does not fulfil the elementary requirements of a quasi-judicial process we do not consider it necessary to order a remit to the High Court. The order of the State Government must be set aside

The Supreme Court held that the necessity to give reasons was an elementary requirement of quasi-judicial process and since the order of the Government did not fulfil this elementary requirement, it was liable to be set aside. This decision to our mind is a direct authority for the proposition that every quasi-judicial decision must be supported by reasons and no further authority is necessary in support of the proposition.

10. But if any further authority were needed, it is to be found in the recent decision of the Supreme Court in *Bhagat Raja's case* AIR 1967 SC 1606 (supra). The order impugned in that case was an order of the Central Government in exercise of its revisional power under Rule 55 of the Mineral Concession Rules, 1960 and the question directly arose whether the order was bad in that it did not give any reasons in support of it. The Supreme Court after an elaborate review of various decisions bearing on the point came to the conclusion that the Central Government was

bound to give reasons in support of the impugned order and since no reasons had been given, the impugned order was bad. This decision was sought to be distinguished on behalf of the State on the ground that the Central Government whose order was impugned in that case was a tribunal within the meaning of Art. 136 and therefore subject to the appellate jurisdiction of the Supreme Court under that Article and it was the existence of this right of appeal to the Supreme Court against the order of the Central Government which weighed with the Supreme Court in taking the view that the order of the Central Government required to be supported by reasons. The argument on behalf of the State was that the ratio of this decision was confined to a case of quasi-judicial authority which was a tribunal within the meaning of Article 136 and it had no application where an order made by a quasi-judicial authority other than a tribunal was in question. This argument is in our view not well founded. It ignores the true ratio of the Supreme Court decision. It is undoubtedly true that the Central Government was a tribunal within the meaning of Article 136 and the Supreme Court therefore emphasized the existence of a right of appeal against the decision of the Central Government under that Article but the reasoning on which the decision was based is applicable alike to a case of an administrative authority which is not a tribunal within the meaning of Article 136. Just as there is a right of appeal against the decision of a tribunal under Article 136, there is a right of judicial review against the decision of a quasi-judicial authority under Articles 226 and 32 and the reasons which impelled the Supreme Court to import the necessity of giving reasons because there is a right of appeal under Article 136 must equally apply in spelling out the necessity of giving reasons when there is a right of judicial review under Articles 226 and 32. If the right of appeal under Article 136 would be stultified by absence of reasons, equally would the right of judicial review under Articles 32 and 226 be stultified if no reasons are given. Moreover, we find that the first reason which we have given above for importing the necessity of giving reasons is also adverted to by the Supreme Court in paragraph 13 of the judgment and has been relied upon for the purpose of holding that the Central Government was bound to give reasons in support of its order and the validity of this reason does not depend upon whether the quasi-judicial authority is a tribunal or not. This decision also, therefore, supports the view we are inclined to take.

11. It may be noted that so far as this question is concerned, the only contest

was from the State and the second respondent did not dispute that an administrative officer discharging quasi-judicial functions must give reasons in support of the order made by him. But the contention of the second respondent was that this requirement was applicable only in case of a final order and not in case of an interlocutory order. If an interlocutory order was made by an administrative officer it was not required to be supported by reasons and the administrative officer could make it without giving reasons. The second respondent urged that the impugned order of the conciliation officer refusing to accord approval to the petitioner to discharge the second respondent was in the nature of an interlocutory order in the main conciliation proceeding which was pending before the conciliation officer and the conciliation officer was, therefore, not bound to give reasons in support of his order. We cannot accept this argument. We are not at all sure that an interlocutory order need not show reasons on its face but even if we assume with the second respondent that an interlocutory order stands on a different footing from a final order in this respect, we do not think that the impugned order was an interlocutory order. The impugned order was an order made on an application for approval of the action of discharge of the second respondent taken by the petitioner and this application had to be made under Section 33(2)(b) because conciliation proceedings were pending before the conciliation officer. Section 33(2)(b) places a ban on the employer from discharging any workman concerned in any industrial dispute during the pendency of conciliation proceeding before the conciliation officer unless on an application made by him, he obtains approval of the conciliation officer to the action of discharge taken by him. The object and purpose of placing this ban on the employer is clear. By imposing the ban, as observed by Gajendragadkar J., as he then was, in *Punjab National Bank Ltd. v. All India Punjab National Bank Employees' Federation*, AIR 1960 SC 160 at p. 161: "... S. 33 attempts to provide for the continuance and termination of the pending proceedings in a peaceful atmosphere undisturbed by any cause of friction between the employer and his employees. In substance it insists upon the maintenance of the status quo pending the disposal of the industrial dispute between the parties; nevertheless it recognizes that occasions may arise when the employer may be justified in discharging or punishing by dismissal his employees; and so it allows the employer to take such action subject to the condition that" he obtains the approval of the conciliation officer to the action taken by him. Now where an application is made

by the employer for the requisite approval under Sec. 33(2)(b) what the conciliation officer would have to consider is whether a prima facie case has been made out by the employer for discharge of the employee in question. If the employer has held a proper inquiry into the alleged misconduct of the employee and if it does not appear that the proposed discharge of the employee amounts to victimisation or unfair labour practice, the conciliation officer would have to limit his inquiry only to the question whether a prima facie case has been made out or not. If he comes to the conclusion that a prima facie case is made out, he would have to grant approval to the employer. He would not be concerned to inquire as to what would be the effect of his order upon industrial peace between the employer and the employees, nor would he be guided in making the order by the merits of the industrial dispute pending conciliation before him.

12. In the context of this background, it is difficult to see how an order granting or refusing approval under Section 33(2)(b) can be regarded as an order of interlocutory character. The application under Section 33(2)(b) is not for an interlocutory relief in a pending conciliation proceeding. It is a totally distinct and separate proceeding which becomes necessary by reason of the ban imposed by the Legislature on the employer from discharging an employee during the pendency of the conciliation proceeding. The cause of action for making the application has nothing to do with the industrial dispute in the pending conciliation proceeding. Nor does its determination depend upon the merits of such industrial dispute. The inquiry which is required to be held by the conciliation officer for the purpose of considering whether to grant or to refuse the application is a totally distinct and separate inquiry unconnected with the main conciliation proceeding. It is no doubt true that the application is required to be made because a conciliation proceeding is pending but that cannot impart the character of interlocutory proceeding to the application. The application is made for the purpose of lifting the legislative ban imposed in the interest of industrial peace and the conciliator has to apply his mind to the relevant considerations for the purpose of deciding whether to lift the ban or not. We are, therefore, of the view that the order made under Section 33 (2) (b) is not an order of interlocutory character. This view which we are taking is supported by the decision of the Supreme Court in *Tata Iron and Steel Co., Ltd. v. S. N. Modak*, AIR 1966 SC 380. Dealing with the question as to the nature of an application under Section

33(2), the Supreme Court pointed out in that case at page 383:

"As we have already indicated, the application of the appellant can, in a sense be treated as an incidental proceeding but it is a separate proceeding all the same, and in that sense, it will be governed by the provisions of S. 33(2) as an independent proceeding. It is not an interlocutory proceeding properly so called in its full sense and significance; it is a proceeding between the employer and his employee who was no doubt concerned with the main industrial dispute along with other employees; but it is nevertheless a proceeding between two parties in respect of a matter not covered by the said main dispute. It is, therefore, difficult to accept the argument that a proceeding which validly commences by way of an application made by the employer under S. 33(2)(b) should automatically come to an end because the main dispute has in the meanwhile been decided."

Some reliance was placed on behalf of the second respondent on the observations of the Supreme Court in *Jaswant Sugar Mills' case*, AIR 1963 SC 677 (supra) where it has been held that the conciliation officer is not a tribunal within the meaning of Article 136 nor can he be regarded as "other Authority" within the meaning of Section 4 of the Industrial Disputes (Appellate Tribunal) Act, 1950. But these observations cannot help us in determining whether the impugned order under Section 33(2)(b) is an interlocutory or a final order. We are of the view, for reasons set out above, that such an order is not in the nature of an interlocutory order but is a final order affecting the right of the employer to discharge the employee by refusing to accord approval to the action of discharge taken by the employer and is, therefore, in any view of the matter, required to be supported by reasons.

13. We may point out that an argument was sought to be advanced before us on behalf of the second respondent that even if the conciliation officer was bound to give reasons in support of the order, failure to give reasons did not invalidate the order so as to render it liable to be quashed and set aside but this Court could in the exercise of its jurisdiction under Article 226 compel the conciliation officer by a mandamus to give reasons in support of the order and then proceed to examine whether the order was required to be quashed by certiorari. But we did not allow this argument to be raised before us because sitting as a Full Bench, we are concerned only with the question referred to us by the Division Bench and we cannot allow any party to extend the scope and ambit of the controversy beyond that set out in the question referred to us.

14. Our answer to the question referred to us, therefore, is that the conciliation officer exercising quasi-judicial functions under Section 33(2)(b) is bound to make a speaking order or, in other words, reasons must be stated on the face of the order. There will be no order as to costs of this reference.

Reference answered in the affirmative.

AIR 1970 GUJARAT 10 (V 57 C 2) *

N G SHELAT, J.

Bai Diwali and others, Appellants v. Koli Bala Ranchhod, Respondent.

Second Appeal No 1323 of 1960, D/- 8-11-1967, against order of Dist. J., Baroda in Civil Appeal No. 122 of 1958.

Limitation Act (1908), Art. 144 — Adverse possession — Claim of co-sharer — Principles — Calculation of period — Property held to be joint in partition suit — Shares of co-sharers declared — Possession awarded to all of them except one — Such possession also held to be as co-owners along with that one co-sharer — Such co-sharer then filing suit for possession of his share — Period of adverse possession prior to partition suit — Such period cannot be tacked to period after that suit — (Co-sharers — Adverse possession). (1913) 45 Bom LR 104 & AIR 1956 SC 548 & AIR 1954 SC 575, *Foll*; AIR 1948 Bom 149, *Dist. (Paras 1 and 2) Cases Referred: Chronological Paras (1956) AIR 1956 SC 548 (V 43)=*

Mohammad Baqar v. Naim-un-Nisa Bibi

(1954) AIR 1954 SC 575 (V 41)=

(1955) 1 SCR 60, *Chhotekhan v. Malkhan*

(1948) AIR 1948 Bom 149 (V 35)=

49 Bom LR 767, *Gavaji Dagadabhai Fakirmahomed v. Sakhamam Gavali*

(1943) 45 Bom LR 104, *Nargisbai D.*

B. Acidwala v. Jehangir Homusji Modv

K. M. Parikh, for A. S. Pradhan, for Appellants; M. M. Patel, for Respondent.

JUDGMENT: [His Lordship after detailing the facts, observed:]

It is, thus, a common ground that in the suit land the plaintiff-respondent has 1/3 share and the suit land has been in actual possession of defendants Nos. 1 to 5. The normal rule of law in the case of joint property is that mere exclusive possession and enjoyment by one co-owner is not enough to constitute adverse possession against the other co-owner, unless there is a denial of title justifying a presumption of ouster of the latter as held in the case of *Nargisbai*

* (Only portions approved for reporting by High Court are reported here).

LL/CM/F693/68/JRM/D

D. B. Acidwala v. Jehangir Hormusji Mody, (1943) 45 Bom LR 104. In **Mohammad Baqar v. Naim-un-Nisa Bibi**, AIR 1956 SC 548, it has been observed that possession of one co-sharer is possession of all co-sharers and it cannot be adverse to them unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period of 12 years. Thus, it is well settled that the possession of one co-sharer is possession of all co-sharers in respect of the property unless it is shown that there was a denial of the right to the knowledge of the other side for a requisite period of 12 years under Art. 144 of the Indian Limitation Act. The contention of Mr. Parikh, the learned advocate for the appellant, was that defendants Nos. 1 to 5 have been holding this property adverse to the plaintiff since more than 12 years and that they should, therefore, be held to have acquired ownership by adverse possession against him. According to him, no such point was decided in Civil Suit No. 128 of 1950 between the parties and that it is, therefore, a question open to be gone into in the present suit. As already stated hereabove, Suit No. 128 of 1950 was a suit for partition. Every party in the suit, therefore, was interested in the property in dispute and the claims of all the parties in relation to the property were to be ascertained and decided by the Court. It may well be and in fact as done in the suit, since defendant No. 6 the plaintiff of the present suit, had not claimed possession by offering to pay the necessary court-fees in respect of his 1/3 share in the suit land, no further orders came to be passed in that suit and the decree for possession after partitioning the same came to be passed in favour of the plaintiffs only. That, however, does not make any difference for, after all, on a consideration of the entire evidence in the case the Court had come to the conclusion that the property was kept as joint property belonging to the three brothers and that it was held by defendants Nos. 1 to 5 as co-owners along with the plaintiffs and defendant No. 6 in the suit. It was on that basis that the learned Assistant Judge who heard the appeal against the decision in that suit came to the conclusion that the property was held jointly by all of them—each branch having 1/3 share in it. The possession was awarded to the plaintiffs only and it remained to be awarded to defendant No. 6 in that suit. I have already pointed out hereabove that the claim made by defendants Nos. 1 to 5 was of their exclusive ownership over the said property as also based on adverse possession against the persons claiming interest in that property. The Court

decided that it was a property held jointly by three branches, each branch having 1/3 share therein, and that the defendants Nos. 1 to 5 remained in possession as co-owners along with the other co-sharers in the suit property. When such is the decision and the rights of the parties are found on that basis in respect of the same suit property, the rights of the parties in respect thereof can be said to have been crystalized and made final. The property then can be said to have been held by defendants Nos. 1 to 5 as co-owners along with defendant No. 6—the plaintiff in the present suit. The partition is a right incident to the ownership of property and once the defendants are held as co-owners, their right to partition cannot be resisted as observed in the case of **Chhotekhan v. Malkhan**, (1955) 1 SCR 60 at p. 69—(AIR 1954 SC 575 at pp. 578, 579).

2. It is indeed true that such a right can be resisted on the ground of adverse possession provided there has been ouster in respect of the property for a requisite period of 12 years, but that can commence by an act of ouster to his knowledge after the date of that decision. The reason is simple. With that decision in the suit between the same parties, the rights over their property came to be declared by the Court, and therefore whatever right or interest any of those parties claimed or had in that property came to merge in the decision itself. There cannot be a separate right or interest independent of the decision in that suit in respect of the same parties and in relation to the same property. If, therefore, any claim of adverse possession was based on the ground of ouster of this plaintiff in relation to the property in question on the basis of any evidence prior to the date of that suit as claimed in this suit, it cannot be taken into account. That period of ouster prior to the decision, in my view cannot be tacked with any such period after the decision in the suit. Reliance was, however, placed by Mr. Parikh for the appellants on the case of **Dagadabai Fakir-mahomed v. Sakharan Gawaji**, AIR 1948 Bom 149. The facts of the case were that the plaintiff mortgaged certain lands and the mortgagee obtained a decree which provided that the mortgagee should have possession of the lands for two years and the possession should thereafter go to the plaintiff. The mortgagee attempted to execute the decree but could not get possession from the defendants who were in possession as heirs of the husband of the plaintiff. The possession was never in fact obtained by anybody. The plaintiff then brought a suit against the defendants claiming as an heir of her husband to eject the defendants. The

defendants set up adverse possession. The question was whether possession was interrupted by mortgage decree and it was held that the possession of the defendants must, on the facts, be deemed to have been adverse throughout and could not be said to have been interrupted by the mortgage decree. It was further held that it is purely a question of fact to be decided in the circumstances of each case. On an analogy of this case, it was urged that the present decree also cannot be said to have any interruption in the adverse enjoyment of the said property by defendants Nos. 1 to 5. The distinguishing feature of the case is that it was not a case of any co-owners or co-sharers where they can be said to have joint interest in the property. When a decree declares a particular party to be a co-owner or a co-sharer along with others with specified shares the others who are in possession thereof are deemed to be in possession thereof as co-owners and that way holding possession of the property on account of themselves and other co-owners and in no way adverse to other co-sharers. By that decree, they become joint owners of the property in suit and it would thus cause interruption to the adverse possession, if held prior to it. That is an incident of co-ownership and that goes along with it. In my opinion, therefore, this case would have no application to the facts of the present case. It is, therefore, clear that the decree passed in Civil Appeal No. 360 of 1951 puts at naught the effect of any right of enjoyment held by defendants Nos. 1 to 5 in respect of that property with a declaration by the Court that the defendant No. 6 — now the plaintiff in this suit having 1/3 share therein along with those defendants. The starting point for adverse possession would be after the decree provided again there is an ouster to the knowledge of the plaintiff in respect of the property. At any rate, the previous period of enjoyment of the property adverse to the present plaintiff cannot be tacked with subsequent period of adverse possession. It cannot be taken into account in a suit which has been based on the declaration of the right of the present plaintiff in Civil Suit No. 128 of 1950.

Appeal dismissed.

AIR 1970 GUJARAT:12 (V 57 C 3)

N. G. SHELAT AND B. G. THAKOR, JJ.

Abdul Satar Haji Ibrahim, Appellant
v. Shah Manilal Talakchand, Respondent.
First Appeal No. 1129 of 1960, D/- 31-8-68, against decision of Civil J., Senior Division at Godhra in Spl. Civil Suit No. 11 of 1958.

(A) Administration of Evacuee Property Act (1950), Ss. 2(d) and (f), 46 — Administration of Evacuee Property Ordinance (1949), S. 23 — Question as to whether person was in reality evacuee and that way his property evacuee property as contemplated under S. 2(d) and (f) cannot be agitated in Civil Court.

(Para 9)

(B) Administration of Evacuee Property Ordinance (1949), S. 38 — Evacuee is competent to enter into any agreement in respect of evacuee property though he cannot transfer his right or interest in it. (Contract Act (1872), S. 11).

Under the scheme of the Administration of Evacuee Property Ordinance, 1949, the Custodian merely acts as a statutory agent having powers to manage and administer the evacuee property and the title of the evacuee remains, as it were, in statutory suspense till the property comes to be restored to him under S. 16(1) of the Administration of Evacuee Property Act, 1950. Therefore, he is not a person who can be called incompetent to enter into any agreement to sell the evacuee property, sale deed to be executed after obtaining certificate from the Custodian of Evacuee Property so as to render the agreement invalid on that account only, though, no doubt, by that he cannot transfer his right or interest in property without obtaining approval of the Dy. Custodian of Property: AIR 1951 Bom 440 & AIR 1951 Mad 930, Rel. on.

(Para 11)

(C) Administration of Evacuee Property Ordinance (1949), S. 38 — Administration of Evacuee Property Act (1950), S. 40 — S. 38 or S. 40 operates, not on agreements to transfer, but only upon transfers creating right or interest in property: ILR (1965) 1 Punj 619, Dissent. from.

A contract for sale is in no way a contract of sale so as to transfer any right or interest in any property. By a contract for the sale of immoveable property all that the purchaser gets is a right for obtaining a sale of such property on the terms agreed to between the parties. His remedy, thus, is to get a deed of sale for transfer of ownership and no more. It confers no right and no interest on any such property comprised under the contract for sale. Therefore, the meaning to the term "transfer" used in S. 38 of the Ordinance as also under Section 40 of the Act has to be given having regard to and in relation to the provisions relating to the transfer of property which have been in the T. P. Act, particularly provisions of Section 54 of that Act. Section 38 of the Ordinance or Section 40(1) of the Act does not impose any disability on the power to contract and it does not operate on the agreements to transfer. It operates only upon transfers which create

right or interest in property: AIR 1960 Madh Pra 136 Rel. on; ILR (1965) 1 Punj 619 Dissent. from. (Para 12)

(D) Administration of Evacuee Property Ordinance (1949), S. 38 — Administration of Evacuee Property Act (1950), S. 40 — Contract for sale of immoveable property does not create any interest in or charge on property so as to attract provisions of S. 38 or S. 40: AIR 1956 Cal 462, Dissent. from. (T. P. Act (1882), Ss. 54, 55(6)(b)).

While the latter part contained in S. 54 of the T. P. Act requires an act of parties for creating any right or interest in any such property comprised thereunder unless it is so created there is no such right or interest created by a simple agreement for sale, even though an earnest money has been paid thereunder. Any such payment, for securing the enforcement of the agreement, would not turn the effect to be given to any such agreement other than one given in latter part of S. 54 which relates to contract for sale. S. 55(6)(b) of the T. P. Act, on the other hand, creates a statutory charge and not a charge or interest which can be said to have been created by the act of parties. Not only that, but any such charge under S. 55(6)(b) again depends upon certain contingencies. It does not create an absolute charge as such. That charge arises provided it is shown that the buyer has not improperly declined to accept delivery of the property. Therefore, a contract for sale of immoveable property does not create any interest or charge in the property so as to attract the provisions contained in S. 38 of the Ordinance or S. 40 of the Act: (1899) ILR 23 Bom 181, Rel. on; AIR 1956 Cal 462, Dissent. from.

(Paras 13, 14)

(E) Specific Relief Act (1877), S. 18 — Agreement for sale of evacuee property by person having imperfect title to it due to statutory restrictions of S. 40, Administration of Evacuee Property Act (1950) — Held, purchaser was entitled to claim performance of contract after restrictions coming to end. (Administration of Evacuee Property Ordinance (1949), S. 38) — (Administration of Evacuee Property Act (1950), Ss. 40, 16.)

Where an agreement for sale of evacuee property is made by a person having imperfect title to it and the agreement is otherwise valid, the purchaser is entitled, even apart from S. 16(3) of the Administration of Evacuee Property Act, 1950, to claim performance of the contract under S. 18(a) of the Specific Relief Act, 1877 after the property in question came to be restored to that person under S. 16(1) of the Act of 1950.

Due to the statutory restriction contemplated in S. 38 of the Administration

of Evacuee Property Ordinance, 1949 or S. 40 of the Act of 1950, the person who makes the contract is not competent to effect a valid title in the purchaser during that period. The title to the property that way is rather an imperfect title in him. This restriction comes to an end when the property is restored to him under S. 16(1) of the Act. By that event, the title in him over the property becomes full and perfect which he can pass on to any one by passing a registered sale-deed or the like. During that period, it is not possible for the purchaser to enforce his right to obtain a valid transfer of the property. But his right to enforce it revives and remains unaffected as stated in S. 38(3) of the Ordinance or S. 40 of the Act of 1950. (Para 16)

(F) Contract Act (1872), Ss. 31, 32 — Agreement for sale of evacuee property on condition that execution of sale deed to take place after obtaining certificate from Custodian under S. 40 of Administration of Evacuee Property Act (1950) — Held, since condition of obtaining certificate became unnecessary in view of property being restored free from any such restrictions under S. 16(1) of Act of 1950, contract did not depend upon condition so as to render it void. (Para 17)

(G) Specific Relief Act (1877), S. 21(b) — "Volition of parties" — Section refers to parties to agreement and not to any party, such as statutory authority with powers to act according to provisions governing the same: AIR 1957 Bom 119, Disting. (Para 18)

(H) Specific Relief Act (1877), S. 22 — Circumstances prevailing at date of agreement are to be considered and not as to what happened subsequently: ILR (1964) 2 Mad 500, Rel. on. (Para 19)

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N. R. Oza, for Appellant; Hariprasad
B. Desai, for Respondent.

SHELAT J.:— The defendant-appel-
lant is a resident of Godhra in the Dis-
trict of Panchmahals and he owned a
house property bearing Municipal Nos.
5146 and 5147 in City Tika No. 60, Lot
No. 66. It had two floors. While the
ground floor thereof was let out by him
to witness Ramanlal Girdharilal Ex. 32
on a monthly rent of Rs. 18/-. the first
floor was let out to witness Shantilal Ex.
65 on a monthly rent of Rs. 10/-. This
house property adjoins the building where
the plaintiff's firm has been carrying on
its business since last several years. On
29-11-49 Abdulsatar Haji Ibrahim Dadi of
Godhra — the defendant-appellant executed
an agreement Ex. 28 in favour of
the plaintiff-respondent whereby he
agreed to sell the suit property for a
sum of Rs. 12,051/-. Rs. 2000/- were paid
by the plaintiff by way of earnest money
thereunder to the defendant. The agree-
ment then provided that the sale-deed
would be executed on obtaining the cer-
tificate from the Custodian of the Eva-
cuee Property and on receiving the
balance of the amount. For obtaining
that certificate the defendant was to ap-
ply to the Custodian on the next day.
One of the conditions was that the rent
realized out of the suit property was to
be taken by the plaintiff and no interest
was to be paid on the earnest money till
the certificate was obtained.

2. It appears that by a notification
published on 6th October 1949 in the
Bombay Government Gazette, the Collec-
tor and Deputy Custodian of Evacuee pro-
perty, Panchmahals, assumed possession
of the properties specified in the schedule
annexed thereto in pursuance of the
powers vested in him as Deputy Custod-
ian under sub-section (1) of Section 6
of the Bombay Administration of Evacuee
Property Act, 1949. The suit property
was shown therein as belonging to the
defendant and valued at Rs. 12000/-. In
those circumstances, since the tenants
were directed to pay rent for the premises

occupied by them to the Deputy Custo-
dian, the plaintiff could not realize any
amount of rent from them. The case of
the plaintiff then was that by an order
dated 8th July 1958 this property which
was taken over by the Deputy Custodian,
came to be restored to the defendant,
under Section 16 of the Administration of
Evacuee Property Act, 1950. The tenants
occupying the premises were directed to
pay rent with effect from that date to
the defendant. The plaintiff came to
know about this order and consequently
he gave a notice dated 22-9-58 to the
defendant calling upon him to execute
the sale-deed in respect of the property
as per the terms contained in the agree-
ment Ex. 28 dated 29-11-49. He showed
his willingness to pay the balance of the
amount after deducting the amount of
earnest money, as also the amount of rent
which, according to him, came to Rs.
3020/-. That notice came to be refused
by the defendant. In the meantime as
he came to know about the defendant's
intention to sell off the property, he gave
a public notice Ex. 29 which was publish-
ed in the daily paper "Jansatta" of
Ahmedabad. The defendant came to know
about it and that led him to give a reply
Ex. 31 dated 19-10-58 through his advo-
cate. In that reply, all that he stated
was "that by lapse of time the agreement
which was executed in 1949, had become
ineffective at law and then after denying
his liability to comply with the terms of
that agreement and asserting his right
to sell and dispose off the property to
any person, he has stated that he was
not even liable to pay any amount under
the said agreement as it was barred by
limitation." Be it noted that he raised
no other contentions therein such as those
urged in a suit filed by the plaintiff for
the enforcement of that agreement passed
by him. Soon after on receipt of that
reply, i. e. on 19-12-58 the plaintiff filed
Special Civil Suit No 11 of 1958 in the
Court of the Civil Judge (S. D.) at
Godhra, wherein his main prayer was
for a decree for specific performance of
that agreement Ex. 28 dated 29th Novem-
ber 1949, requiring the defendant to exe-
cute the sale-deed in respect of the suit
property on his paying the remaining
amount of Rs. 7,027/- or any such amount
as may be declared by the Court, which
he was willing and ready to pay. In the
alternative, he also prayed that in case
for any reason whatever, the Court did
not think it proper to pass a decree ac-
cordingly, the defendant may be directed
to pay the amount of Rs. 5024/- together
with future interest thereon from the
defendant. That amount consisted of
Rs. 2000/- which he had paid by way of
earnest money under the agreement and
Rs. 3024 due on account of rent for a
period from 30-11-49 till 1-12-58 at the

rate of Rs. 28/- per month, as per the terms thereof.

3. This suit was resisted by the defendant as per the contentions raised in his written statement Ex. 12 in the case. He inter alia contended that the agreement was illegal and void — the same having been entered into in respect of his evacuee property which had vested in the Deputy Custodian of the Evacuee Property; that he alone was entitled to sell the property to any person whomsoever he liked; that, therefore, there was no question of obtaining any certificate from him for the sale of the property as alleged; that the condition of obtaining such a certificate mentioned in the agreement was impossible of performance, and that, therefore, the agreement passed by him was void. He further contended that such an agreement being void and ineffective cannot be enforced in law; that he was not entitled to a refund of the earnest money as well under any such agreement; that the claim in that respect is barred by limitation; that the plaintiff is not entitled to claim any amount on that account either from the tenants or from the Custodian; that the suit is barred by delay and laches, and that it may be dismissed with costs.

4. The trial Court raised the issues as set out in para 3 of the judgment and in its opinion, the agreement was neither invalid nor ineffective as alleged by the defendant; that it was not against public policy as alleged; that the claim for the refund of earnest money as also for a sum of Rs. 3024 due on account of arrears of rent under the terms of the agreement was not time-barred; that the suit was maintainable; and that the plaintiff was entitled to specific performance of the agreement. He, however, found that since the defendant had neither recovered any rent from any of the tenants, nor from the Custodian in respect of the suit property, plaintiff was not entitled to get any such amount, but instead, he would be entitled to get interest at the rate of 6% on the amount of Rs. 2000 given by way of earnest money. In the result, he passed a decree directing the defendant to execute the sale-deed as per the terms and conditions embodied in the agreement Ex. 28 on or before 3rd October 1960. He further directed the plaintiff to bear the cost of the execution of the sale-deed as also of the registration thereof and on failure of the defendant to execute the sale-deed, the Court will execute it at the cost of the plaintiff. The plaintiff was directed to pay Rs. 8971/- only being the balance due from him to the defendant towards the purchase price of Rs. 12,051/-. The defendant was directed to pay the costs of the plaintiff and bear his own. Feeling dissatisfied with that decree passed on 30th August 1960

by Mr. T. P. Shah, Civil Judge (S. D.), Godhra, the defendant has come in appeal before this Court.

5. The contention made out by Mr. Oza, the learned advocate for the appellant, was that the agreement Ex. 28 dated 29-11-49 passed by the defendant in respect of the suit property in favour of the plaintiff was void — it being in contravention of the provisions contained in Sections 40 and 41 of the Administration of Evacuee Property Act (Act No. XXXI of 1950), or under Section 38 of the Ordinance No. XXVII of 1949 which was in force then. According to him, since it was an evacuee property at the time when this agreement came to be executed by the defendant-appellant, in view of the provisions contained in Sections 40 and 41 of the Act, that transaction entered into by him in relation to such property was void and ineffective inasmuch as the same has been entered into without obtaining the previous approval of the Deputy Custodian in whom it had already vested. That way it was said that the consideration or the object of that agreement was such which was forbidden by law and therefore unlawful, and when that is so, such agreement was void as contemplated under Sec. 23 of the Indian Contract Act.

6. Before we turn to this principal contention, it is essential to point out that the Bombay Evacuee (Administration of Property) Act, 1949 came in effect on 17th May 1949 and it was in pursuance of the powers vested in the Deputy Custodian under Section 6(1) of the Act, he assumed possession of the suit property which was of Abdulsatar Haji Ibrahim Dadi — the defendant in the case. On 18-10-49, however, the Ordinance No. XXVII of 1949 called "The Administration of Evacuee Property Ordinance, 1949", hereinafter to be referred to as 'the Ordinance' came to be issued by the Governor General of India. By reason of Section 55 of this Ordinance, the Bombay Act came to be repealed and as provided therein, notwithstanding the repeal by this Ordinance of the Administration of Evacuee Property Ordinance, 1949 (XII of 1949) or of any corresponding law, anything done or any action taken in the exercise of any power conferred by that Ordinance or law shall be deemed to have been done or taken in the exercise of the powers conferred by this Ordinance and any penalty incurred or proceeding commenced under that Ordinance or law shall be deemed to be a penalty incurred or proceeding commenced under this Ordinance as if this Ordinance were in force on the day on which such thing was done, action taken, penalty incurred or proceeding commenced. Thus, it was during the existence of this Ordinance

that the agreement Ex. 28 had come to be executed by the defendant in respect of the suit property. The validity or otherwise of the agreement would ordinarily be governed by the law as it then prevailed. This Ordinance was later on repealed by Act No. XXXI of 1950 known by the name of the Administration of Evacuee Property Act, hereinafter to be referred to as 'the Act'. Section 56 of the Act whereby the Ordinance came to be repealed, has provided that it shall not affect the previous operation of the Ordinance, Regulation or corresponding law and subject thereto, anything done or any action taken in the exercise of any power conferred by or under that Ordinance, Regulation or corresponding law shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act were in force on the day on which such thing was done or action taken.

7. It was urged by Mr. Oza, that the agreement Ex. 28 related to evacuee property as defined under S. 2(f) of the Act inasmuch as it belonged to the defendant who was said to be an evacuee as contemplated under Section 2(d) of the Act. When that is so, that property no sooner it came to be notified as such, vested in the Custodian under Section 9 of the Act. He alone was, thus, entitled to deal with that property and by reason of Sections 40 and 41 of the Act, the defendant had no right to effect any transaction in relation to that property, and in case he does, without the approval of the Custodian, it becomes void and ineffective in law. Section 41 of the Act provides as under:

"Subject to the other provisions contained in this Act, every transaction entered into by any person in respect of property declared or deemed to be declared to be evacuee property within the meaning of this Act, shall be void unless entered into by or with the previous approval of the Custodian."

Now apart from the fact that no such provision existed in the Ordinance, it has to be read subject to the other provisions contained in this Act, as stated therein. The other provision to be considered is contained in Section 40 of the Act. It runs thus:—

"40. (1) No transfer made after the 14th day of August, 1947, but before the 7th day of May, 1954 by or on behalf of any person in any manner whatsoever of any property belonging to him shall be effective so as to confer any rights or remedies in respect of the transfer on the parties thereto or any person claiming under them or either of them, if, at any time after the transfer, the transferor, becomes an evacuee within the meaning of Section 2 or the property of the transferor is declared or notified to be evacuee

property within the meaning of this Act, unless the transfer is confirmed by the Custodian in accordance with the provisions of this Act."

Then sub-section (3) thereof provides that an application under sub-section (1) for the confirmation of any transfer may be made by the transferor or the transferee or any person claiming under, or lawfully authorised by, either of them to the Custodian within two months from the date of the transfer or within two months from the date of the declaration or notification referred to in sub-section (1) whichever is later, and the provisions of Section 5 of the Indian Limitation Act, 1908 (IX of 1908) shall apply to any such application. It is worth noting that under Section 41 "any transaction" entered into by any person in respect of any evacuee property shall be void. In other words, it covers not only transfer of any property effected having regard to the provisions contained in the Transfer of Property Act, but also any agreements to transfer in respect of any such property. We are therefore concerned with the effect of section 40 of the Act, which has been similar to Section 38 of the Ordinance which governed the transaction as per the agreement Ex. 28 executed by the defendant in respect of the alleged evacuee property. In other words, Section 41 of the Act has no application whatever, and the validity or otherwise of the agreement Ex. 28 has to be judged on the basis of Section 38 of the Ordinance which has been incorporated in Section 40 of the Act of 1950.

8. It was, however, urged by Mr. Desai, the learned advocate for the respondent, that the defendant was not an evacuee as defined under Section 2(d) of the Ordinance and consequently his property cannot be called evacuee property as contemplated under Section 2(f) of the Ordinance. He then contended that even if it was taken to be the evacuee property having regard to the scheme of the provisions contained in the Ordinance, much though the evacuee property vested in Custodian under Section 8 thereof, the defendant cannot be said to have been divested of his right or interest of ownership therein. He was, according to him, quite competent to enter into any such agreement whereby he bound himself to carry out the same after the bar or restriction imposed on his right came to be removed. He further urged that this property has been admittedly restored to the defendant by the Custodian as per the order Ex. 33 dated 8-7-58 under Section 16(1) of the Act which is similar to the provision contained in Section 16 of the Ordinance. He then invited a reference to Section 16 and in particular sub-section (3) thereof which says that upon the restoration of the property to the eva-

cuee or to his heir, as the case may be, the Custodian shall stand absolved of all responsibilities in respect of the property so restored and that such restoration shall not prejudice the rights, if any, in respect of the property which any other person may be entitled to enforce against the person to whom the property has been so restored. In other words, the contention is that with the restoration of the property to the defendant, it became a free property which can be dealt with by the defendant in any manner he chose—he being its owner. The bar or restriction, if any, contemplated under the provisions of the Act or the Ordinance, as the case may be, came to an end in respect of that property. With such restoration of the property to the defendant, the right to claim the specific performance of an agreement for sale that was executed by the defendant before in favour of the plaintiff, would arise and revive as any such right for claiming enforcement thereof as contemplated in the latter part of sub-section (3) of Section 16 of the Ordinance was in no way affected or prejudiced. It appears, therefore, clear that at the date when the suit is filed for enforcing the agreement for sale in respect of the property which happened to be evacuee property till that date, it would be maintainable unless it is shown that the defendant was not competent to execute any such agreement for sale in respect of that property so that any such agreement would be void and ineffective by reason of the same being hit by Section 40 of the Act or Section 38 of the Ordinance.

9. Now it is indeed true that whenever any such agreement is challenged on the ground of invalidity or the like, it has to be so shown by one who so alleges. The case of the defendant was that while he was not an evacuee within the meaning of the term defined in Section 2(d) of the Act inasmuch as he had never left India for Pakistan or so in 1948, but that since the plaintiff knew about the property being an evacuee property and that way knowing full well about such a property being evacuee property, he had taken undue advantage in obtaining the agreement from him. That plea has no substance whatever and in fact the terms of the agreement as also other circumstances amply belie it. What appears is that with the coming in force of the Bombay Act, the Deputy Custodian in pursuance of the powers vested in him under sub-section (1) of Section 6 of Bombay Act, 1949, assumed possession of the evacuee property specified in the Schedule annexed thereto. The suit property formed a part thereof and it belonged to the defendant and was valued at Rs. 12,000/-. This notification was published in the Gazette on 6th October

1949. It appears, as contemplated in Section 7 of the Ordinance, where the Custodian is of opinion that any property is evacuee property within the meaning of this Ordinance, he may, after causing notice thereof to be given in such manner as may be prescribed to the persons interested, and after holding such inquiry into the matter as the circumstances of the case permit, pass an order declaring any such property to be evacuee property. We have, however, no material on record to know as to whether any such notice was issued to him and whether any such inquiry was held before holding this property as an evacuee property. But whatever that be, the fact remains that with the notification issued on 6th October, 1949 under the previous Act, it can be taken as declared to have been the evacuee property and that the Deputy Custodian assumed possession thereof. In fact he recovered constructive possession thereof in the present case by calling upon the tenants to pay the rent in respect of the premises occupied by tenants. Under Section 8, any property declared to be evacuee property under section 7 shall vest in the Custodian. Neither the defendant nor the plaintiff has chosen to put any such material on record and all that we find is that some dispute was going on with regard to the declaration of this property as an evacuee property between the defendant and the Custodian and that it came to be finally decided in 1955 that the defendant was an evacuee and the property in question was an evacuee property as would appear from the endorsement made in the Property Register the copy whereof has been produced at Ex. 32 in the case. That endorsement shows the date of such a declaration as on 27-10-55. This becomes all the more clear if we turn to the recitals in the agreement itself. In this agreement while the defendant has described himself as an owner and a person in possession of that property, he has stated that there was a necessity to obtain the certificate from the Custodian Office of the District of Panchmahals and that he would apply for obtaining the same on the next day i. e. on 30-11-49. After obtaining such certificate, he would execute the sale-deed on receiving the balance amount. The plaintiff has also referred to in his plaint about some dispute going on with regard to this property. It would, therefore, follow that not only this property was declared as an evacuee property under Section 6(1) of the Bombay Act, 1949, but that some dispute in that regard was pending. In other words, it is reasonable to think that the defendant must have challenged any such declaration about his property being an evacuee property for the reason that he was not an evacuee as contemplated under Sec-

tion 2(d) of the Ordinance. His evidence shows that he had never left the Province for any place outside the territories now forming the part of India on account of the setting up of the Dominion of India and Pakistan or on account of civil disturbances or the fear of such disturbances, on or after the 1st day of March 1947. Whatever that be, any such question as to whether he was in reality an evacuee and that way his property an evacuee property as contemplated under Section 2(d) & (f) respectively, could not be agitated in a civil Court. The jurisdiction of a Civil Court has been barred by reason of Section 23 of the Ordinance as also by reason of Section 46 of the Act. It is, therefore, enough to observe that the property in question has to be treated as evacuee property at the time when the defendant executed the agreement Ex. 28 in favour of the plaintiff and it is on that basis that the question about the validity thereof or otherwise has to be determined. The only thing that can be said is that the defendant may have allowed the plaintiff to understand that he would be able to obtain the certificate in that respect by making an application to the Custodian, and after obtaining the permission or the certificate as the case may be, he would execute the sale-deed in pursuance of that agreement.

10. The question then is as to whether the defendant was competent to enter into any such agreement in respect of any such evacuee property with any other person, and if he did so without obtaining the necessary previous permission, whether he acted against the provisions of the Act so as to render any such agreement void and unenforceable at law. In other words, the point to be considered is as to whether the defendant can be said to have been divested of his right or interest in that property so as to forbid him from entering into such an agreement for sale. The contention of Mr. Oza is that by reason of Section 38 of the Ordinance, he was forbidden from entering into any such contract in relation to any such evacuee property unless it was approved by the Custodian. According to him, not having obtained any such consent renders his act unlawful in regard to that property and that it cannot, therefore, be given any effect in law. On the other hand what was urged by Mr. Desai was that having regard to the scheme of the provisions contained in the Ordinance, much though the property can be said to have vested in the Custodian, it does not take us to mean that the defendant or the real owner thereof was divested of his right or interest in the property so as to make him incompetent to deal with the same. His further contention was that Section 38 of the Ordinance

merely puts a restriction on the power to transfer that property and in no case can such an agreement as per Ex. 28 be called a transfer of property or of any right or interest in any such property so as to fall within the ambit of Section 38 of the Ordinance.

11. It would not be so very necessary to refer to the provisions of the Ordinance in details for the reason that the scheme of this Ordinance has come to be considered in the case of Abdul Majid Haji Mahomed v. P. R. Nayak, 53 Bom LR 621=(AIR 1951 Bom 440). The relevant observations run thus:—

"Now looking to the various provisions of this Act, it is clear that the object and purpose of the Legislature in enacting this Ordinance was to deal with the custody, management and administration of evacuee property. The evacuee was to be prevented from exercising any rights as an owner in respect of his property, and the property was to vest in the Custodian. But the property was not to vest in him as an owner with the rights of an owner; it was to vest in him for the purposes of the Ordinance; his powers and rights were confined to the provisions contained in the Ordinance itself."

Then at p. 640 (of Bom LR)=(at p. 448 of AIR) in more specific and clear language it has been observed as under:—

"The effect of the Ordinance is not to transfer the title vested in the evacuee as the owner of the property to the State or to any other person. As I said before, the only effect of vesting the property in the Custodian is to give the Custodian certain powers enumerated in the Ordinance for the purpose of managing and administering the evacuee property. The title of the evacuee remains, as it were, in statutory suspense until it is determined by Parliament as to how that title is to be dealt with or disposed of. It would not be true to say that the title of the evacuee is destroyed or extinguished. The title is in existence, but its exercise has been suspended by reason of the Ordinance. This is not clearly a case where a property is destroyed by the State and both the property and the title disappear. There is neither destruction of property nor extinguishment of title."

Another case referred to by Mr. Desai was one of M. B. Namazi v. Deputy Custodian of Evacuee Property, Madras, AIR 1951 Mad 930. In that case also, after considering the scheme in the Ordinance, almost similar observations have been made and they are:—

"The entire scheme of the Administration of Evacuee Property Ordinance (1949) in respect of 'evacuee property' is a provision for the custody and administration of such property and not for confiscation. The evacuee's title as such is never

affected. Even the rights of a heir are recognised. Restoration of the property is contemplated. The Custodian acts practically as a statutory agent with large powers, but under a duty to keep accounts. There is no deprivation of the property of the evacuee within the meaning of Art. 31(1)."

In the light of these observations, with which we respectfully agree, it appears clear that the evacuee's title was not affected in the sense that he was not divested of his right or interest in the property so much so that he cannot enter into any such agreement for sale of that property. The Custodian merely acted as a statutory agent having powers to manage and administer the evacuee property, and as observed in the Bombay case, the title of the evacuee remained, as it were, in statutory suspense till the property came to be restored to him in 1958 under Section 16(1) of the Act. In our view, therefore, he was not a person who could be called incompetent to enter into any such agreement so as to render the same invalid on that account only, though no doubt by that he cannot transfer his right or interest in property without obtaining approval of the Dy. Custodian of property.

12. That takes us to the question as to whether Section 38 of the Ordinance comes in the way of the defendant so as to render the agreement Ex. 28 invalid. Section 38 of the Ordinance runs thus:—

"38. (1) No transfer of any right or interest in any property made in any manner whatsoever after the 14th day of August, 1947, by or on behalf of an evacuee or by or on behalf of a person who has become an evacuee after the date of the transfer, shall be effective so as to confer any rights or remedies on the parties to such transfer or on any person claiming under them unless it is confirmed by the Custodian."

Sub-section (2) thereof then provides for an application for confirmation of such transfer and the Custodian is required to hold an inquiry in that regard under sub-section (4) thereof. Then comes Section 39 which prohibits registration of documents in certain cases. The contention of Mr. Oza, the learned advocate for the appellant, was that the word "transfer" used in Section 38 has not to be given a narrow meaning as contemplated under the provisions of Transfer of Property Act. In other words, his contention was that by reason of the use of the word "transfer", the Legislature contemplated to include agreements to transfer any such property. In support of that proposition, he invited a reference to a decision in the case of *Netram v. Custodian General of Evacuee Property*, ILR 1965-1 Punj 619, where it has been observed that the word "trans-

fer" has been used in Section 40 of the Act in a comprehensive sense precluding narrowness and technicality. Transfer of property involves a series of steps, first an agreement to sell, then the execution of the deed of conveyance and finally the registration. On the other hand, it was urged by Mr. Desai, the learned advocate for the respondent, that the word "transfer" contemplates nothing short of a transfer of property as such and, at any rate, according to him, in absence of any definition given to the term "transfer" in the Ordinance or in the Act as the case may be, one has to turn to the provisions contained in the Transfer of Property Act. He then invited a reference to Section 54 of the Transfer of Property Act which defines "sale" and "a contract for sale". "Sale" has been defined as "a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other tangible thing, can be made only by a registered instrument A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property." Laying emphasis on the latter part of the definition of a contract for sale, he urged that any such contract for sale as per Ex. 28 does not and cannot create any interest in or charge on such property. In those circumstances, Section 38 would not come in the way for it does not create any right or interest in any such evacuee property. Now, it is clear that the term "transfer" used either in the Ordinance or the Act has not been defined. When a term such as "transfer in relation to any property" is required to be considered, one would be justified in looking at the provisions governing the transfer of property contained in the Transfer of Property Act, 1882. Section 5 of the Transfer of Property Act defines "transfer of property" as meaning an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons, and "to transfer property" is to perform such act. Section 6 thereof provides that property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force, and then it sets out certain rights which cannot be transferred in clauses (a) to (i). Clause (h) provides that no transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration with-

in the meaning of section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be transferee. It would follow from this provision that if any law for the time being in force forbids any property or right or interest in any property being transferred to anyone else, that would become void. Then Section 7 refers to persons competent to transfer. As stated therein, every person competent to contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force. Section 11 of the Contract Act defines the capacity to contract as under:—

"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

Then comes Section 8 which says that "unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof . . ." Now, in order that there is a transfer of property so as to convey the same to any other person, it has to be effected in the manner laid down under the other provisions of the Transfer of Property Act. They may relate to sale, mortgage, lease etc. We have already referred to Section 54 which relates to sale of immovable property and in order that there is transfer of ownership by reason of any such sale, in the case of tangible immovable property of the value of one hundred rupees and upwards, it can be made only by a registered instrument. In view of this provision, in order that there arises any transfer of property or transfer of any right or interest in any property, it can take place having regard to Section 54 of the Act. It is only then that there would arise a valid transfer of any property or of any right or interest in the property. In the latter part of Section 54, as already pointed out hereabove, a contract for sale of immovable property has been defined as a contract that a sale of such property shall take place on terms settled between the parties. In other words, it is distinct from a contract of sale whereby transfer of ownership is effected. A contract for sale is in no way a contract of sale so as to transfer any right or interest in any property. But a contract for the sale of immovable property all that the purchaser gets is a right for obtaining a sale of

such property on the terms agreed to between the parties. His remedy, thus, is to get a deed of sale for transfer of ownership and no more. It confers no right and no interest on any such property comprised under the contract for sale such as Ex. 28 in the case. In fact even after a decree for specific performance, the purchaser cannot be said to have any interest in the property unless that is created by having the instrument registered as required under Section 54 of the Act when the value of the property is one hundred rupees and upwards. In our view, therefore, the meaning to term "transfer" used in Section 38 of the Ordinance as also under Section 40 of the Act has to be given having regard to and in relation to the provisions relating to the transfer of property which have been in the Transfer of Property Act, 1882. If, on the other hand, it was so intended to cover any such agreement for sale of any such property or any right or interest in any such property, the words would have been to that effect such as we find in Section 41 of the Act of 1950 viz. "any transaction" used therein. Section 38 of the Ordinance does not refer to any such transaction and it refers to only a transfer of any right or interest in the property. With respect, therefore, we are unable to agree with the view taken in the Punjab case about the meaning to be given to a term "transfer" used in Section 38 of the Ordinance, to include any agreement for transfer by giving a very wide and comprehensive meaning to that term. On the other hand, in the case of Kirodimal Ganeshlal Bani v. Haji Sulman Haji Wali Mohd., AIR 1960 Madh Pra 136, Section 40(1) of the Act (analogous to Section 38 of the Ordinance) came to be considered and it was held that it operates upon transfers only and not on agreements to transfer. It has been further observed that "Section 40 by itself, does not impose any disability on the power to contract. Such contracts would be valid and binding on the eva-
cuee personally. The specific performance of the contract for sale does not defeat the provisions of S. 40 (especially when the transfer is to take place after 7-5-1954)." In our view, therefore, Section 38 of the Ordinance or Section 40(1) of the Act does not impose any disability on the power to contract and that it does not operate on the agreements to transfer. It operates only upon transfers which create right or interest in property.

13. It was next contended by Mr. Oza that much though the latter part of the definition of "contract for sale" given in Section 54 of the Act provides that it does not create any interest or charge on such property, by reason of Section 55(b) of the Transfer of Property Act, the buyer is entitled to claim a charge on the

property for the amount of any purchase money properly paid as also for the earnest money as contemplated therein. By reason of this provision, according to him, it can be easily said that the interest or charge on the property is created by reason of this agreement Ex. 28 inasmuch as Rs. 2000 were paid to the defendant by the buyer for securing the contract and taking the same towards the purchase price for the property in question. In support thereof, he invited a reference to a decision in the case of Rabindra Nath Banerjee v. Harendra Kumar, AIR 1956 Cal 462, where it was held that "where there is a part payment of the purchase price or payment of what is called the earnest money, the provisions of Section 55(6)(b), Transfer of Property Act, would be attracted and it will be treated as though the ownership of the property had passed and there is a charge for part of the purchase money paid. Such a purchaser under an agreement for sale has an interest and even a charge in the immovable property sold in execution." Now we have already pointed out hereabove, an express provision contained in Section 54 of the Transfer of Property Act saying that any such contract for sale does not create any interest in or charge on any property. Section 55(6)(b) would, therefore, naturally lead to some anomalous position inasmuch as it entitles the purchaser to have a charge in respect of any such purchase money paid or in respect of the earnest money referred to therein. Now while the latter part contained in Section 54 of the Transfer of Property Act requires an act of parties for creating any right or interest in any such property comprised thereunder, unless it is so created there is no such right or interest created by a simple agreement for sale, even though an earnest money has been paid thereunder. Any such payment, for securing the enforcement of the agreement, would not turn the effect to be given to any such agreement other than one given in latter part of Section 54 which relates to contract for sale. Section 55(6)(b) on the other hand provides for an equitable remedy by making an express provision in respect of purchase money or the earnest money as the case may be. In other words, it creates a statutory charge and not a charge or interest which can be said to have been created by the act of parties. Not only that, but any such charge under Section 55(6)(b) of the Act again depends upon certain contingencies. It does not create an absolute charge as such. That charge arises provided it is shown that the buyer has not improperly declined to accept delivery of the property.

14. Mr. Desai, on the other hand, invited a reference to a decision of Division

Bench of the High Court of Bombay in the case of Mahadeo Chintaman Wadekar v. Vasudev J. Kirtikar, (1899) ILR 23 Bom 181. This decision lends support to the view taken by us in that regard. The facts of the case were that on 16th May 1895, one Dinaji Moroba sold the property, subject to the mortgage, to the applicant's daughter Mothibai and that Mothibai had afterwards by a registered agreement, dated 28th August 1896, contracted to sell it to him for Rs. 2,200 of which he had paid a part as earnest-money. On 17th October, 1896, in execution of a mortgage decree obtained by one Sadaram Ramchandra against Dinaji Moroba, the sale of that property took place. The opponent Rao Bahadur Vasudev J. Kirtikar bought the property. That led the applicant Mahadeo Chintaman Wadekar to apply for setting aside the sale alleging that Dinaji Moroba had sold the property subject to the mortgage to his daughter who in turn had contracted to sell it to him. The question arose as to whether he had any right or interest in the property so as to entitle him to present an application for setting aside the sale in execution. On a consideration of Section 54 of the Transfer of Property Act, it was held that "a person who has contracted to purchase land, or an interest in land, does not by any such contract become the owner, in equity, of such land or such interest in view of Section 54 of the Act. He has a personal right against his vendor or the assignee with notice of his vendor to compel the latter by a suit for specific performance to perform his contract; but he has no direct right over the land." He was, therefore, not entitled to apply to set aside the sale under Section 310A of the Civil Procedure Code. While considering the same, they also considered the effect of Section 55(6)(b) of the Transfer of Property Act and observed as under:—

"Assuming that under Section 55 of the Transfer of Property Act the applicant as against his vendor has a lien or charge upon the subject-matter of his purchase for the earnest that he has paid, and that a person holding a simple lien over immoveable property is pro tanto the owner of such property within the meaning of S. 310-A — the inclination of our opinion is to the contrary view—we cannot think that the applicant can be said to be owner of even the interest over which his lien extends. The lien or charge which the section gives him, is, at the most, a contingent lien which will only become absolute if he is ready and willing to perform his contract when the time for performance arrives, or if he properly declines to perform it."

Apart from the fact that the decision would bind this Court—the same having

been prior to 1-5-50 we agree with the view expressed therein and with respect, we are unable to agree with the view expressed by a Single Judge of the High Court of Calcutta in AIR 1956 Cal 462, relied upon by Mr Oza for the appellant. In our view, therefore, the agreement Ex. 28 does not create any interest or charge in the property so as to attract the provisions contained in Section 38 of the Ordinance or Section 40 of the Act.

15. In those circumstances, it is unnecessary to consider as to whether the prohibition contemplated under Section 38 of the Ordinance or Section 40 of the Act is absolute so much so that any such transfer would become void. If any such transfer, however, of any property or any right or interest in evacuee property had been effected by the evacuee after 14th August 1947, it would become ineffective if no approval of the Custodian was obtained. It would not bind the custodian and as long as there continued a restriction under Section 38 of the Ordinance or Section 40 of the Act, absence of any approval of the Custodian would render a transfer ineffective and even void. Some authorities were cited by Mr Oza to say that any transfer which was void cannot become enforceable later on by reason of the fact that any such disability or restriction which rendered the same void has been removed. That which is void ab initio cannot be validated subsequently and to that position in law there hardly arises any dispute. In fact that position was conceded by the learned advocate of the respondent and, therefore, it is unnecessary to refer to those authorities such as Gaurishankar Balmukund v Chinnuniya, ILR 46 Cal 183 = (AIR 1918 PC 168), Sundrabai Sitaram v. Manohar Dhondur, 35 Bom LR 404 = (AIR 1933 Bom 262), Suraimull Nagore-mull v Triton Insurance Co. Ltd., AIR 1925 PC 83, and Waman Shrinivas v. Ratilal Bhagwandas and Co., AIR 1959 SC 689. In the present case, however, as already held above, the defendant had a right in him to bind himself by passing such an agreement Ex. 28 in respect of his property and that since it was not actually transferred as contemplated under Section 38 of the Ordinance, it cannot be hit thereby and it remained a valid agreement. The performance thereof, however, can be said to be in abeyance by reason of the statutory suspense, as it were, created by the provisions of the Act, in the authority and power to transfer the property to the defendant. In pursuance of an order Ex. 33 passed on 8-7-58 under Section 16 of the Act the property has been restored free from any such restriction and since by reason of sub-section (3) of Section 16 the right to enforce any such right under the agreement has not been affected, the plaintiff

would be entitled to claim specific performance thereof.

16. Now even apart from Section 16(3) of the Act, the plaintiff is entitled to claim performance of that contract under Section 18(a) of the Specific Relief Act. Section 18 runs thus:—

"18. Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this chapter) has the following rights:—

(a) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;

The defendant had contracted to sell the property as per the terms and conditions set out in the agreement Ex. 28 and since that agreement is valid, the plaintiff has a right to enforce the performance thereof. As already observed hereabove, the defendant was competent to pass any such agreement and bind himself personally by the terms or conditions set out therein for transferring the property. What obviously prevented him from passing any such transfer in pursuance of the agreement was due to the statutory restriction on him contemplated in Section 38 of the Ordinance or Section 40 of the Act. He was not competent to effect a valid title in the plaintiff during that period. The title to the property that way was rather an imperfect title in him. This restriction came to an end and the property has been restored to him under Section 16(1) of the Act. By that event, the title in him over the property became full and perfect which he can pass on to anyone by passing a registered sale-deed or the like. During that period, on the other hand, it was not possible for the plaintiff to enforce his right to obtain a valid transfer of the property. But his right to enforce it revived and that way arose as soon as it became a free property of the defendant liable to be transferred in accordance with law, and more so, as the plaintiff's right had remained unaffected as stated in sub-section (3) of Section 38 of the Ordinance or of Section 40 of the Act. It was attempted to be urged by Mr. Oza that Sec. 18 requires or presupposes a valid agreement and that the fact about the title being defective was known to the plaintiff. In other words, according to him, the plaintiff knew that it was an evacuee property and that in spite of it he had chosen to obtain an agreement for sale from the defendant. We have already found that the defendant was competent to pass any such agreement and bind himself and that it was valid. That right of the defendant to fulfil the contract, or of the plaintiff to enforce that contract had

merely remained suspended till such time that the property came back to him. On his getting back the property he was bound to make good the contract. This is not a case where something which was invalid by reason of any disqualification prevailing or incompetence on his part to transfer the property, and the same being removed, he is called upon to fulfil the contract. Such a contract would be void ab initio by reason of transferor's incapacity to contract or incompetence to contract. In our view, therefore, under Section 18 of the Specific Relief Act the plaintiff was entitled to compel the defendant to make good the contract after the property in question came to be restored to him under Section 16(1) of the Act.

17. Mr. Oza then contended that the agreement Ex. 28 was such which cannot be specifically enforced in view of the provisions contained in Section 32 of the Contract Act. Section 31 of the Contract Act defines a "contingent contract" as a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. Then comes Section 32 which says that contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void. On the basis of this provision contained in Section 32 of the Indian Contract Act, he contended that the performance of the contract depended upon the defendant obtaining a certificate from the Custodian and that, therefore, it became a contingent contract. His further contention was that since the property had been restored to the defendant, that contingency became impossible of performance and therefore void. As we have already stated hereabove, there existed some dispute with regard to the fact as to whether the property in question was an evacuee property. While that dispute was pending, this agreement had come to be executed by the defendant. It was in those circumstances that the defendant assured the plaintiff that he would make an application on the next day to the Custodian for obtaining the necessary certificate and after obtaining the same, he would execute the sale-deed in respect of the property. Such a condition was in the nature of perfecting the transfer of valid title in favour of the purchaser. Such a contingency was quite possible in the sense that the Custodian had the authority to confirm the same or give consent in respect thereof. Such a condition was not such which was impossible of performance and in fact he had admitted to move the Custodian on the next day though no doubt with no success. It appears that the matter or the inquiry as the case may be, went on for long till

1955. As to what exactly happened we are unable to know in absence of any material on record in that regard. This condition of obtaining a certificate or the consent of the Custodian became unnecessary in view of the property being restored to him by the Custodian free from any such restrictions under Section 16(1) of the Act. It cannot, therefore, be said that a contract depended upon a condition which cannot be enforced at law or that which had become impossible of performance so as to render any such contract void.

18. It was then urged that the performance of the contract depended on the volition of a third party, namely, the Deputy Custodian of Evacuee Property and that when such is the case, having regard to section 21 of the Specific Relief Act, the relief claimed by the plaintiff cannot be given by the Court. He invited a reference to clause (b) of Section 21 of the Specific Relief Act which provides as under:—

"21. The following contracts cannot be specifically enforced :—

xx xx xx xx
(b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;

xx xx xx xx"
The emphasis was that it depended upon the volition of the Custodian and it cannot be said that he shall necessarily act and issue a certificate as required by the defendant. In that respect, he invited a reference to the case of *Shree Ambarnath Mills Corporation, Bombay v. D. B. Godbole*, AIR 1957 Bom 119. In that case the question that arose was as to whether there is an enforceable agreement of sale wherein it was provided that the price for which the properties were agreed to be conveyed to the plaintiff was indefinite and that it was to be determined by an expert appointed in this behalf by the Government of India, Ministry of Rehabilitation. It was then observed as under:—

"The Government of India is not a party to this agreement and is under no obligation to appoint any person to determine the market value of the properties. The determination of the market value must, therefore, depend upon the volition of a person other than the parties to the agreement. The agreement also does not contain any indication whether the person designated in this behalf is to be accepted by the parties as an expert in ascertaining the market value. Again, the quantum of property to be conveyed to the plaintiffs is indefinite."

In those circumstances, the specific performance of the contract was not granted. In the present case, however, there is no such question of compelling or requiring the Custodian to issue the necessary certificate. All that the agreement provided was that the defendant should apply to the Custodian for obtaining a certificate. That obviously meant to move the Custodian for enabling him to execute the sale-deed in accordance with law. It did not, therefore, depend upon the volition of any party to the contract much less to that of the Custodian for, after all, the Custodian was to act according to the provisions of the Ordinance and he had to decide as to whether any such certificate should be issued or not, and pass orders on any such application given by the defendant for that purpose. It did not depend upon his performance of any act so as to say that he may act or may not act according to his own personal wish or volition. In fact Section 21 refers to the volition of the parties — obviously meaning the parties to the agreement, and not of any party — such as a statutory authority with powers to act according to the provisions governing the same. We do not, therefore, think that the case relied upon by Mr. Oza would stand on the same footing as to justify us in holding that any such agreement Ex. 28 cannot be specifically enforced. In fact no such considerations now arise for the simple reason that the property has been restored to the defendant and he has to comply with the terms and conditions set out in the agreement itself. At the date when the specific performance is claimed therefor, there is no question of anything depending on the volition of any such party as is sought to be urged before us.

19. Mr. Oza then contended that having regard to the provisions contained in Section 22 of the Specific Relief Act, the Court should refuse to give any relief for specific performance of the contract as sought for by the plaintiff. He relied upon clauses I and II of Section 22 of the Act. According to him, the plaintiff has taken unfair advantage over the defendant in obtaining the agreement Ex. 28 in the case. That way the case would fall under clause I of Section 22 of the Act. What was said in this connection was that since the property was an evacuee property at the time when the agreement was effected, it was bound to fetch less price and now that it is free from any such restrictions under the provisions of the Act, a free property would fetch far more. It would fetch about Rs. 20,000 to 25,000 as averred by the defendant. If, therefore, the specific performance of the contract were to be effected, the plaintiff would get unfair advantage. On the

same basis an attempt was made to bring it within clause II of Section 22 which refers to some hardship on the defendant which he did not foresee viz., about any such restoration of the property. In those circumstances, he urged that the Court should not exercise its discretion in passing a decree for specific performance of the agreement. Now Section 22 of the Specific Relief Act gives discretion to a Court to pass a decree for specific performance of the contract and the Court is not bound to grant such relief merely because it is lawful to do so. At the same time, as provided therein, the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. Turning to clause I, it is obvious that there has been no fraud or misrepresentation shown on the part of the plaintiff in obtaining the agreement for sale. It was the defendant who can be in the know of the property declared as an evacuee property and an assurance was given by him to the plaintiff that he would obtain the certificate from the Deputy Custodian of Evacuee Property to fulfil the contract. He took away the earnest money and left the plaintiff to his fate. Besides, there is no evidence that the property was worth more than the price agreed to be given by the plaintiff. In fact it was valued at Rs. 12,000 in the notification by which it came to be declared as evacuee property. Besides, it appears from the evidence of Ratilal that the Custodian had chosen to auction this property for sale and the highest bid was of Rs. 16,000 only in 1956. That, however, could not be given effect to as later on the property came to be restored to the defendant. There is no suggestion whatever made even in the evidence of Ratilal that the property was worth more than Rs. 20,000 or so at the date when the contract took place. The price agreed to be paid by the plaintiff under the agreement was therefore quite adequate and there is hardly anything to justify us to say that any unfair or undue advantage was at all taken by the plaintiff. Nor would there arise any question of hardship to the defendant, as neither of the parties possibly visualized when that property would revert back to him or that the prices would shoot up and he would stand to suffer in 1958. One has to consider the circumstances, prevailing at the date of the agreement and not as to what happened subsequently. Such considerations cannot be taken into account. A future increase in the price of a property agreed to be sold cannot be a good ground for refusing enforcement of any contract for sale of an immovable property. In this connection, Mr. Desai invited a reference to the case of Muthukumaraswami Goundan v. Ranga

Rao, ILR (1964) 2 Mad 500, where it has been observed as follows:—

"The mere fact that the defendant entered into a losing bargain or one where plaintiff will reap great gains is clearly not enough ground to deprive the plaintiff of the benefit of his contract. However wide the jurisdiction of the Court may be to grant succour to persons who have been victimised there is no power to grant relief to a person whose only complaint is that the bargain is foolish and improvident. If the Court were to strike down a bargain on the ground that it was not wise on the part of one of the contracting parties to have entered into it, it would be assuming an overriding power to interfere with the freedom of contract."

Thus, the mere ground that the prices have gone up in 1958 when he is required to execute the contract for sale, cannot justify the Court to refuse the relief sought for enforcement of the contract. In fact if we turn to the Explanation to Section 12 of the Specific Relief Act, it clearly provides that "unless and until the contrary is proved the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money and that the breach of a contract to transfer movable property can be thus relieved." In other words, when a contract is to transfer immovable property, the Court has to presume that it cannot be relieved by compensation and there is hardly anything to show that the compensation can serve as an adequate relief in the circumstances of this case. The property appears to have been agreed to be taken from the defendant as it adjoined the plaintiff's shop which has been there since long. No compensation can therefore be an adequate relief to him. On the other hand, it is the defendant who has tried to take undue advantage of the entire position to an extent that he goes out to challenge his own contract by calling it an invalid agreement and that again he declines to go by it after the property has been restored to him. Not only that, but he has gone to the length of declining to refund even the earnest money received by him. This attitude of his can be easily characterized as one who wants to take rather unfair advantage over the plaintiff and more particularly when in his reply Ex. 30 to the notice no such contentions were at all raised. The only contention raised therein was that much time had elapsed and that, therefore, it was not enforceable. In the suit, however, he has taken all such pleas which justify this Court to characterize as hardly proper. In fact that attitude has continued even before this Court in going to an extent that even with the declaration of the agreement

being void, the plaintiff would not be entitled to claim back his earnest money or even interest thereon. It is hardly necessary to point out that even if any such agreement were declared to be void, by reason of Section 65 of the Indian Contract Act, the plaintiff would be entitled to get back his amount and the defendant was bound to restore it after making compensation for it when he has received any such advantage. In our view, there is no good ground shown why we should refuse to enforce the contract solemnly entered into by him in favour of the plaintiff. The learned Judge was right in so holding.

20. That takes us to the question of limitation and latches raised by Mr. Oza for the appellant. In our view there hardly arises any question of limitation for the simple reason that having regard to Article 113 of the Indian Limitation Act which provides the period of limitation as three years and it begins to run from the date when the plaintiff came to know about the refusal of performance by the defendant. The plaintiff came to know about his refusal to perform his part of the contract on 19-10-58. Soon thereafter i. e. on 9-12-58 the plaintiff has filed this suit. The suit is, therefore, obviously in time.

21. With regard to the question of latches, no such considerations arise for, after all, as already stated above, the right to claim relief for obtaining the sale-deed from the defendant in respect of the property was, as it were, under suspension and the plaintiff could not have enforced the same as the law then prevailed in regard to the property in question. With the removal of that bar or restriction in regard to that property and no sooner the plaintiff came to know about it, he immediately called upon the defendant to perform his part of the contract, and at the same time stating that he was willing and ready to perform his part of the contract viz. to pay up the balance of the amount for the price of the property in question. It was urged that the plaintiff could have applied to the Custodian. But as we said above, since the plaintiff had no right or interest in the property, he was not entitled to apply under any of the provisions of the Ordinance or of the Act. His right to claim the specific performance of the contract arose with the restoration of the property to the defendant under Section 16(1) of the Act. Since his rights were not prejudiced in claiming the enforcement of this contract by reason of Section 16(3) of the Act, there was nothing that comes in his way in obtaining the reliefs sought for in the suit.

22. It was lastly urged by Mr. Oza that the plaintiff had not deposited the

balance of the amount and according to him, merely stating that he was willing and ready to pay the amount in the plaint was not enough. There is hardly any justification to say so for we are not shown any provision of law, which requires him to deposit the balance of the amount in Court. The statement in the plaint in that respect is enough to show that he was ready and willing to abide by the terms of the contract. That point has no substance whatever.

23. We, therefore, agree with the findings recorded by the learned Judge and hold that the agreement was valid and quite enforceable at law. The plaintiff was entitled to claim specific performance thereof and the decree passed by the trial Court, therefore, is quite proper.

24. In the result, therefore, the appeal fails and it is dismissed. The decree passed by the trial Court is confirmed. The appellant shall pay the costs of the respondent and bear his own.

Appeal dismissed.

AIR 1970 GUJARAT 26 (V 57 C 4)

N G SHELAT, J.

Balamal Matlomal, Petitioner v. State of Gujarat, Opponent.

Criminal Revn Appln No 490 of 1965, D/- 28-2-1968 against order of Chief City Magistrate, Ahmedabad, D/- 30-9-1965.

(A) Criminal P. C. (1898), Ss. 517, 520, 435 and 439 — S. 520 is only enabling provision — It confers no right as such for filing appeal or application for revision thereunder — Order under S. 517 affecting third party not before court in the main case — High Court can vary order in exercise of powers under S. 520 or in exercise of its powers under Ss. 435 and 439: AIR 1960 Madh Pra 195 & 1957 MPLJ 67 (Nag) & AIR 1963 Guj 223, Rel. on. (Para 5)

(B) Limitation Act (1963), Art. 131 — Starting point — Order under S. 517 of Criminal P. C. sought to be revised by a third party — Period would run in such a case not from date of order, but from date of knowledge of order: AIR 1961 SC 1500 Applied — Delay of five days condoned. (Para 7)

(C) Criminal P. C. (1898), S. 517(1) — Power to confiscate — It is to be exercised in reasonable and judicial manner — Accused found carrying stolen property in rickshaw — Rickshaw cannot be said to have been used in commission of offence — Order is liable to be set aside: AIR 1931 Lah 565 & (1904) 8 Cal WN 887 & AIR 1944 Mad 59 & AIR 1954 SC 312 Rel. on. (Para 8)

Cases Referred: Chronological Paras
(1968) Cri. Revn. Appln. No. 156 of 1967, D/- 31-1-1968 = ILR (1968) Guj 274, Natwarlal Damodardas v. State 2
(1963) AIR 1963 Guj 223 (V 50) = 1963-4 Guj LR 102, Kanchanlal Somulal v. The State 5
(1963) ILR (1963) Guj 1002 = (1963) 4 Guj LR 1019, Mohmed Yusuf v. Jivraj Premjibhai 2
(1961) AIR 1961 SC 1500 (V 48) = 1962-1 SCR 676, Harish Chandra v. Deputy Land Acquisition Officer 7
(1960) AIR 1960 Madh Pra 195 (V 47) = 1960 Cri LJ 919, Har Bhagwandas v. Diwan Chand 5
(1957) 1957 MPLJ 67 = 1957 Nag LJ 43, Nandu v. Dhasada 5
(1954) AIR 1954 SC 312 (V 41) = 56 Bom LR 1180 = 1954 Cri LJ 881, Suleman Issa v. State of Bombay 8
(1944) AIR 1944 Mad 59 (V 31) = 45 Cri LJ 516, In re, Abdul Azeez 8
(1931) AIR 1931 Lah 565 (V 16) = 1931 Cr. C. 853, Phula Singh v. Emperor 8
(1924) AIR 1924 Lah 75 (V 11) = 24 Cri LJ 713, Kanshi Ram v. Emperor 7
(1904) 8 Cal WN 887 = 1 Cri LJ 49 Jarip Gazi v. Emperor 8
J. M. Acharyya, for Petitioner; A. H. Thakar, Asst. Govt. Pleader, for the State.

ORDER: — The charge against one Ibrahimkhan Fazalkhan in Criminal Case No 1201 of 1964, in the Court of the Chief City Magistrate, Ahmedabad, was that he had committed theft of 5 catch-pit jalis ordinarily known as covers of the gutters, of the Municipal Corporation of Ahmedabad, in the early morning of 1-10-1964, so as to be liable for an offence under Section 379 of the Indian Penal Code. The accused was found going in auto rickshaw bearing No GTD 285 wherein he had put the said stolen property. He was stopped, and as he could not explain about the possession of those catch-pit jalis, that property as also the auto rickshaw came to be attached under a panchanama made in respect thereof. During that trial one Gokaldas Kanjibhai was examined as a witness on behalf of the prosecution, as the owner of that auto rickshaw. According to his evidence he had given that rickshaw to one Babubhai Nurbhai on hire on 30-9-1964 with instructions to return the same to him at Amedpura before the next morning. Some time after he learnt that his rickshaw was lying at the Kalupur Police Chowki. Babubhai also informed him about the rickshaw being attached by the police. In that case the learned Chief City Magistrate, Ahmedabad found the accused guilty for an offence under section 379 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment.

ment for three months and to pay a fine of Rs. 200 or in default to suffer rigorous imprisonment for one month. At the same time he passed another order whereby the Muddamal auto rickshaw before the Court was directed to be confiscated to the State. Aggrieved by that order passed on 21-4-1965 the accused had preferred an appeal, and it came to be dismissed.

2. During the pendency of that trial, however, that Gokaldas Kanjibhai had preferred his claim in respect of this auto rickshaw and the same was rejected. That Gokaldas had also filed an application in revision No. 181 of 1965 against that order of confiscation passed by the learned Magistrate in this Court and on that application the following order was passed by Raju J. on 5-7-1965:—

"I see no reason to exercise my revisional jurisdiction in this case."

It further appears that the present petitioner Balamal had also filed Criminal Revision Application No 242 of 1965 against the order of confiscation passed by the learned Magistrate. In respect of that the following order was passed by Mehta J. on 8-9-1965:

"Mr. Acharya gives an application to withdraw his revision application on the ground that he had not approached the trial Court.

This application is, therefore, rejected for want of prosecution."

Mr. Acharya has stated that since he was advised by the Court that he should approach first to the Court of facts, he requested for being permitted to withdraw the application so as to enable him to file the same in the Court of the learned City Magistrate, Ahmedabad. After that order was passed on 8-9-1965 this petitioner Balamal presented an application on 17-9-1965 in the Court of the learned Magistrate who rejected the same. Feeling dissatisfied with that order passed on 30-9-1965 by Mr. D. C. Mehta, Chief City Magistrate, Ahmedabad, the applicant has come in revision before this Court.

3. The application discloses two prayers. The first is that the order passed on 21-4-1965 by the learned Magistrate regarding the disposal of the auto rickshaw, the muddamal property, before the Court in Criminal Case No. 1201 of 1964 was illegal and improper and that it should be set aside. By the second prayer he claimed to be entitled to have that rickshaw restored to him, he being its owner and if necessary, by holding an inquiry in respect thereof. However, before this court, Mr. Acharya, the learned advocate appearing for him, has claimed to be entitled to its possession on the basis of hirepurchase agreement entered into between him and Gokaldas and as it

was standing in his name before the registration authority before it came to be attached by the police. It was contended by Mr Acharya that since he was not a party to the proceeding in which the order of confiscation of auto rickshaw came to be passed by the learned Magistrate under Section 517(1) of the Code he could not file any appeal against that order and as soon as he came to know about it he approached the High Court for setting aside the same so as to enable the trial Court to make suitable inquiry as to whom the auto rickshaw should be returned under Section 517 of the Criminal Procedure Code. Mr. Acharya's contention then was that since it was the view of the Court that before filing an application in revision against that order, he should have first approached the original Court which passed the order and on that basis or rather feeling that view to be correct, he withdrew his application by obtaining permission from the Court so as to enable him to present an application in the trial Court. His first contention was that any order passed on his application is revisable by this Court having powers to revise the same, if found to be illegal or improper and unjust in the circumstances of the case. According to him, the order can hardly be justified in law inasmuch as the use of rickshaw cannot be called use thereof in commission of an offence of theft by the accused and that again when it belongs to some one else, who cannot be said to have known that he would so use. On the other hand it was pointed out by Mr. Thakar, the learned Assistant Government Pleader, for the State that this petitioner has no right to present any such application to the Court below for the simple reason that the Court had already passed an order directing confiscation of the muddamal property in the case, and since his remedy against that order was only before the Superior Court such as the Appellate Court or Revisional Court, and as he had already availed of that opportunity, and when his application had come to be rejected by the High Court on 8-9-1965, he cannot reagitae the same question even if the order is found to be illegal or unjust, and more particularly after the period of limitation under Article 131 of the Limitation Act was over.

4. Before we consider the legality, propriety or otherwise of the order of confiscation passed by the learned Magistrate, in view of the contentions raised, it is essential to consider whether the petitioner has a right to come in revision in this Court in respect of an order passed by the learned Magistrate on an application presented by him on 17-9-1965, and if so whether this Revision Application is in time. The contention

of Mr. Acharya is that this application can be treated both under Section 520 as also under Section 435 or 439 of the Criminal Procedure Code. As I said above there are two prayers in the application one for setting aside the order of confiscation of the auto rickshaw passed on 21-4-1965 at the conclusion of the trial and that obviously cannot be set at naught by the same Court, though no doubt it had authority to consider any such application wherein claim of any muddamal property if made during the pendency or at the conclusion of the trial, under Section 517 of Criminal Procedure Code. In the case of Natwarlal Damodardas v. State, Criminal Revn. Appln. No. 156 of 1967, decided by me recently on 31-1-1968 (Guj) section 517(1) of the Code was considered, and having regard to the use of words "any person claiming to be entitled to possession thereof" therein, and in agreeing with the view taken by Raju J. in Mohamed Yusuf v. Jivraj Premjibhai, ILR (1963) Guj 1002, while no difficulty arises in passing an order regarding disposal of the property at the end of the trial affecting the parties in the case, as it can consider their claims, but when no such claim or right to possession was made by a third party, the Court cannot be required to take any notice of any such supposed claim. But if the claim is made by any third party before the Court even during the pendency of the trial, that claimant has a right to be heard about his claim at the end of the trial and before passing any orders under Section 517(1) of the Code. In the present case, however, the Court appears to have before it the claim of Gokaldas, and it had come to be rejected. Thus the learned Magistrate cannot be said to be in any way wrong in the order he passed in the case. This applicant was, however, not a party to the proceeding. Nor was he a witness in regard to the muddamal property so as to infer knowledge to him with regard to the trial. He is a third party-claimant, and in my opinion, he should have, therefore, made a claim before that Court so as to enable that Court to deal with his claim while passing an order under Section 517(1) of the Code. Not having so made a claim, he cannot claim it in that Court as the order was already passed, and in that event, his remedy lay by preferring an appeal or revision against that part of the order, and it is only if that order is set aside that his claim can be considered by the original Court. The learned Magistrate was, therefore, right in rejecting his application as, he cannot reopen the matter and revise his own order of 21-4-1965.

5. The question then is whether this revision application lies against the order passed by the learned Magistrate. It was

said that this may be treated as an application in revision under Section 520, or even under Section 435 or 439 of the Criminal Procedure Code and at any rate, the High Court exercising supervising jurisdiction over subordinate Courts can set aside an order of confiscation, if found to be illegal and unjust and do justice to the party affected thereby. Now Section 520 of the Criminal Procedure Code provides:

"Any Court of appeal, confirmation, reference or revision may direct any order under Section 517, Section 518 or Section 519, passed by a Court subordinate thereto, to be stayed pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just."

Since the order of confiscation of muddamal property was passed under Section 517 1 would set out the relevant portion of that provision also:—

"517(1): When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise or any property or document produced before it or in its custody or regarding which any offence appears to have committed, or which has been used for the commission of any offence."

On a plain perusal of Section 520, it appears to be an enabling provision, and confers no right as such to any person for filing the appeal or an application in revision thereunder. By this provision the Court of Appeal or any Court of Revision, . . . has been empowered to modify, alter or annul any such order that may have been passed under Sections 517, 518 or 519 and make any further orders that may be just. It follows, therefore, that if any appeal or revision against the order in the case were before the Court of Appeal or Revision it could have considered the legality or propriety of the order passed therein under Section 517 of the Criminal Procedure Code, even if no appeal or revision against that part of the order under Section 517 of the Code was before it. The question, however is whether any such Court can entertain and decide any such question when no appeal or revision is filed against the main case. In other words, whether any appeal or revision lies against any such order affecting a third party who was not before the Court in the main case under Section 520 of the Criminal Procedure Code. Such a question arose before the Division Bench of the Nagpur High Court in *Nandu v. Dhasada*, 1967 MPLJ 67 viz. as to whether an appeal lies under Section 520 of the

Code against an order passed by a Criminal Court under Section 517 of the Code, and the answer to the same can well be found in the observations which run thus:—

"On the whole, we think that the concurrence of opinion on this point is that S. 520 of the Code of Criminal Procedure does not confer a right of appeal but is only an enabling section creating a supervisory power in Courts of appeal, confirmation, reference or revision. These Courts can pass the order in the main case, or if no appeal has been filed against the main case, can be moved to pass such order as they think fit in respect of the property involved in the criminal case. It may be pointed out that the subordination of the Courts according to the better view is to be taken into account in determining the forum for the exercise of such supervisory powers. It is not necessary that the Court of appeal must every time be the Court of appeal to which an appeal against the main decision can be taken."

The same observations can well apply to 'revision' contemplated in that section and, therefore, it can be held that while the appeal or revision against that order of confiscation as such cannot lie, under Section 520 of the Code, such a Court of Appeal or Court of Revision can be moved to pass such an order as it thinks fit in respect of property involved in the criminal case. That power can thus be exercised by this Court which is both a Court of Appeal as also of Revision, in any such matter brought to the notice of the Court. But apart from that position, the revisional powers of the High Court are wide enough under Sections 435 and 439 of the Code, to consider the legality or propriety of any such order passed in any case by any subordinate Court, and they can be exercised by the Court even suo motu or on being moved by any party affected by any such order. In the case of *Har Bhagwandas v. Diwan Chand*, AIR 1960 Madh Pra 195, a similar question had arisen and it was held that even after the appeal or revision against the main order in the case is disposed of, an application under Section 520 would lie to the Court. Even if when the matter does not come up before High Court at all, the appellate Court can be moved by way of original application. Then the observations are that even a revision under Sections 435 and 439 of the Code would lie for the purpose. Thus while this Revision application may not so strictly lie under Section 520, it can be treated as an application invoking exercise of powers by this Court under Section 520 of the Criminal Procedure Code. In any event, the Court can exercise powers under Sections 435 and 439 of the Criminal Procedure Code, and

therefore the present application whether against the order passed by the learned Magistrate or not, it can be heard, and the validity or propriety of the orders regarding the disposal of property etc. passed under Section 517 of the Code, can well be raised, set aside or modified by this Court. The decision of this Court in *Kanchanlal Somlal v. State*, 1963-4 Guj LR 102=(AIR 1963 Guj 223) also leads support to the same.

6. It was then pointed out by Mr. Thakar that he had preferred a revision application against the order of confiscation passed in the case, and since it was rejected, he cannot be allowed to re-agitate the same. As already pointed out hereabove, the application was not decided on merits and it had come to be withdrawn with the Court's permission, with a view to file an application to the original Court. He had then filed an application in the lower Court, and it is against that order apparently that he has come before this Court. In these circumstances, there can therefore, be no bar to this application, as it was not decided on merits. It was on a probably doubtful position of law, that he withdrew the application and at any rate it was obviously a bona fide act on his part.

7. It was next urged by Mr. Thakar the learned Assistant Government Pleader for the State that the application should be filed within 90 days from the date of the order of confiscation of the property under Art. 131 of the Indian Limitation Act. The order was passed on 21-5-1964 and the application either to the trial Court or to this Court is obviously beyond 90 days provided therein, it being against an order passed under the provisions of the Criminal Procedure Code. On the other hand, it was pointed out by Mr. Acharya that in respect of any application under Section 520 of the Code before this Court, there would not arise any question of limitation within which he must come in revision. In support thereof he invited a reference to a case of *Kanshi Ram v. Emperor*, AIR 1924 Lah 75, where it was held that no period of limitation was prescribed for an application for restoration of property under section 517 and it can be made within a reasonable time from the date on which the accused is acquitted of the crime with which he was charged. Then it is observed that the words "and make any further orders that may be just" in Section 520 obviously intended to cover cases of this nature and to enable superior Courts to pass proper orders in cases where property has been erroneously disposed of under Section 517. Now such a question would not arise, once it is found that this Revision Application can be treated as an application invoking the supervisory powers of a Court of Appeal

or Revision in relation to any such order passed under Section 517, and that can be exercised by the Court at any time when it comes to its notice or is brought to its notice by any such party. This point would therefore, have only academic interest, and if any party were to come in revision or appeal against that order, the provisions of Limitation Act would no doubt govern. Since the matter was argued from this point of view, I would consider the same. Now under the old law of limitation no such provision as we have now Article 131 under the amended Act of Limitation, 1963, was there. The case relied upon by Mr. Acharya may not, therefore, apply. But now in the new amended Limitation Act, 1963, we have Article 131, namely added, whereby period of limitation of 90 days has been provided "from the date of the decree or order or sentence sought to be revised for the exercise of its powers of revision by any Court under the Civil Procedure Code or Criminal Procedure Code, 1898". The order of confiscation passed by the learned Magistrate under Section 517 of the Criminal Procedure Code is obviously an order under the Criminal Procedure Code and is sought to be revised by the Court in exercise of its power of revision. In my view, therefore Article 131 would apply and the period contemplated therein ordinarily would run from the date of the order of the confiscation of the muddamal auto rickshaw, which was 21-4-1965. Now there is no doubt that this period of limitation would clearly govern the party to the proceeding who comes in revision of any such order. But the present petitioner was not a party to the proceeding and it would be, therefore, difficult to say that he knew of the order on the date it came to be passed by the learned Magistrate. If he can move the Court, it appears reasonable and fair that the period should run from the date of his knowledge of that order in the case. In this respect I would refer to case of *Harish Chandra v. Deputy Land Acquisition Officer*, AIR 1961 SC 1500, where the question arose as to whether the expression "the date of the award" in proviso (b) to Section 18(2) of the Land Acquisition Act, 1894 must mean the date when the award is either communicated to the party or is known by him either actually or constructively. Their Lordships of the Supreme Court said that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order, the making of the award must mean either actual or constructive communication of the said order to the party concerned. So the knowledge of the party affected by the award made by the

Collector under Section 12 of the Land Acquisition Act, 1894 either actual or constructive is an essential requirement for fair play and natural justice. Their Lordships then observed that it would be unreasonable to construe the words "from the date of the Collector's award" used in the proviso to Section 18 in a literal or mechanical way. Those observations were followed by this Court in Criminal Reference No. 75 of 1966, the judgment whereof was delivered on 23rd February 1967, where a similar question had arisen with regard to the provisions contained in Section 488(6) of the Criminal Procedure Code. In my opinion, therefore, the period of limitation would have to be counted not from the date of the order passed by the learned Magistrate in the case namely 21-4-1965 but from the date when this petitioner came to know about. He can be said to have come to know on 14-6-1965 when he presented the revision application. If we calculate the period of 90 days from that date the application should have been filed by the petitioner in the trial Court on or before 12-9-1965. There has been, therefore, thus delay of 5 days. That deserves to be condoned the same having been obviously due to misunderstanding of the position of law or at any rate due to time spent in bona fide having his remedy in the High Court. In fact that was a correct remedy and at that stage he was already in time. This is a fit case where such delay can well be condoned. But as already stated above this Court can pass just orders under Section 520 or under S. 439 of the Criminal Procedure Code, now that the matter is brought to our notice for invoking revisional or supervisory jurisdiction of this Court. I may incidentally observe that the revision application No 181 of 1965 preferred by Gokaldas against that order cannot come in his way for the reason that this applicant was not a party to that proceeding.

8. The material question, however that arises to be considered is as to whether the order of confiscation passed by the learned Magistrate on 21-4-65 in the Criminal Case No 1201 of 1964, under Section 517(1) of the Code is illegal and improper requiring interference by this Court. I have already set out Section 517(1) of the Code under which the order has been passed by the learned Magistrate. On a plain reading of this section, it is clear that the Court has every authority and power to exercise discretion in making any order for the disposal of the muddamal property before him in any case. That can be done by passing an order "for disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession of any property or document produced before it

or in its custody or regarding which any offence appears to have committed or which has been used for the commission of any offence." Now the learned Magistrate has observed in his judgment, while passing such order in the end, that he "agreed with the learned Police Prosecutor that use of such vehicle makes the commission of such offence easy and, therefore, in his opinion, since five gutter covers were found from the auto rickshaw it was liable to be confiscated to the State." In other words, he directed it to be confiscated to the State, as in his view it was used in commission of that offence of theft. Now the words "which has been used for commission of an offence" have to be read and interpreted in a reasonable manner. The accused was going away in that rickshaw and in that were put the stolen articles. The auto rickshaw, therefore, does not necessarily become an article which can be said to have been used in the commission of an offence of theft. It was not an instrument with which that theft was committed, that it could be destroyed or confiscated. The theft was already committed, and the mere fact that the stolen property was placed in a rickshaw whereby he was going away, cannot be called an instrument used in commission of offence. If that were so, any motor car driven by any person from which a stolen property is found can well be taken as used in the commission of the offence. In that event the car may have to be confiscated to the State. Such a view hardly sounds in any way so reasonable or proper. I was referred to some cases by Mr. Acharya, in this respect, and I will refer to them in brief. In *Phula Singh v. Emperor*, AIR 1931 Lah 565, a motor driver was prosecuted for an offence of causing grievous hurt while driving the car rashly and negligently under Section 338 of the Indian Penal Code. On his conviction the car was confiscated to the State as one used for commission of the offence under Section 516-A of the Criminal Procedure Code. It was held that it would be straining the language to hold that the motor car was used for the commission of the offence within the meaning of Section 516-A, Criminal Procedure Code. In *Jarip Gazi v. Emperor*, (1904) 8 Cal WN 887, the point arose as to whether the confiscation in respect of two boats passed by the Court should be set aside. The facts of that case were that some persons broke into the granary of the complainant at night time and were carrying away two sacks of paddy. Those culprits left the sacks of paddy behind and managed to get into boats and tried to escape. They were pursued and they were then prosecuted for an offence under Section 457 of the Indian Penal Code. The accused were convicted in

respect thereof and the two boats in which the accused had run away were directed to be confiscated by the Magistrate on the ground that they were used for the commission of the offence under Section 517 of the Criminal Procedure Code. The matter was taken in revision in the High Court. The High Court while setting aside the order observed as under:—

"We hardly think that such could have been the intention of the Legislature. A man may use a lathi or other instrument for committing an offence. No doubt such a weapon can be dealt with under the section in question, but if the interpretation put by the Magistrate upon the Section were sound, one might conceive a case in which the house used by thieves or counterfeiters of coin for carrying on their unlawful trade would be liable to confiscation. Such an interpretation has never been given to this section. Apart from the question of law we think that the confiscation of the boats which apparently were hired by the petitioners would be very unjust to the owners."

Another case to which my attention was invited by Mr. Acharya was one of *In re, Abdul Azeez*, AIR 1944 Mad 59. In that case the accused was charged under Section 65, City Police Act, in connection with some hides which he was found carrying in a cart. He was charged only in respect of the hides and not in respect of the cart, but all the same the Magistrate directed the confiscation of the cart as well. It was then held in that case that the offence being only in respect of the hides there was no justification for passing an order, in respect of the cart confiscating it. The only order that ought to have been passed was an order directing the return of the same to the accused from whose possession it was seized. Apart from this some observations made in *Suleman Issa v. State of Bombay*, 56 Bom LR 1180=(AIR 1954 SC 312) may well be quoted here: "The powers of the Court, under Section 517 of the Criminal Procedure Code no doubt extend to confiscation of property in the custody of the Court, but it is not every case in which the Court must necessarily pass an order of confiscation irrespective of the circumstances of the case. It is possible to conceive of cases where the subject matter of the offence may be property which under the law relating to the offence is liable to be confiscated as a punishment on conviction. The section contains a general provision for disposal of the property in the circumstances mentioned in the latter part of the Section. Confiscation is not the only mode of disposal of property and is singularly inappropriate in a case where the accused is prosecuted for an offence punishable with the maximum sentence of 3

months and a fine of Rs. 100/ under Section 61-E of the Bombay District Police Act. By reference to all these authorities, my attempt was to show that much though the learned Magistrate has powers to confiscate any such property under Section 517 of the Criminal Procedure Code, he has to exercise his powers in a reasonable and judicial manner. In the present case it is too much to say that the auto rickshaw was used in commission of an offence of theft in respect of the catch-pit covers from the Municipal gutters. All that he did was that he placed the stolen property in it and went away in that rickshaw and for that reason it cannot be said that rickshaw was used in commission of that offence. The order is not only, therefore, illegal, improper but also very unjust to the real owner of the auto rickshaw. It is, therefore, liable to be set aside.

9. Once that order is set aside the trial Court would have to consider the claim made by this applicant as also by any person who can be said to have any interest therein. During the course of the trial it transpired that Gokaldas had made a claim in respect of that auto rickshaw. He would be a person interested and that way it would be necessary to give him an intimation by the Court while determining the claim sought to be made by the present petitioner in this case. It may well be necessary to issue notice to one Balamal Metlani in whose possession that auto rickshaw was and from whom the accused is said to have taken. The learned Magistrate is, therefore, directed to issue suitable notices to those persons interested in the auto rickshaw and then after holding the proper inquiry with regard to the same pass orders under Section 517(1) of the Criminal Procedure Code.

10. The result, therefore, is that the order passed by the learned Magistrate on 21-4-1965 in the original Criminal Case No. 1201 of 1964 in so far as it directs confiscation of the auto rickshaw, muddamal property before the Court is set aside. This matter shall be sent back to the Court of the learned Magistrate. On receipt of the papers he shall issue notices not only to this applicant but also to two other persons such as Gokaldas Kanjibhai and Babubhai Noorbhai as also the accused in that case and then after making suitable inquiry with regard to their being entitled to claim for possession thereof pass suitable orders under Section 517 of the Criminal Procedure Code.

Order accordingly.

AIR 1970 GUJARAT 32 (V 57 C 5)

J. M. SHETH, J.

B. Kanjibhai and others, Applicants v. Mohanraj Rajendrakumar, Opponent.

Civil Revn. Appns. Nos. 585 and 586 of 1968 D/- 9-7-1968 against decision of Judge, S.C.C. at Ahmedabad D/- 23-4-1968.

(A) Ahmedabad Small Causes Court Rules, R. 39 — Suit under Order 37 of Civil P. C. — Triable issues regarding jurisdiction and liability as partners — Issues raised not found to be sham — Unconditional leave to defend, held, should be granted — (Civil P. C. (1908), O. 37, R. 3).

In suit filed under O. 37 of Civil P. C. for recovery of price of goods sold and delivered to the defendants, some of them applied for leave to defend the suit alleging lack of jurisdiction in the court and denying liability to pay the suit debts on the ground that they were not partners of the defendant firm. The trial court, though it found that the affidavits raised triable issues about jurisdiction and partnership, granted conditional leave to defend on depositing into court the amount claimed in the suit.

Held, on revision, that once the trial court found that the affidavits raised triable issues and there was nothing to show that the issues raised were sham and not bona fide, regarding which the trial Court had no say, unconditional leave to defend ought to have been granted. AIR 1964 Guj 81 & AIR 1958 SC 321, Foll. (1961) 3 All ER 681, Ref.

(Paras 10 & 11)

(B) Civil P. C. (1908), O. 37, R. 3 — Defence if bona fide — Court ought to decide judicially and not arbitrarily. AIR 1958 SC 321, Foll.

(Para 10)

(C) Civil P. C. (1908), O. 37, R. 3 — Application for leave to defend — Nature of defence alone to be examined at that stage — Proof let in only when leave to defend is granted.

At the stage of application for leave to defend the suit all that the Court has to determine is whether 'if the facts alleged by the defendant are duly proved', they will afford a good, or even a plausible answer to the plaintiff's claim. Only the nature of defence has to be examined at that stage. The stage of proof can only come after the defendant has been allowed to enter appearance and defend the suit. Therefore, where the facts alleged in the affidavit in support of an application for leave to defend are clear and precise, they could not be brushed aside as being vague merely because the evidence by which it is to be proved was not brought on record at that stage. AIR 1958 SC 321, Foll.

(Para 10)

THE All India Reporter

1970

Jammu & Kashmir High Court

AIR 1970 JAMMU AND KASHMIR 1
(V 57 C 1)

JASWANT SINGH, J.

Nazir Mesiah, Applicant v. The State,
Respondent.

Criminal Misc. Appln. No. 49 of 1968,
D/- 30-11-1968.

Criminal P. C. (1898), Ss. 497, 498 —
Non-bailable offence registered against ac-
cused and warrant of arrest issued —
Held, as accused was liable to be arrested
and as such under threat of arrest and
he having surrendered himself before
court, was entitled to ask for bail: Case
law discussed. (Para 9)

Cases Referred: Chronological Paras

(1966) AIR 1966 Guj 146 (V 53) =
1966 Cri LJ 746, State of Gujarat
v. Govindlal Manilal

(1954) AIR 1954 Hyd 55 (V 41) =
1954 Cri LJ 458, Sunder Singh
v. The State

(1954) AIR 1954 Raj 279 (V 41) =
1955 Cri LJ 66, Juharmal v.
State

(1950) AIR 1950 EP 53 (V 37) =
51 Cri LJ 480 (FB), Amirchand
v. The Crown

I. D. Grover, for Applicant; Advocate
General, for the State.

ORDER:— This is an application under
Sections 561-A and 498 of the Code of Cri-
minal Procedure for quashing the proc-
eedings pending against the applicant
Nazir Mesiah, who is one of the accused
in F. I. R. No. 108 of 1968 relating to
Thanna Saddar Jammu, in the Court of
the Chief Judicial Magistrate, Srinagar,
or in the alternative for his release on
bail.

2. I have heard Shri Inder Das appear-
ing in support of the application as also

the learned Advocate General appearing
for the State.

3. The application under Section 561-A
Cr. P. C., has not been seriously pressed
by the learned counsel for the applicant.
Nor have I sufficient material to warrant
quashing of the proceedings against the
applicant at this interlocutory stage. The
prayer for quashing the proceedings
pending against the applicant is, there-
fore, rejected.

4. The only other question that arises
for consideration and determination is
whether this court has got power to re-
lease the accused when he has not been
actually arrested.

Section 498 Cr. P. C. which governs the
matter runs as follows:—

“(1) The amount of every bond executed
under this Chapter shall be fixed with
the due regard to the circumstances of
the case, and shall not be excessive, and
the High Court or Court of Session may
in any case, whether there be an appeal
on conviction or not direct that any
person be admitted to bail or that the bail
required by a police officer or Magistrate
be reduced.

(2) A High Court or Court of Session
may cause any person who has been ad-
mitted to bail under Sub-section (1) to be
arrested and may commit him in
custody.”

5. In AIR 1954 Raj 279, it has been
held that there must be some kind of res-
traint to him before a person who appears
before the court is granted bail by the
court and that neither the High Court
nor the subordinate courts have power
under the Code of Criminal Procedure to
grant bail to a person seeking bail if he
has not been arrested or detained in cus-
tody or brought before them or no war-
rant of arrest or even an order in writing
for his arrest under Section 56 Cr. P. C
has been issued against him.

6. In AIR 1954 Hyd 55, it has been held that where a non-bailable offence has been registered against the accused, the threat and the power of the officer in charge of investigation of arresting the accused is always hanging on his head and that is a sufficient restraint for the purposes of Section 497 Cr. P. C.

7. In AIR 1966 Guj 146, it was held that a person merely accused or suspected of an offence cannot ask for bail, by appearing in court unless he is actually under arrest or a warrant of arrest has been issued and he being liable to arrest has appeared before the Court.

8. In AIR 1950 East Punj 53 (FB) it has been held that in case of a person who is not under arrest but for whose arrest warrants have been issued, bail can be allowed if he appears in court and surrenders himself.

9. The legal position that emerges from the aforesaid authorities is that for exercise of power under Sections 497 and 498 Cr. P. C. the person asking for bail must be under some sort of restraint or a warrant of arrest must have been issued against him. As not only a non-bailable offence has been registered against the applicant but warrant of arrest under Section 512 Cr. P. C. has according to his affidavit been issued against him, I cannot but in the light of the aforesaid rulings hold that the applicant is liable to be arrested and as such as under a threat of arrest. Thus a warrant for his apprehension having been issued under Section 512 Cr. P. C. and he having surrendered himself before me, I think he is entitled to ask for bail. As the other accused namely O. N. Chadda, Bimal Kumar and Himmat Singh have already been released on bail vide my order dated 25th November, 1968, and as the case of the applicant appears to stand at par with them, I am of the opinion that he should also be released on bail. I, therefore, direct that the applicant be released on his furnishing bail and a personal recognizance bond to the satisfaction of the Chief Judicial Magistrate, Srinagar.

10. The learned counsel for the applicant has undertaken to cause the attendance of the applicant before the Chief Judicial Magistrate, Srinagar, on the 2nd December, 1968.

Order accordingly.

AIR 1970 JAMMU AND KASHMIR 2 (V 57 C 2)

S. M. FAZL ALI C. J. AND
JASWANT SINGH, J.

Munshi Ram and others, Petitioners v. Bell and others, Respondents.

Civil Revn. No. 84 of 1968, D/- 5-3-1969 against Order of Sub. J., Kathua, D/- 23-1-1968.

Civil P. C. (1908), S. 9 — Jurisdiction of Civil Court — Implied exclusion not to be inferred — Question to be decided on allegations in plaint — Suit for two or more reliefs — One of them cognizable by Revenue Court — Jurisdiction of Civil Court not barred — (Tenancy Laws — J. & K. Tenancy Act (2 of 1980) S. 85(3) (a) — AIR 1916 Lah 86 held impliedly overruled by AIR 1962 SC 547.

Where a suit is brought for two or more reliefs, one of which is cognizable by the revenue court but the others are not, then the jurisdiction of the civil court is not ousted. (Para 15)

It is well settled that no court is to infer an implied exclusion of the jurisdiction of the Civil Court. There must be a specific provision barring the jurisdiction of the civil court. Further to determine the question of jurisdiction, the Court has to look into the allegations made in the plaint and not in the written statement.

Thus where the prayer in the plaint was for declaration that the plaintiff was the occupancy tenant of the land and to this prayer, another prayer was added for permanent injunction.

Held, that the added prayer was not a mere surplusage but formed an integral part of the main relief and there being no provision in the Tenancy Act by which a revenue court was empowered to grant a relief of injunction, the Civil Court had jurisdiction to entertain the suit. AIR 1916 Lah 86 held impliedly overruled by AIR 1962 SC 547; AIR 1968 All 369 (FB) & AIR 1962 SC 547 & AIR 1957 Raj 342 & AIR 1954 All 766 & (1964) 2 Andh WR 465, Rel. on. (Paras 5 & 10)

Cases Referred: Chronological Paras
(1968) AIR 1968 All 369 (V 55) =
1968 All LJ 595 (FB), Raja Ram v. State of U. P. 3
(1964) 1964-2 Andh WR 465.
K. Naganna v. S. K. Venkamma 14
(1962) AIR 1962 SC 547 (V 49) =
(1962) 3 SCR 673, Magiti
Sasamal v. Pandab Bisoi 3, 11
(1957) AIR 1957 Raj 342 (V 44) =
1957 Raj LW 277, Nopla v. Mula 12
(1954) AIR 1954 All 768 (V 41) =
1954 All LJ 669, Angnu v. Mahabir 13
(1953) AIR 1953 All 729 (V 40) =
1953 All LJ 399, Mohd. Zahir Hasan v. Dularey 7

(1940) AIR 1940 PC 105 (V 27)=
67 Ind App 222, Secy. of State
v. Mask & Co. 3
(1927) AIR 1927 Lah 35 (V 14)=
98 Ind Cas 875, Hari Shankar
v. Nazirkhan 10
(1916) AIR 1916 Lah 86 (V 3)=
34 Ind Cas 209, Ibrahim v. Akbar 11
B. L. Suri, for Petitioners; O. P. Malik,
for Respondents.

S. M. FAZL ALI, C. J.:— This application arises out of an order passed by the trial court of the sub-Judge Kathua holding that the present suit is cognizable by the Civil Court.

2. The plaintiff brought a suit alleging that he was the occupancy tenant of the land in question, having purchased the occupancy rights from the defendants, and prayed for a declaration to this effect and also for a permanent injunction restraining the defendant from interfering with the possession of the plaintiff. The trial court was of the view that on the allegations made in the plaint the case was cognizable by a civil court and not by the revenue court. In revision the point raised before the learned single judge was that as the suit fell within the four corners of Section 85 (3)(a) of the J. & K. Tenancy Act, the jurisdiction of the civil court was clearly barred. The learned single Judge after hearing the counsel for the parties has referred the following point for our decision:—

“Has the civil court jurisdiction to entertain a suit when a prayer for permanent injunction is added to the prayer for declaration to the effect that the plaintiff is the occupancy tenant of the land.”

3. We have heard counsel for the parties. The learned counsel for the petitioner relied upon the decisions of the Allahabad and the Lahore High Courts in support of his contention that the present suit being clearly covered by the first group of Section 85 (3) (a) of the Tenancy Act was not cognizable by the civil court. On the other hand the counsel for the respondent has relied on other decisions to show that since the suit was also for a permanent injunction it could not be entertained by a revenue court which was not entitled to give a relief with respect to the prayer for injunction. In order to determine this question it will be necessary to analyze the provisions of the Tenancy Act which in our opinion appear to be different from the provisions of the Tenancy Act which were the subject matter of interpretation by the Allahabad High Court. Section 85 (3) (a) of the J. & K. Tenancy Act runs thus:

“The following suits shall be instituted in and heard and determined by Revenue Courts and no other court shall take cognizance of any dispute or matter with

respect to which any such suit might be instituted — (a) suits by a tenant under S. 7-A (1) or otherwise, to establish a right of occupancy, or by landlord to prove that a tenant has not such a right.”

Counsel for the petitioner seeks to bring his case within the ambit of clause (a) referred to above inasmuch as according to him it is in substance a suit for establishing a right of occupancy against the defendant. It is well settled that in order to determine the question as to which court would have jurisdiction to decide the suit, the court has to look into the allegations made in the plaint and not in the written statement. In the plaint the allegation made by the plaintiff does not constitute a prayer for declaration of the status of an occupancy tenant simpliciter, but the plaintiff avers that he had purchased rights of occupancy from the defendant on the basis of which he seeks to base his title. Thus even on the allegations made in the plaint it would appear that a clear question of title is involved, namely, the validity of the transfer of the occupancy rights by the defendant to the plaintiff. Therefore, such a suit does not come *prima facie* within the purview of Section 83 (3) (a) (*supra*).

Even assuming, however, that the right to question the purchase of the right of occupancy by the plaintiff amounted to a right to establish the right of occupancy and is covered by Section 85(3) (a) of the Tenancy Act the question still remains whether or not there is any provision in the Tenancy Act which empowers the revenue court to grant relief for a permanent injunction. It is well settled that no court is to infer an implied exclusion of the jurisdiction of the Civil Court. Unless there is a specific provision barring the jurisdiction of the civil court, the same would not be said to be ousted. This principle was recently laid down in a Full Bench case of the Allahabad High Court in AIR 1968 All 369 (FB). Further more in *Magiti Sasamal v. Pandab Bissoi*, AIR 1962 SC 547, the same principle had been laid down by the Supreme Court in the following words:—

“It is true that having regard to the beneficent object which the legislature had in view in passing the Act its material provisions should be liberally construed. The legislature intends that the disputes contemplated by the said material provisions should be tried not by ordinary civil courts but by tribunals especially designated by it, and so in dealing with the scope and effect of the jurisdiction of such tribunals the relevant words used in the section should receive not a narrow but a liberal construction.

While bearing this principle in mind we must have regard to another important principle of construction, and that is that if a statute purports to exclude the ordin-

any jurisdiction of civil courts it must do so either by express terms or by the use of such terms as would necessarily lead to the inference of such exclusion. As the Privy Council has observed in *Secretary of State v. Mask & Co.*, 67 Ind App. 222 at p. 236—AIR 1940 PC 105 at p. 110.

"It is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied."

* * * *

"If the respondents contend that the jurisdiction of the civil court to deal with such a civil dispute has been taken away by Section 7(1), we must enquire whether Section 7(1) expressly takes away the said jurisdiction or whether the material words used in the section lead to such an inference or the scheme of the Act inescapably establishes such an inference. The relevance and materiality of both these principles are not in dispute."

In the case which was being considered by their Lordships of the Supreme Court, Section 7(1) of the Orissa Tenants Protection Act had laid down suits lying in five different categories which were not cognizable by a civil court. Their Lordships pointed out that all the five categories had to be carefully analyzed in order to see whether or not a particular suit falls within four corners of those categories before the jurisdiction of a civil court could be ousted. Similarly their Lordships held that any dispute regarding the existence of the relationship of landlord and tenant was beyond the ambit of the categories mentioned in the said Act.

4. On a parity of reasoning, therefore, it appears to us that if we analyze the suits contemplated by Section 85(3) (a) (supra) we do not find any category which includes a suit where a relief for injunction can also be granted by a revenue court. The position, therefore, is that there is no provision in the Tenancy Act by which a revenue court is empowered to grant a relief of injunction.

5. In the instant case the prayer of the plaintiff for injunction cannot be said to be a mere surplusage, but it forms an integral part of the main relief of declaration sued for by the plaintiff. Such a prayer not being cognizable by a revenue court, it is obvious that the suit can only be filed in a civil court and not in a revenue court.

6. We shall now deal with some of the authorities that have been cited before us.

7. In *Mohd. Zahir Hasan v. Dularey*, AIR 1953 All 729 it is true that suits for a permanent injunction under the U. P. Tenancy Act were held to be cognizable by a revenue court alone so as to bar the jurisdiction of the civil court. From a

perusal, however, of the relevant provisions, of the U. P. Act cited at pages 729-30 of the Report it would appear that the U. P. Act had two distinguishing features. In the first place Section 242 which had barred jurisdiction of the civil court was couched in a very comprehensive language and the words "or of any suit or application based on a cause of action in respect of which any relief could be obtained by way of any such suit or application" were naturally wide enough to include a suit for a permanent injunction. Furthermore the Explanation to Section 242 of the U. P. Act which ran thus:

"If the cause of action is one in respect of which relief might be granted by the revenue court, it is immaterial that the relief asked for from the civil court may not be identical with that which the revenue court could have granted."

made it absolutely clear that a relief of injunction also could be entertained by a revenue court.

8. In the J. & K. Tenancy Act however, the provisions which bar the jurisdiction of the civil court are not couched in such wide terms so as to bar suits by the civil court with respect to injunction also.

9. The other Allahabad authorities also are based on the special language of the U. P. Tenancy Act and are therefore not helpful to us in determining the question.

10. As regards AIR 1927 Lah 35, *Harl. Shankar v. Nazir Khan*, the facts of that case are clearly distinguishable because the suit was not for an injunction at all, and the only claim was one for declaration on the basis of ownership.

11. Another case relied on by the counsel for the petitioner was *Ibrahim v. Akbar*, 34 Ind Cas 209—(AIR 1916 Lah 86). This case no doubt supports the contention of the petitioner because it would appear that there also the suit was for a permanent injunction. In this case their Lordships relied merely on the fact that since one of the claims was for declaration it was cognizable by a revenue court and therefore the entire suit was not triable by a civil court. Their Lordships did not specifically consider the effect of the fact that there was no provision in the Tenancy Act providing for a relief regarding injunction. Furthermore the interpretation given by their Lordships does not appear to be in consonance with the principles laid down by the Supreme Court in AIR 1962 SC 547 (Supra). For these reasons we find ourselves unable to agree with the view expressed by their Lordships and record our respectful dissent therefrom.

12. In *Nopla v. Mula*, AIR 1957 Raj 342, it was clearly held by Bapna J. that a revenue court had no jurisdiction to

entertain a suit for issue of a permanent injunction which could only be granted by a civil court.

13. Even a Division Bench of the Allahabad High Court in *Angnu v. Mahabir*, AIR 1954 All 768 has endorsed this view and has observed as follows:—

"If a suit is brought in respect of an agricultural plot of land as also for the removal of constructions standing on it and for damages and also for an injunction, such a suit would lie in the civil court. The revenue court is not competent to grant all the reliefs and if all the reliefs cannot be granted by the revenue court, the suit would lie only in the civil court."

14. To the same effect is another case in (1964) 2 Andh WR 465.

15. We respectfully agree with this view and hold that where a suit is brought for two or more reliefs, one of which is cognizable by the revenue court but the others are not, then the jurisdiction of the civil court is not ousted.

16. For the reasons given above, we decide the question referred to us in the affirmative and hold that the civil court has jurisdiction to entertain the present suit. The application shall now be sent back to the learned single Judge for disposal on merits.

17. JASWANT SINGH, J.:— I agree.
Reference answered in affirmative.

AIR 1970 JAMMU AND KASHMIR 5 (V 57 C 3)

JASWANT SINGH, J.

Harbans Lal and others, Plaintiffs v. Union of India and another, Defendants.

Civil Suit No. 70 of 1967, D/- 17-2-1969.

(A) Fatal Accidents Act (1855), S. 1A — Jammu and Kashmir Fatal Accidents Act (17 of 1977 Sm.) S. 1 — Persons entitled to sue for compensation — Death caused by actionable wrong — Parents and grand-parents of deceased inter alia have a right to claim compensation — Principles on which compensation is to be awarded are same in State of Jammu and Kashmir as those in India and England — Compensation has to be proportionate to actual pecuniary benefit which dependants might reasonably expect to receive — AIR 1936 Mad 247 & AIR 1959 Punj 297 & AIR 1956 Cal 555, Ref. to.

(Para 26)

(B) Fatal Accidents Act (1855), S. 1A — Damages — Mode of assessment — Factors to be considered indicated — (Tort — Damages — Negligence resulting in death).

The standard for estimating the amount of damages in case of actionable negligence resulting in death must not be a subjective standard but an objective one and regard in this behalf is to be had to the earnings of the deceased at the time of his death, his future prospects, his life expectancy, the amount he would have spent on himself and on the support of his dependants, the property left by him and the like. AIR 1958 Bom 218 & 1942 AC 601 & AIR 1966 SC 1750 & AIR 1969 Bom 13 & AIR 1967 Orissa 116 & AIR 1967 Delhi 98, Rel. on. (Para 27)

(C) Tort — Vicarious liability — State servants — Liability of State for acts of its employees — Unless it is shown that employee was acting in exercise of sovereign power delegated to him by some law or rule and was doing something which could not be done by private individual, State cannot claim any immunity from tortious acts of its employees — Death caused by rash and negligent driving of a truck by defendant-2 who was a member of defence services of defendant-1, Union of India — Burden of proving existence of circumstances to claim immunity lies on defendants — No material on record to indicate that defendant-2 while driving military truck at time of accident was carrying on any peculiar duty of sovereign nature or that there was anything special about his employment — Defendant-1 held liable in damages. (1868) 5 Bom HCR App 1 & AIR 1962 SC 933 & AIR 1957 Raj 305 & AIR 1961 Punj 336 (FB) & AIR 1962 Punj 315 (FB) & AIR 1965 SC 1039 & AIR 1967 Delhi 98 & AIR 1967 Madh Pra 246 & AIR 1969 Bom 13, Rel. on. (Para 37)

(D) Limitation Act (1908), Art. 21 — Suit for compensation under Fatal Accidents Act — Limitation of one year starts from date of accident occasioning death viz. 14-2-1966 — Suit filed on 13-3-1967 — Excluding statutory period of notice suit held was within time (Para 39)

Cases Referred: Chronological Paras

(1969) AIR 1969 Bom 13 (V 56)=	
70 Bom LR 212, Union of India v. Sugrabai	28, 37
(1967) AIR 1967 Delhi 98 (V 54)=	
69 Pun LR (D) 125, Smt. Satyawati Devi v. Union of India	29, 36
(1967) AIR 1967 Madh Pra 246 (V 54)=	
1967 Jab LJ 260, State of M. P. v. Saheb Datta Mal	37
(1967) AIR 1967 Orissa 116 (V 54)=	
ILR (1967) Cut 506, Amulya Patnaik v. State of Orissa	29
(1966) AIR 1966 SC 1750 (V 53)=	
(1966) 3 SCR 649, Municipal Corporation, Delhi v. Subhagwanti	28
(1965) AIR 1965 SC 1039 (V 52)=	
1965 (2) Cri LJ 144, Kasturi Lal Ralia Ram Jain v. State of U. P.	35

- (1962) AIR 1962 SC 933 (V 49) =
1962 Supp (2) SCR 989, State of
Rajasthan v. Mt. Vidyawati 38
- (1962) AIR 1962 Punj 315 (V 49) =
ILR (1962) 1 Punj 708 (FB),
Union of India v. Smt. Jasso 36
- (1961) AIR 1961 Punj 336 (V 48) =
63 Pun LR 231 (FB), Rup Ram
Kalu Ram Aggarwal v. Punjab
State 36
- (1959) AIR 1959 Punj 297 (V 46) =
61 Pun LR 683, Vanguard Fire
General Insurance Co. Ltd. v.
Sarla Devi 28
- (1958) AIR 1958 Bom 218 (V 45) =
59 Bom LR 1196, Dinbal R.
Wadia v. Farukh Mobedjina 27
- (1957) AIR 1957 Raj 305 (V 44) =
1957 Raj LW 404, Vidyawati
v. Lokumal 36
- (1956) AIR 1956 Cal 555 (V 43) =
Bir Singh v. S. M. Hashi Rashi
Banerjee 28, 35
- (1942) 1942 AC 601 = 111 LJ KB 418
Davies v. Powell Duffryn Associated
Colliers Ltd. 28
- (1936) AIR 1936 Mad 247 (V 23) =
ILR 59 Mad 402, Stanes
Motors Ltd. v. Vincent Peter 28
- (1868) 5 Bom HCR App 1 = Bourke
A.O.C. 166, Penninsular and
Oriental Steam Navigation Co. v.
Secy. of State for India 36
- Ishwar Singh, for Plaintiffs.

JUDGMENT:— The plaintiffs, parents and grandfather of one Brij Mohan Lal Sharma, have brought this suit claiming Rs. 60,000/- as damages and compensation for the death of the latter alleged to have been caused as a result of collision between Dodge Power Wagon Truck (B. A.) No. SA 8323 15 CWT driven in a rash and negligent manner by the second defendant and the Scooter driven by the said Brij Mohan Lal on the afternoon of the 14th February, 1966, on the National High Way near the Water Point, Satwari.

2. The plaintiffs' case as put forth in their petition of plaint is that the aforesaid truck was being driven by the second defendant, a member of defence services, in the course of his employment and as a part of his official duty as a servant of and for the purposes of the Union of India, the first defendant, from the side of Jammu cantonment towards the city, that the second defendant was driving the said truck "in a most rash and negligent manner and on the wrong side of the road", that when the truck reached near the Water Point it struck a rehra (a cart drawn by a horse) of one Gur Das Ram Megh of Khaur, Tehsil Ranbirsinghpura, District Jammu, which was going on its correct side of the road at usual pace, that on seeing the said truck coming in a very rash and negligent manner towards him on the wrong side of the road, the rehra driver in order to ward off the dan-

ger which he thought was imminent pulled his rehra to the extreme left side of the road but despite the precaution taken by him, the truck dashed against the right side of his rehra breaking its bamboo and right wheel, that after striking the rehra of Gur Das Ram and damaging the same the truck collided against Scooter No. PNQ 2021 which was being driven at a distance of about 20 yards from the rehra by the said Shri Brij Mohan Lal from Jammu city side towards the Cantonment side in consequence whereof the said Brij Mohan Lal was thrown off and was badly injured, that the Scooter got entangled in the said truck and was dragged for some distance in that position and was smashed, that the said Brij Mohan Lal was removed in an unconscious state to the hospital where he reached at 15-35 hours but despite the best efforts of the doctors attending on him, he succumbed to his injuries at about 16-45 hours on the same day, that the death of the said Brij Mohan Lal and smashing of his scooter was the immediate result of the rash and negligent driving of the second defendant, that the scooter was so badly smashed that the estimated cost of its repairs as assessed by the Insurance Company came to Rs 1988.10, that Shri Brij Mohan Lal was a young man of 26 years (having been born on 18-5-1940) and was working as the Territorial Manager, Fire Stone Tyre and Rubber Company of India Ltd, Jammu and was drawing a salary of Rs. 620/- per month plus an annual bonus of Rs. 1400/- and odd at the time of his death, that ordinarily the said Brij Mohan Lal would have served for about 34 years more i.e. still he would have attained the age of superannuation of 60 years, that he was a very competent and promising young officer and had a very bright future and in the normal course he would have earned increments and promotions and would have risen to a very high position in life, that even at the rate of the last salary drawn by him the total salary which he would have drawn upto the age of his superannuation would have been about three lacs and if the increments and promotions which he would have earned in the normal course are kept in view, then his total salary would have been more than twice the aforesaid amount, that over and above all this the said Brij Mohan Lal would have also got "employees" contribution provident fund and retirement gratuity, that the plaintiffs were being mainly supported by the said Brij Mohan Lal who was spending most of his salary on their maintenance and that of his grandmother who died shortly after the fatal accident, that the plaintiffs have been deprived of the financial assistance and support and have suffered a great mental shock and pain, and though they are entitled to much larger amount

of damages and compensation yet being unable to incur huge expense by way of court-fees etc. due to their financial difficulties, they claim Rs. 60,000/- only from the defendants, the second of whom is liable for his rash and negligent act and the first of whom being an employer is liable for the rash and negligent act of the second defendant who was driving the truck on official duty at the time he knocked down the said Brij Mohan Lal and smashed his scooter.

3. The suit was resisted in the first instance by both the defendants. In their joint written statement while admitting that the second defendant was driving the aforesaid military vehicle on 14-2-1966 at about 15 hours as a member of the Defence services as a part of his official duty and in the course of his employment for the purposes of defendant No. 1 from Jammu Cantonment side towards Jammu city side and that Shri Brij Mohan Lal was going on a Scooter from Jammu city side towards Cantonment at the time the accident took place and that he was removed in an unconscious state to the hospital where he reached at about 15-35 hours and despite the best efforts of the doctors he succumbed to his injuries at about 16.45 hours on the same day, the defendant denied that the accident was due to rash and negligent driving on the part of the second defendant. According to them, the second defendant while returning to his Unit No. 998 INDPT ASC was faced with a grave situation as a result of reckless driving of a tonga by Shri Gurdas Ram at the Satwari Water Point at about 15.00 hours. The defendants have contended that as a result of his careless driving, the tonga driver while passing by the aforesaid military vehicle lost control over his horse and took a sudden turn towards his right bringing his tonga in close contact with the hind wheel of the military vehicle, that accident was averted as the military vehicle was being driven on its own side at a normal and moderate speed of 18/20 Kmts. per hour, that soon after the said tonga passed by the military vehicle a scooter bearing No. PNQ 2021 driven very rashly and negligently by Shri Brij Mohan Lal abruptly appeared on the scene, that on observing the uncontrollable movement of the tonga Shri Brij Mohan Lal because of his rash and negligent driving could not control the scooter which he let loose after jumping from the same on his left side, that the moving scooter took a right turn and was "entrapped" in the right wheel of the military vehicle when the second defendant immediately applied his breaks and stopped the vehicle within a short distance, that the said vehicle being a very heavy one it was not possible to stop it instantaneously with the application of the breaks and that in this way the

scooter was damaged to some extent but Brij Mohan Lal was injured due to his own act of jumping from the moving scooter, and that the second defendant was in no manner responsible for the accident which the said Brij Mohan Lal met with. It has also been denied that Shri Brij Mohan Lal was a young man of 26 years and was working as a Territorial Manager in the Fire-Stone Tyre and Rubber Company of India Ltd. and was drawing a salary of Rs. 620/- in addition to the annual bonus of Rs. 1400/- per annum at the time of his death. It has also been denied that the plaintiffs were dependant for their maintenance upon the earnings of the deceased, Shri Brij Mohan Lal. or that Brij Mohan Lal was legally bound to maintain them. It has also been denied that any notice of the claim in accordance with law had been served on the defendants. It has been further averred that the plaintiffs have independent source of income and sufficient means of maintaining themselves. The defendants have further pleaded that second defendant "was discharging his duty in the course of defence service of defendant No. 1 and was thus performing the functions of sovereign nature" and in such circumstances no liability attached to either of the defendants. It is further pleaded that the suit is time barred.

4. On the pleading of the parties, the following issues were framed in this case, vide my order dated 29th February, 1968.

(1) Was the defendant No. 2 driving Truck No. BA SC-8323 15 CWT on 14-2-1966 at about 15 hours near Satwari Water point Jammu, in a rash and negligent manner or on the wrong side of the road? If so, was the defendant No. 2 responsible for the death of Shri Brij Mohan Lal Sharma and damage to his scooter No. PNQ 2021? O P P

(2) In case Issue No. 1 is proved in favour of the plaintiffs, are they entitled to any compensation? If so what is the quantum of such compensation? O P P

(3) (a) In case Issue Nos. 1 and 2 are found in favour of the plaintiffs are the defendants not liable to pay compensation to the plaintiffs for the death of Shri Brij Mohan Lal Sharma and damage to his aforesaid scooter? If so why? O P D

(b) Was the act in question done by the defendant No. 2 in the course of employment but in connection with sovereign powers of the State? If so are the defendants immune from liability? O P D

(4) Does the notice under Section 80 of the Code of Civil Procedure suffer from any defect? If so what is its effect on the suit? O P D

(5) Is the suit barred by time? O P D

(6) Has the High Court no jurisdiction to entertain and try this suit?

5. The plaintiffs closed their evidence on 3-5-1968 with regard to the issues the burden of proof of which lay on them and the defendants were directed to produce their evidence on 6-9-1968. When the case came up for hearing at Srinagar on 6-9-1968, it was found that despite the lapse of nearly four months since the last hearing no witness had been summoned by the defendants. Shri Abdul Karim Malik appearing for the defendants prayed for further time to produce evidence on behalf of his clients. The request made on behalf of the defendants was granted on payment of Rs. 100/- as costs to the other side and the case was fixed for 17-10-1968 as prayed for by Shri Malik. On the case coming up for hearing on 17-10-1968 Shri Malik again made a request for further time to produce his witnesses. The request for further adjournment was strongly opposed by the learned counsel for the plaintiffs but the same was granted on payment of Rs. 200/- as costs to the plaintiffs and the case was, thereafter directed to be put up at Jammu on 12-12-1968 as agreed to by the learned counsel for the parties. When the case came up on 12-12-1968, no one appeared on behalf of the defendants with the result that the case was set *ex parte* against them.

6. To prove the issues the burden of proof of which lay on them, the plaintiffs have examined:—

Gurudas Ram Rehra Driver, Dr. Samunder Singh, Shri Krishen Lal Assistant Sub-Inspector of Police, Shri Jal Bhagwan Saini, Shri Yog Raj, Shri Sham Lal Raina, Shri Kasturi Lal, Shri Amar Nath, and Shri Dharm Paul. In addition to these witnesses, Harbans Lal plaintiff No. 1 has also appeared as his own witness.

7. Before taking up the issues serially, it would, I think, be advantageous to give a synopsis of the evidence adduced by the plaintiffs.

(8 to 24) (After giving resume of evidence given by the plaintiffs and P.Ws. 1 to 9 His Lordship proceeded to deal with the issues and then recapitulating the evidence relevant to Issue No. 1 concluded:)

25. To sum up, the evidence adduced by the plaintiffs reasonably establishes that the second defendant was not only driving the military vehicle at a very high speed at the time of the accident but also on the wrong side of the road. If he had been a little vigilant and cautious his truck would not have struck the cart driven by Gurdas Ram on proper side of the road nor would it have collided with the scooter driven by Brij Mohan Lal, which was also moving on its correct side. Even after striking the rehra he did not swerve towards his left side where there was ample room but brought his truck in close proximity to the scooter and dashed against it knocking off Brij

Mohan Lal. On the facts and circumstances proved in the case, I have no hesitation in holding that there was a breach of legal duty on the part of the second defendant and it was his rash and negligent driving which was the direct, proximate and natural cause of the death of Brij Mohan Lal, who was in the prime of his life. Issue No. 1, is, therefore, decided in favour of the plaintiffs and against the defendants.

ISSUE No. 2.—

26. The second Issue which relates to reparation is the most difficult of all the issues in the case. It cannot be gainsaid that the Fatal Accidents Act, 1977 (1920 A.D.) of the State gives a right amongst other persons to parents including grandparents to claim compensation in case of death caused by actionable wrong. It is, however, the measure of reparation that presents the real difficulty. The principles on which the compensation is to be awarded in our State are the same as those on which it is awardable in England under the English Fatal Accidents Acts 9, and 10 Vict Chapter 93, known as the Lord Campbell's Acts and (The Indian) Fatal Accidents Act, 1855 (Act No. XIII of 1855). Section I of the State Fatal Accidents Act 1977 (1920 A.D.) Act No. XVII of 1977 which is a reproduction of Section I-A of (The Indian) Fatal Accidents Act, 1855 (Act XIII of 1855) provides that the compensation for the loss in case of fatal accidents has to be proportionate to the actual pecuniary benefit which the dependants of the deceased might reasonably expect to enjoy. Reference in this connection may also be usefully made to the decisions reported in AIR 1936 Mad 247, AIR 1959 Punj 297 and AIR 1958 Cal 555.

27. It needs to be emphasised that the standard for estimating the amount of damages in case of actionable negligence resulting in death must not be a subjective standard but an objective one and regard in this behalf is to be had to the earnings of the deceased at the time of his death, his future prospects, his life expectancy, the amount he would have spent on himself and on the support of his dependants, the property left by him and the like. The following observations made by Desai J. in *Dinbal R. Wadia v. Farukh Mobedjina*, AIR 1958 Bom 218 are apposite in this connection:—

"The standard must not be a subjective standard but an objective standard. Hypothetical considerations should not, as far as possible be permitted to augment or reduce the quantum of damage. All speculation and conjecture and considerations of sympathy and solatium have to be eschewed. Even so certain amount of guess work is liable to creep in. Mere speculative possibility of pecuniary benefit is not sufficient; the assessment must

be based on reasonable probability of pecuniary benefit. In cases of higher incomes this would also be affected by income-tax that the deceased would have paid on his income if his life had not been cut short. Some uncertain values of reduction resulting from considerations of the widow remarrying and other matters of doubt of an allied nature would have also to be borne in mind in arriving at the summation. The court has some discretion in fixing the measure of reparation and the important consideration would be the probable earning of the deceased and what is more important what amount the deceased would have probably spent for the support of his wife and children. Expectation of life of the deceased having regard to his age, bodily health and habits and the possibility of premature death is one of the other relevant considerations. The assessment cannot obviously be a matter of multiplication of the datum or basic figure of what the deceased would probably have spent for the maintenance of the claimants by the number of years of expectation of his life although this would have to be done in the first instance. The amount so calculated would have to be discounted to arrive at an equivalent in the sum to be decreed as immediately payable instead of yearly payments spread over a number of years. Where the deceased has left property which goes to the claimants the resulting acceleration of interest in that property would also be a factor of reduction in the final assessment."

28. The principles for estimating the compensation have been tersely stated by Lord Wright in a judgment of the House of Lords in *Davies v. Powell Duffryn Associated Colliers Ltd.* 1942 A. C. 601 at p. 617 in the following words:—

"It is a hard matter of pounds, shillings, and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertaining of which to some extent may depend upon the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned in to a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt."

In *Municipal Corporation of Delhi v. Subhawanti*, AIR 1966 SC 1750 where a clock tower situate in Chandni Chowk Delhi belonging to the Municipal Corporation of Delhi collapsed resulting in loss of

life, their Lordships of the Supreme Court after quoting section 1-A of (The Indian) Fatal Accidents Act, 1855 (Act XIII of 1855) approved the principles enunciated in the aforesaid judgment of the House of Lords. The dictum of the House of Lords as approved by the Supreme Court has been followed in one of the recent decisions of the Bombay High Court in *Union of India v. Sugrabai*, AIR 1969 Bom 13.

29. In *Amulya Patnaik v. State of Orissa*, AIR 1967 Orissa 116, Misra J. laid down that the following factors should be taken into consideration in determining the quantum of damages:

i. The amount of wages which the deceased was earning, the ascertainment of which may, to some extent depend upon the regularity of his employment.

ii. An estimate is to be made as to how much of that earning was required or spent on his personal and living expenses.

iii. The balance will furnish the basis which will be turned into a lump sum by capitalising it; and

iv. This capitalised sum would be taxed down having due regard to uncertainties, for instance the widow might get remarried or might die, thus ceased to become a dependent.

In *Smt. Satyawati Devi v. Union of India*, AIR 1967 Delhi 98, it was observed as follows:—

"The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value in the hands of the plaintiff. No doubt, in such like cases, which are of frequent occurrence these days, certain rules relating to the measure or assessment of damages have gradually been evolved, yet in general there is no specific rule upon the matter and it is always left to the good sense of the court to assess as best as it can what it considers to be an adequate recompense for the loss suffered by the plaintiff. The assessment may well be a matter of great difficulty, indeed, in some cases one of guess work but the fact that it cannot be made with mathematical accuracy is no reason for depriving the plaintiff of compensation.

The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing, on the one hand, the loss to him of the future pecuniary benefit and, on the other any pecuniary benefit which, from whatever source, comes to him by reason of the death."

30. Bearing in mind the principles deducible from the above mentioned decided cases, let me scrutinize the evidence led in the case in so far as it is relevant to the various factors alluded to above and assess the amount of damages to which the plaintiffs (who manifestly fall within the categories of persons who can recover compensation under the Fatal Accidents Act) are entitled.

31. Life Expectancy of the deceased. Adverting first to the life expectancy of the deceased reference in the first instance has to be made to the deposition of Shri Harbans Lal plaintiff No. 1 who has examined himself as a witness in the case. According to him, Brij Mohan Lal who was the youngest of his four sons was born on 15-3-1940, was selected for service in the Firestone Tyre and Rubber Company in April 1963 and but for his premature death due to the aforesaid accident would have served the company for a period of 24 years and 3 months more. It also appears from his statement that he himself was born on 1st September 1901, that the age of his father, i.e. Brij Mohan Lal's grandfather, plaintiff No. 3 is 89 years, that the age of his mother was 87 years when she died in March 1966, that the age of his wife is 65 years, that the ages of his father-in-law and mother-in-law were 74 and 70 years respectively at the time of their death, that his wife's maternal uncle was 82 years when he died, that his wife's aunt was 95 years when she died, that his grandfather was 70 years when he died in 1915, and that his paternal aunt who is 80 years is still alive. The plaintiff has further stated that considering the ages of his ancestors and the average life of an Indian, he and his wife expect to live for two decades more and his father expects to live for another decade. The statement of Shri Harbans Lal plaintiff receives corroboration from the statement of Shri Amar Nath P.W. 7 who is the maternal uncle of the deceased. Further the fact that the deceased was a healthy young man possessed of good character and temperate habits is proved not only from the statement of Shri Harbans Lal plaintiff but also from the statements of Shri Sham Lal Raina P.W. 6, Sales Assistant, Firestone Tyre and Rubber Company, Jullunder, Shri Amar Nath P.W. 7, maternal uncle of the deceased and Shri Kasturi Lal P.W. 8, the landlord of the deceased, Shri Sham Lal Raina has also proved the photographs of the deceased appearing in the Issues of the Firestone News Journal for the months of October 1965, and January 1966 marked Ex. P.W. 6/2 and Ex. P.W. 6/1 respectively produced for the purpose of showing that the deceased was a handsome tall young man and had robust physique. The testimony of these witnesses in regard to the sound health of the deceased is also supported by the statement of Dr. Samunder Singh P. W. 2 who performed the post mortem examination of the dead body of the deceased. According to Dr. Samunder Singh, the dead body was stout, and healthy and the deceased Brij Mohan Lal who was twenty-six years of age at the time of his death did not appear to suffer from any disease. Thus from the evidence led by the plaintiffs it can

be safely concluded that the deceased would in the ordinary course have easily attained the age of superannuation which according to Shri Sham Lal Raina is 60 years in case of the employees of the Firestones Tyre and Rubber Company.

32. The earnings of the deceased and his future prospects. Under this head which relates to the wages and earnings capacity of the deceased reference has to be made to the statements of Shri Harbans Lal plaintiff No. 1, and Shri Sham Lal Raina P. W. 6, Shri Harbans Lal plaintiff has stated that on the date of his death the deceased, who was a graduate of the Punjab University, was getting more than Rs. 1000/- by way of salary, allowances and bonus in addition to other amenities to which he was entitled. He has further stated that if the deceased had remained alive he would have earned several lacs by way of salary etc. in addition to the gratuity and provident fund. The statement of Harbans Lal receives ample corroboration from the statement of Shri Sham Lal Raina P.W. 6 Sales Assistant in the office of the Firestone Tyre and Rubber Company at Jullunder, who has deposed that on 14-2-1966 when the death of the deceased, who was Territory Manager with Head quarters at Jammu, occurred he was drawing a salary of Rs. 611 per month besides Rs. 7/- per day as head quarter expenses and Rs. 17-50 per diem as T. A. for the days he remained on tour, and that over and above his emoluments he was getting transport and other incidental charges etc. The witness has further stated that the superannuation age of the employees of his company is 60 years, that the work of Brij Mohan Lal was satisfactory and he was due for promotion, that apart from salary and allowances every employee of his company is entitled to bonus at the rate of 20% of his pay, that if Brij Mohan had survived there was every chance of his becoming a District Manager whose pay ranges between Rs. 1500/- and Rs. 5000/- per mensem, that on retirement after the service of 20 years, the employees of his company are given 22 months pay as gratuity and that the company was contributing Rs. 49/- to the provident fund of the deceased.

33. From the foregoing evidence I have no manner of doubt in my mind that the deceased was earning nearly Rs. 1000/- per mensem at the time of his death and that his earning capacity was likely to increase with the passage of time.

34. Benefits which the claimants have lost as a result of the accident and consequent death of Brij Mohan Lal deceased. Regarding the amount spent by the deceased Brij Mohan Lal on the maintenance of the plaintiffs, reference may be made to the statements of Shri Har-

bans Lal plaintiff No. 1, Shri Dharam Paul Saraf P. W. 9 and Shri Amar Nath, P. W. 8. Shri Harbans Lal has stated that the deceased was remitting Rs. 250/- to Rs. 300/- to him every month. This statement receives corroboration from the statement of Shri Amar Nath P. W. 8 and Shri Dharam Paul P. W. 9. The fact that the deceased was not only contributing to the maintenance of his parents but was also supporting his grand parents who were residing with him is proved not only from the statement of Shri Harbans Lal plaintiff but also from the statements of Shri Kasturi Lal P. W. 7, Shri Amar Nath P. W. 8 and Shri Dharam Paul P. W. 9. Even if it be taken that the deceased was spending nearly Rs. 400/- per mensem as his personal and living expenses out of his monthly emoluments of nearly Rs. 1,000/- there is nothing improbable in his remitting Rs. 250/- per mensem to his parents whose monthly income is only Rs. 100/- according to the statement of Shri Harbans Lal plaintiff and his spending Rs. 125/- per mensem on the maintenance of his grand father, plaintiff No. 3 who gets a meagre pension of Rs. 36/- to Rs. 37/- per mensem as proved from the statements of Shri Amar Nath P. W. 8 and Shri Harbans Lal plaintiff. Thus the plaintiffs Nos. 1 and 2 have incurred a loss of Rs. 250/- per mensem and plaintiff No. 3 a loss of Rs. 125/- per mensem as a result of the death of the deceased due to the aforesaid accident which was a consequence of the gross negligence of defendant No. 2.

35. Quantum of damages to which the plaintiffs are entitled. Although the plaintiffs claim Rs. 60,000/- as compensation yet taking the yard stick of 16 years purchase for capitalizing the loss as adopted in *Bir Singh v. S. M. Hashi Rashi Banerji*, AIR 1956 Cal 555, and *Vanguard Fire General Insurance Company Ltd. v. Saria Devi*, AIR 1959 Punj 297, let us ascertain the benefit which the plaintiffs have lost as a result of the death of Brij Mohan Lal deceased. As already seen the plaintiffs Nos. 1 and 2 have lost an income of Rs. 250/- per mensem and plaintiff No. 3 has lost the benefit of Rs. 125/- per mensem. This comes to Rs. 3,000/- per annum in case of plaintiffs Nos. 1 and 2 and Rs. 1,500/- in case of plaintiff No. 3. Capitalizing the figure of Rs. 3,000/- at 16 years purchase the damages in case of plaintiffs Nos. 1 and 2 come to Rs. 48,000/-. Deducting the net amount of Rs. 1,2067.66 realized by plaintiff No. 1 according to his own admission from the insurance policy etc. of the deceased, the plaintiffs Nos. 1 and 2 are entitled to Rs. 3,5932.34. As the plaintiff No. 3 is already 89 years of age, I think he cannot reasonably expect to live beyond 95 years. Capitalizing the sum of Rs. 1,500/- at 8 years purchase i.e. with effect from 1966 when the accident

took place the plaintiff No. 3 should, in my opinion, get Rs. 12,000/- as compensation. Thus the total compensation to which the plaintiffs are cumulatively entitled comes to Rs. 47,932.34. Issue No. 2 is decided accordingly.

ISSUE No. 3.—

36. This issue consists of two parts and the burden of proof of both the parts was on the defendants but they have failed to discharge the same. The principles governing the vicarious liability of the State in case of tortious acts of its employees are well settled and it has now been consistently held that unless it is shown that the employee was acting in exercise of sovereign power delegated to him by some law or rule and was doing something which could not be done by a private individual the State cannot claim immunity. The fundamental principles bearing on the subject were succinctly stated as far back as 1861 by Chief Justice Peacock of the Supreme Court at Calcutta in the leading Full Bench case of *Penninsular and Oriental Steam Navigation Company v. Secretary of State for India*, (1868) 5 Bom HCR App. 1, in the following words:—

"There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them. Where an act is done or a contract is entered into in the exercise of powers usually called sovereign powers by which we mean powers which cannot be lawfully exercised except by sovereign or private individual delegated by a sovereign to exercise them, no action will lie."

In a Rajasthan case entitled *Mst. Vidya-wati v. Lokumal*, AIR 1957 Raj 305, where the deceased was run over and killed by a motor vehicle owned by the State of Rajasthan but driven by its employee, it was observed:—

"It does not require any sovereign authority or governmental powers to purchase or maintain cars or to keep drivers for driving the same. There are a number of public and private companies and persons who also purchase cars and give them to their employees in order that they may render better service to them. They cannot be allowed to invoke any immunity for tortious acts of their employees."

The State is in no better position in so far as it supplies cars and keeps drivers for its employees in its civil service. When Government employs person to drive vehicles on public roads for purpose for which ordinary persons also do then, in our opinion the State may be held vicariously responsible for the acts of its employees just as any private employer."

In deciding the appeal from the above decision of the Rajasthan High Court, their Lordships of the Supreme Court observed as follows AIR 1962 SC 933:—

"This case also meets the second branch of the argument that the State cannot be liable for the tortious acts of its servants, when such servants are engaged on an activity connected with the affairs of the State. In this connection it has to be remembered that under the Constitution we have established a welfare State, whose functions are not confined only to maintaining law and order, but extend to engaging in all activities including industry, public transport, state trading, to name only a few of them. In so far as the State activities have such wide ramifications involving not only the use of sovereign powers but also its powers as employers in so many public sectors, it is too much to claim that the State should be immune from the consequences of tortious acts of its employees committed in the course of their employment as such. In this respect the present set up of the Government is analogous to the position of the East India Company, which functioned not only as a Government with sovereign powers, as a Delegate of the British Government, but also carried on trade and commerce as also public transport like railways, post and telegraphs and road transport business."

Reference may also be usefully made to the following observations of the Full Bench of the Punjab High Court in *Rup Ram Kalu Ram Aggrawal v. Punjab State*, AIR 1961 Punj 336 (FB).

"The decided cases thus show that the State is in certain circumstances liable for the tortious acts of its servant, but that the circumstances must be such as to make the relation between the case and that particular servant identical with the circumstances of private employment. The liability would depend not only on the nature of the act in which the servant may have been engaged but also on the nature of the employment and, of course, the nature of the tort committed. The mere fact that the act may or may not have been done in the course of governmental activity is not one way or the other conclusive."

Again in *Union of India v. Smt. Jasso*, AIR 1962 Punj 315, (FB), *Falshaw J.* (as his Lordship then was) speaking for the court observed as follows in regard to the liability of Union of India to be sued for a tort committed by a military driver while transporting coal to General Headquarters at Simla in discharge of his duties.

"The Government's immunity from actions in respect of the acts of its servants is limited to cases involving acts of State and cases involving the use of

sovereign powers. In a case like the present no question of any act of State can arise since acts of State can only be taken against persons not subjects of the government concerned, and the question which thus arises in this case is whether the act of the servant which was carried out in exercise of the sovereign powers of the State.

Such a routine task as the driving of a truck loaded with coal from some depot or store to the General Headquarters' building at Simla presumably for the purpose of heating the room cannot be held to be something done in exercise of a sovereign, since such a thing could obviously be done by a private person. Such being the case, the mere fact that the truck happened to be army truck and the driver a military employee cannot make any difference to the liability of the Government for damages for the tortious act of the driver."

The question of vicarious liability of the State again came up for decision before their Lordships of the Supreme Court in *Kasturi Lal Ralia Ram Jain v. State of Uttar Pradesh*, AIR 1965 SC 1039, where it was held as follows:—

"There is a material distinction between acts committed by the servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to public servants and acts committed by public servants which are not referable to the delegation of any sovereign powers. If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: Was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose. This distinction which is clear and precise in law, is sometimes not borne in mind in discussing questions of the State's liability arising from tortious acts committed by public servants."

Again in AIR 1967 Delhi 98, it was laid down that the State is immune from liability when tortious act is committed in course of an undertaking which is referable to exercise of sovereign power or to exercise of delegated sovereign power but where act is done which cannot truly be

called exercise of sovereign power, State would be liable.

37. Then again in *State of Madhya Pradesh v. Saheb Datta Mal*, AIR 1967 Madh Pra 246, it was observed as follows:

"Whenever the State is sued for tort committed by any of its servants, the court has to examine firstly whether the servant has been acting or purporting to act in exercise of powers delegated to him. The immunity from action in a court of law arises not only in regard to acts done while functioning within the strict letter of the delegation but also while purporting to do so; secondly, it has to see whether or not these acts have been done in exercise of sovereign power of the State, the simplest test in this behalf being to consider whether these functions could be discharged by any private citizen or association; and thirdly if the breach of tort has been committed while purporting to exercise such sovereign function, there is no remedy in law courts for the aggrieved person."

Again in a recent case of the Bombay High Court, AIR 1969 Bom 13 (supra), it has been observed as follows:—

"Can it be said that when the jeep car was being driven back from the repair shop to the Collector's place when the accident took place, it was doing anything in connection with the exercise of sovereign powers of the State? It has to be remembered that the injuries resulting in the death of Jagdish Lal (the deceased in that case) were not caused while the jeep car was being used in connection with the sovereign powers of the State."

Thus from a resume of the above authorities it clearly follows that it is only when the servant is acting in exercise of delegated sovereign power of the State and doing something which could not be done by a private individual that the State would not be liable for the tortious acts of its servant. In the instant case, there is no material on the record to indicate that defendant No. 2 while driving the military vehicle at the time of accident was carrying on any peculiar duty of sovereign nature assigned to him under any law or rule or that there was anything special about his employment. In the circumstances, I have no hesitation in deciding Issue No. 3 in favour of the plaintiffs and against the defendants,

ISSUE No. 4.—

38. This issue relates to the validity of the notice given in the present case by the plaintiffs to the defendants. I have gone through the notice with care but I have not been able to detect any material defect therein which can be said to have an adverse effect on the suit. The notice clearly sets out the cause of action and the relief claimed and substantially ful-

fills the requirements of Section 80 of the Code of Civil Procedure. Issue No. 4 is, therefore, decided in favour of the plaintiffs and against the defendants.

ISSUE No. 5.—

39. The burden of proof of his issue was also on the defendants, and they have not been able to show as to how the claim of the plaintiffs is time barred. The present action is, in my opinion, governed by Article 21 of the Limitation Act which prescribes one year's limitation for a suit under the Fatal Accidents Act. The accident which occasioned the death of Brij Mohan Lal and has given rise to the claim for compensation by the plaintiffs occurred, as stated above, on the 14th February, 1966. Excluding the statutory period of notice the present suit which was brought on 13-3-1967 is clearly within time. Issue No. 5 is, therefore, decided against the defendants and in favour of the plaintiffs,

ISSUE No. 6.—

40. The burden of proof of this issue too was on the defendants and they have not shown as to how the High Court is deprived of its jurisdiction to entertain and try the suit. This issue, is therefore, decided in favour of the plaintiffs and against the defendants.

41. In the result I grant a decree for Rs. 47,932.34 with proportionate costs in favour of the plaintiffs and against the defendants. The payment of the decretal amount shall be made to the plaintiffs within three months from today failing which it will be open to the plaintiffs to realize the amount by taking out execution of the decree.

Suit partly decreed.

AIR 1970 JAMMU & KASHMIR 13
(V 57 C 4)

S. M. FAZL ALI, C. J. AND
J. N. BEAT, J.

Haji Abdul Ahad Sheikh and others,
Appellants v. Pir Ghulam Mohd. and
others, Respondents.

Civil First Appeals Nos. 22, 23, 24, 25
and 26 of 1967 D/- 29-7-1969.

Civil P. C. (1908), O. 22, Rr. 3, 4, 8, 11,
12; O. 43 Rr. 1, 2 — Applicability of O. 22,
R. 12 to appeals against orders passed in
execution proceedings — Death of party
during pendency of such appeal — Sub-
stitution of heirs — Procedure under Rr. 3,
4, and 8 must be followed — AIR 1929
Pat 565 (FB), Dissented From.

The provisions of O. 22, R. 12 do not
apply to appeals against orders passed in
execution proceedings and O. 22, R. 12 is
limited to execution proceedings alone.
Consequently on death of a party to exe-
cution appeal unless procedure under Rr.

3, 4 and 8 is followed for substitution of heirs, the appeal abates. AIR 1929 Pat 565 (FB), Dissented from.

(Paras 6, 14)

A close analysis of the scheme of the Civil P. C. clearly reveals that the statute has provided separate provisions for the procedure to be adopted in the disposal of suits, miscellaneous proceedings, execution proceedings and appeals. O. 43, R. 1 which deals with appeals against orders applies the procedure applicable to appeals against decrees by virtue of R. 2 of O. 43. (Para 7)

Apart from this there are incidental provisions which apply to suits essentially and which have been expressly or impliedly made applicable to appeals, for instance provisions regarding pauperism, substitution of deceased parties, appointment of the guardian of minor parties and so on. The legislature has taken care to define the powers to be exercised by the original and the appellate courts and wherever it intended to apply the incidental provisions mentioned above, a specific provision therefor has been made. R. 12, which expressly excludes the application of Rr. 3, 4 and 8 to execution proceedings does not say that these provisions would also be excluded from appeals against orders passed in execution of a decree nor does R. 11 which precedes R. 12 make any mention that while the provisions of this order would be applicable to these appeals certain other provisions would be exempted. On the other hand the words 'in the application of this order' clearly indicate that all the provisions of O. 22 have been applied to appeals without any exemption or limitation. The only distinction made is in the nomenclature of the parties that is to say the plaintiff has been held to include the appellant and the defendant a respondent and suit an appeal. From the fact that the exemption contained in R. 12 of O. 22 has been deliberately omitted by the legislature in O. 22 R. 11, the only irresistible inference is that the legislature did not intend to exclude the operation of Rr. 3, 4 and 8 to appeals against orders passed in execution proceedings. There is a very good and sound reason for this deliberate omission, i.e. while the execution appeals abate against some deceased respondents who are necessary parties the appeals would abate as whole in order to avoid the existence of two inconsistent orders: one of the trial court having become final by abatement and the other passed by the appellate court in the appeal. (Case law discussed.). (Para 8)

Secondly appeals against orders passed in execution proceedings cannot be said to be proceedings in execution of a decree or order. The appellate court in appeals against orders passed in execution proceedings merely examines the legality

and propriety of the orders passed; it does not execute the decree, and is concerned only with the correctness of the orders passed by the executing court. The appeal is in one sense a continuation of the execution proceedings but merely by virtue of this fact the appeal cannot be treated to be an execution proceeding properly so-called as contemplated by O. 22, R. 12. Consequently, R. 12 of O. 22 applies only to execution proceedings properly so-called and would not apply to appeals against orders passed in execution proceedings. It is the executing court alone which executes the decree and not the appellate court. Case Law discussed. (Para 9)

Cases Referred: Chronological Paras

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|---|---------------|
| (1962) AIR 1962 SC 89 (V 49)= | |
| (1962) 2 SCR 636, State of Punjab v. Nathu Ram | 13 |
| (1962) AIR 1962 Andh Pra 308 (V 49)= | |
| ILR (1960) 2 Andh Pra 449, Chandravati Bai v. Chaganlal | 12 |
| (1960) AIR 1960 Orissa 14 (V 47)= | |
| ILR (1959) Cut 656, Surendra Nath Patnaik v. Dasarathi Dutta | 12 |
| (1956) AIR 1956 Assam 9 (V 53)= | |
| Balaram Karmakar v. Subodh Chandra Bose | 12 |
| (1955) AIR 1955 Cal 281 (V 42)= | |
| Bishnu Bijoy v. Chandra Bijoy | 12 |
| (1950) AIR 1950 EP 302 (V 37)= | |
| 52 Pun LR 100, Ahsan Elahi v. Mehr Elahi | 12 |
| (1947) AIR 1947 Bom 480 (V 34)= | |
| 49 Bom LR 333, Trimbak Narhar v. Gopal Narayan | 12 |
| (1947) AIR 1947 Lah 13 (V 34)= | |
| ILR (1947) Lah 417 (FB), Ajudhia Pershad v. Sham Sunder | 11 |
| (1941) AIR 1941 Oudh 16 (V 28)= | |
| ILR 15 Luck 560, Jagdish Bahadur v. Mahadeo Prasad | 12 |
| (1936) AIR 1936 Lah 1022 (V 23)= | |
| ILR (1937) Lah 80, Cheda Lal v. Aijaz Hussain | 11 |
| (1933) AIR 1933 All 388 (V 20)= | |
| ILR 55 All 509, Changa Mal v. Chaubey Ram Dulare Lal | 12 |
| (1932) AIR 1932 Mad 574 (V 19)= | |
| ILR 55 Mad 1006, Rajah of Kalahasti v. Jagannadha | 12 |
| (1929) AIR 1929 Pat 565 (V 16)= | |
| ILR 9 Pat 372 (FB), Hakim Syed v. Fateh Bahadur | 6, 10, 11, 12 |
| (1923) AIR 1923 Lah 560 (V 10)= | |
| 5 Lah LJ 163, Mir Khan v. Sharfu | 11 |
| (1919) AIR 1919 Cal 1053 (V 6)= | |
| 45 Ind Cas 911, Baksh Ali v. Sarat Chandra | 11 |
| Sunder Lal, for Appellants; S. N. Dax and P. N. Rawal, for Respondents. | |

FAZL ALI, C. J.:— These appeals arise out of orders passed by the executing court and will be decided by one common judgment as the points involved are the same. The appeals arise in the following circumstances.

2. There appears to have been a serious dispute regarding the management of Ziarat Makhdoom Sahib between the Intizamia Committee, the Khadims and other persons. A suit was filed which was ultimately referred to arbitration and an award was given by Mr. M. M. Siddiqui the then Financial Commr. A decree was passed by the trial court laying down a detailed scheme for the management of the Ziarat which was passed on 3-10-1964 and thereafter various parties to the decree filed five execution applications before the executing court for implementing the provisions of the award of Mr. Siddiqui as embodied in the decree, and the only objection pressed before us was that the decree laying down a scheme for management of the Ziarat was purely declaratory in nature and was not executable. The executing court of the District Judge Srinagar after considering the arguments of the objectors rejected their contention and held that the decree was executable and the parties concerned were directed to perform their respective functions. Against this order of the District Judge dated 20-6-1967 the present appeals have been filed before us.

3. While the appeals were pending in this court, some of the respondents namely, Pir Mohd. Shah, Syed-ud-Din and G. M. Shah died on various dates and the respondents took a preliminary objection that since the application for substitution of the heirs was made beyond time, the appeals had abated. The appellants however disputed the date of death of the respondents (deceased) and pleaded their knowledge within the period of limitation. In view of the serious controversy between the parties on this point we remitted the matter to the District Judge for an inquiry as to the date of death of the deceased respondents and the date when the appellants acquired knowledge of the same. The finding has now been received from the District Judge which is against the appellants.

4. The appellants have not contested the finding of the learned District Judge on facts but have argued in their defence that there can be no abatement for two reasons. In the first place it is contended that the deceased respondents were not necessary parties as no relief was sought against them and therefore, the appeals could not abate as a whole. Secondly, it was contended that in view of the provisions of O. 22, R. 12 of the Civil P. C. the abatement proceedings did not apply to appeals against orders passed in execution

proceedings and therefore, the question of abatement did not arise.

5. As regards the first contention we find that it is absolutely untenable because from the terms of the decree it appears that the deceased respondents were persons who were assigned important duties which had to be performed as a part of the obligations imposed upon them by virtue of the decree. In these circumstances it cannot be said that the deceased respondents were merely pro forma parties so as to prevent the appeals from abating as a whole.

6. The second contention poses a serious question of law on which there appears to be some conflict of authorities. The learned counsel for the appellant submitted that an appeal against an order in execution proceedings being a continuation of the execution proceedings is clearly governed by O. 22, R. 12 of the Civil P. C. which runs thus:—

"Nothing in Rr. 3, 4 and 8 shall apply to proceedings in execution of a decree or order."

It is thus contended that the provision relating to abatement of suits does not apply by virtue of this provision to execution proceedings as also to execution appeals, which are a continuation of the said proceedings. In support of this view the learned counsel has relied on a Full Bench decision of the Patna High Court in Hakim Syed v. Fateh Bahadur, AIR 1929 Pat 565 (FB), where the majority opinion was that Rr. 3, 4, and 8 did not apply to appeals against orders passed in the course of proceedings in execution of a decree or an order. This decision is presumably in favour of the proposition adumbrated by the learned counsel for the appellants. The counsel for the respondents, however, submitted that the Patna authority, AIR 1929 Pat 565 (FB), (supra) has been expressly dissented from by the other High Courts in India and should not be followed by us. A large number of authorities have been cited before us and a perusal of them no doubt shows that the consensus of judicial opinion seems to favour the view that the provisions of O. 22, R. 12 do not apply to appeals against orders passed in execution proceedings and that O. 22, R. 12 is limited to execution proceedings alone. Before, however, analysing the authorities cited before us, we would like to approach the subject from its various comprehensive aspects.

7. To begin with a close analysis of the scheme of the Civil P. C. would clearly reveal that the statute has provided separate provisions for the procedure to be adopted in the disposal of suits, miscellaneous proceedings, execution proceedings and appeals. It would be seen that Orders 1 to 20 of the First Schedule deal exhaustively with the procedure in

be adopted in deciding civil suits. O. 21 Rr. 10 to 103 deal with the various stages of the execution proceedings. O. 21-A deals with insolvent judgment debtors. Section 96 deals with the forum of appeals against decrees and O. 43, R. 1 deals with the forum of appeals against orders. Sections 96 to 108 deal with the forum of appeals and the conditions governing the decision of such appeals and O. 43, R. 1 deals with the nature of appeals from orders in contradistinction to decrees. Orders 41 and 42 deal with the procedure of the hearing of appeals. It will be seen that O. 43, R. 1, which deals with appeals against orders applies the procedure applicable to appeals against decrees by virtue of R. 2, of O. 43.

8. Apart from this there are incidental provisions which apply to suits essentially and which have been expressly or impliedly made applicable to appeals, for instance provisions regarding pauperism, substitution of deceased parties, appointment of the guardians of minor parties and so on. The legislature has taken care to define the powers to be exercised by the original and the appellate courts and wherever it intended to apply the incidental provisions mentioned above, a specific provision therefore has been made. For instance O. 33 deals with the procedure to be adopted in suits by paupers. This provision is specially applied to appeals also by virtue of O. 44, Rr. 1 and 2. Similarly take the case of provisions for substitution which find place in O. 22, Rr. 1 to 12. Rr. 3, 4 and 5 deal with the question of abatement. It would be seen that these provisions are made expressly applicable to appeals by virtue of R. 11 which runs thus:—

"In the application of this order to appeals, so far as may be, the word 'Plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal."

A perusal of this provision would reveal that the statute while applying the provisions of O. 22, Rr. 1 to 10 has not deliberately excluded the provisions of Rr. 3, 4 and 8 so far as appeals are concerned but has only indicated the change in the nomenclature of the plaintiff and the defendant. R. 12 which expressly excludes the application of Rr. 3, 4 and 8 to execution proceedings does not say that these provisions would also be excluded from appeals against orders passed in execution of a decree, nor does R. 11, which precedes R. 12 make any mention that while the provisions of this order would be applicable to these appeals certain other provisions would be exempted. On the other hand the words 'in the application of this order' clearly indicate that all the provisions of O. 22 have been applied to appeals without any exemption or limitation. The only distinction

made is in the nomenclature of the parties, that is to say the plaintiff has been held to include the appellant and the defendant a respondent and suit an appeal. Indeed if the legislature intended that Rr. 3, 4 and 8 of O. 22 should not be made applicable to appeals, then this fact should have been indicated in O. 22, R. 11. This however, is not the position. In other words from the fact that the exemption contained in R. 12 of O. 22 has been deliberately omitted by the legislature in O. 22, R. 11, the only irresistible inference would be that the legislature did not intend to exclude the operation of Rr. 3, 4 and 8 to appeals against orders passed in execution proceedings. There appears to be a very good and sound reason for this deliberate omission. It is well settled that successive execution applications are permissible under law so long as they are not barred by the provisions of Art. 181 of the Limitation Act and in such applications the question of abatement does not arise. It is for this reason that, the legislature thought it necessary to exclude the provisions relating to abatement namely those contained Rr. 3, 4 and 8 of O. 22 to execution proceedings only. The same principle, however, cannot apply to appeals from orders passed in execution proceedings, because when an execution appeal is dismissed, another appeal on the same subject-matter cannot be filed or entertained. On a parity of reasoning therefore, while the execution appeals abate against some deceased respondents who are necessary parties the appeals would abate as whole in order to avoid the existence of two inconsistent orders: one of the trial court having become final by abatement and the other passed by the appellate court in the appeal. It seems to us that the legislature had a good reason for deliberately not excluding the provisions of Rr. 3, 4 and 8 of O. 22 to appeals in execution of decrees.

9. Another serious question that has to be determined is as to whether or not appeals against orders passed in execution proceedings can be said to be proceedings in execution of a decree or order. In our opinion the answer must be in the negative, because the appellate court in appeals against orders passed in execution proceedings merely examines the legality and propriety of the orders passed; it does not execute the decree, and is concerned only with the correctness of the orders passed by the executing court. The appeal is in one sense a continuation of the execution proceedings but merely by virtue of this fact the appeal cannot be treated to be an execution proceeding properly so-called as contemplated by O. 22, R. 12. In our opinion, therefore, R. 12 of O. 22 applies only to execution proceedings properly so-called and would

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1970

Kerala High Court

AIR 1970 KERALA 1 (V 57 C 1)

FULL BENCH

M. S. MENON, C. J., P. GOVINDAN
NAIR AND B. BALAKRISHNA ERADI, JJ.

Marggarate Maria Pulparampil Nee
Feldman, Petitioner v. Dr. Chacko Pul-
parampil and others, Respondents.

O. P. No. 71 of 1968, D/- 24-1-1969.

(A) Civil P. C. (1908), Ss. 13, 14 —
Valid order of foreign Court granting cus-
tody of child — Order is to be respected
by Indian Courts unless it is against in-
terests of child.

A competent foreign Court has jurisdic-
tion to pass an order for the custody of
the children, even assuming that the
father, the mother and their children are
Indian and have not acquired domicile of
choice of the country of that Court, pro-
vided it is established that the petitioning
spouse had a real and substantial connec-
tion with the country of that Court or that
the children were ordinarily resident in
that country. And such order is to be
respected by Indian Courts unless such a
course would not be in the interests of the
welfare of the children. (Para 14)

It is no doubt true that in all cases the
Courts need not blindly follow the order
of custody passed by a foreign Court. All
Courts in all countries should respect each
other's orders passed with jurisdiction and
passed after a fair contest, subject to any
material and sufficient change in circum-
stances that would justify the alteration of
the term of the order passed by the
foreign Courts. (Paras 11, 12).

Where as a result of an agreement be-
tween the father an Indian serving in Ger-
many, and the mother a German lady, a
competent court in Germany passes an
order for custody of the children to the
mother and permitting only access to the

father, the father cannot by ignoring or flout-
ing the order bring the children in India.
Consequently, writ for giving the custody of
children to mother can be issued subject
to such terms and conditions as may be
necessary in the interest of the children.

(Paras 14, 16, 27)

(B) Constitution of India, Arts. 226, 19
(1) (e), 21, 25 — Habeas Corpus — Cus-
tody of minor child — Best interests of
child is sole deciding factor in granting
custody — *Parcns patriae* jurisdiction —
Nature of — (Guardians and Wards Act
(1890), S. 25) — (Travancore Christian
Guardianship Act (1116)).

In using the writ of habeas corpus for
the custody of infants the jurisdiction
exercised by the Court in deciding whether
the custody should be entrusted with one
or the other of the contesting parties de-
pends not on the legal right of one of
those parties to the custody of the child
but as to whether in the best interests and
welfare of the child the custody should
be entrusted with one or the other. The
court can in the best interest of the child
pass an order granting custody, even if in
consequence thereof the child may have
to leave the jurisdiction of the court
granting custody. (Case law discussed.)

(Paras 20, 24)

Moreover, the *parcns patriae* jurisdic-
tion exercised by High Court on the ques-
tion of custody of infants in habeas cor-
pus proceeding is an inherent jurisdiction
as distinct from a statutory jurisdiction
conferred by any particular section in any
special statute. Therefore, neither the
Guardians and Wards Act (1890) nor the
Travancore Christian Guardianship Act
(1116) can limit the exercise of *parcns*
patriae jurisdiction. (Para 21)

The order granting custody of children
to mother does not also contravene Art. 25
of the Constitution, for if every father
were to say that he alone can decide the
best interest of the child then the *parcns*

patriae jurisdiction of Courts will cease to exist. (Para 22)

If the Court as parens patriae comes to the conclusion that it is necessary in the paramount interests of the minor to entrust it to the custody and care of one of its parents who is residing outside the territory of India it has full power to pass orders permitting the child to be removed out of India and there is nothing in Article 19 (1) (e) or 21 of the Constitution which abrogates to any extent the Court's jurisdiction in this respect. (Para 23)

Cases Referred : Chronological Paras

- (1968) 1968-3 All ER 411, Re: T. (infants) 13
- (1967) AIR 1967 SC 1836 (V 54) = (1967) 3 SCR 525, Satwant Singh v. Damarathnam, Assistant Passport Officer New Delhi 23
- (1967) 1967-2 All ER 689 = (1967) 3 WLR 510, Indyka v. Indyka 7, 8
- (1967) 1967-2 All ER 881 = 1967-2 WLR 1370 Re: E (an infant) 12
- (1967) 1967-3 All ER 314 = (1968) 1 WLR 401, Angelo v. Angelo 8
- (1966) AIR 1966 SC 160 (V 53) = (1965) 3 SCR 793, Kedar Pandey v. Narain Bikram Sah 9
- (1966) 1966-1 All ER 886, In Re: H. (infants) 11, 12
- (1964) 1964-3 All ER 339 = (1964) 3 WLR 1210, Re: Kernot (an infant) 24
- (1964) 1964-3 All ER 977 = (1965) 2 WLR 1, Re: P. (GE) (an infant) 9
- (1963) AIR 1963 SC 1 (V 50) = (1963) 3 SCR 22, Viswanathan v. Rukn-ul-mulk Sved Abdul Wajid 10
- (1962) AIR 1962 SC 1737 (V 49) = ILR (1962) 2 All 991, (Raj Rajendra Sardar) Moloji Nar Singh Rao v. Shankar Saran 10
- (1961) 1961-39 Mys LJ 189 = ILR (1961) Mys 35, Mrs. Sara Dorine Ramanathan v. Swamynathan Ramanathan 21
- (1960) AIR 1960 SC 93 (V 47) = 1960 Cri LJ 184, Gohar Begum v. Suggi Begum 19
- (1959) 183 NYS 2d 943, (State of New York) Descollenges v. Descollenges 9
- (1956) AIR 1956 SC 346 (V 43) = 1956 SCR 72, Sailendra Narayan Bhanja Deo v. The State of Orissa 10
- (1954) AIR 1954 SC 352 (V 41) = 1955 SCR 99, Shankar Sitaram v. Balkrishna Sitaram 10
- (1952) 344 US 824, Wallace v. Lahrenz 22
- (1948) AIR 1948 Mad 294 (V 35) = 49 Cri LJ 369, Rama Iyer v. Nataraja Iyer 19
- (1944) 321 US 158 = 86 Law Ed 645, Prince v. Massachusetts 22

- (1929) AIR 1929 Mad 634 (V 16) = ILR 53 Mad 72 = 31 Cri LJ 187, Subbaswami Goundan v. Kama-kshi Ammal 19
- (1914) AIR 1914 PC 41 (V 1) = ILR 38 Mad 607, Mrs. Annie Besant v. Narayaniah 10, 14
- (1910) 12 Bom LR 691 = 8 Ind Cas 618, Zara Bibi v. Abdul Rezzak 19
- (1903) 176 NY 201, People v. Pier-son 22
- (1899) 1899 AC 114 = 68 LJPC 25, Great North West Central Rly. Co. v. Charlebois 10
- (1843) 10 Cl and Fin 42 = 8 ER 657, Johnstone v. Beattie 9
- (1836) 4 Ad and El 624 = 111 ER 922 R. v. Greenhill 19

Taikad N. Subramania Iyer, K. N. Narayana Nair and N. Sudhakaran, for Petitioner; Mannuel T. Paikaday and N. N. Narayana Pillai, for Respondent (No. 1); P. K. Kesavan Nair and K. N. Narayana Pillai, for Respondents (Nos. 2 and 3).

GOVINDAN NAIR J.:— This is a petition by a German mother for the custody of her two children, the daughter Konstanze, aged about 4½ years, and the son Thomas Markus who is nearing but having not yet attained the age of 3. The petition is under Article 226 of the Constitution of India and the prayers are that a Writ of Habeas Corpus be issued to the respondents to produce the children before this Court and that a further direction be given to hand over the children to the custody of the mother. The father of the children is the 1st respondent, the 2nd respondent is the father of the 1st respondent, and the 3rd respondent is the wife of the 2nd respondent, the 2nd respondent having married again after the death of the 1st respondent's mother.

A Division Bench of this Court before which this petition came up along with C. M. P. 143 of 1968 for the issue of a mandatory injunction ordered on C. M. P. 143 of 1968 on 4-1-1968, that the respondents produce the children before this Court at 10.30 A. M. on 6-1-1968. By an order on C. M. P. 257 of 1968 dated 6-1-1968 the direction to produce the children on the 6th January, 1968, was altered and the direction issued that the children be produced on the 11th January, 1968. On that day, the children were produced before this court and the matter stood over to the 18th of January, 1968 for further consideration. On 18-1-1968, C. M. P. 694 of 68, a joint petition by the mother and the father was filed in Court and it was agreed by the father and the mother that pending disposal of this original petition the children be entrusted to the St. Theresa's Convent, Ernakulam. Accordingly, Smt. P. K. Fatima Bee, an Assistant Registrar of this Court took charge of the

children and entrusted them the same day with Sister Bernardine, Mother Superior, of the St. Theresa's Convent. Since then the children have been in the Convent under the protection and control of the Mother Superior with access to the father and the mother on the terms embodied in the joint petition referred to.

2. The question, by no means a simple or an easy one, with which we are faced is whether we can, and if we can whether we should, grant the prayers in this petition and this has to be decided on the following facts.

3. The father, the 1st respondent, an Indian National, went to Germany in the year 1958 to study medicine. There he met the petitioner who was also studying medicine in the same College which the 1st respondent attended and their mutual liking for each other developed into affection resulting in their marriage according to the Civil Law on the 20th of December 1963, and according to the ecclesiastical rites on the 29th of December that year. The daughter Konstanze was born on 15-7-1964. Before the second child, the son, Thomas Markus was born on 22-2-1966, the marriage which must have commenced with high hopes and dreams of an adventurous and enjoyable voyage through life ran into heavy weather and difficulties and all but foundered by early August, 1965. On the 6th August that year, the husband it is alleged by the wife, left the matrimonial home, never to return to it, and according to the husband he was forced to leave by the conduct of the petitioner's mother and particularly of her brother, a conduct which according to the husband was approved by, or at least acquiesced in, by the petitioner. It is not very clear how matters came to a head on that fateful day in August 1965 but there are accusations and counter accusations which can be gleaned from proceedings before the German Courts to which parties very freely, soon after, took resort, as evidenced by certain orders produced before us.

The approach to the German Courts seems to have been almost simultaneous by the petitioner and her husband. The father asked for access to the children, who were with the mother, shortly after the incident on 6-8-1965, and the mother sued for divorce by Ext. P-3 petition dated 9-11-1965. There was an agreement arrived at regarding access of the father to the children on the 11th of November 1965 which the father says in the affidavit before this Court dated 12-1-1968 was "formally engrafted in an order of a Court." The father was dissatisfied with the arrangement. He complained that the terms of the agreement were not honoured by his wife. So there was a modification

of the agreement by consent. This new agreement also failed to give satisfaction to the father. According to him even this agreement was violated by the wife. So he petitioned the Court on the 22nd July 1966 (Ext. P-9) praying for an oral hearing regarding his access to the children and further claimed that "since the wife does not comply with the terms of this agreement an order must be made by the Guardianship Court." The parties thereafter agreed on new terms regarding access and this is seen from Ext. P-14 which was filed in the German Court and was "read and approved" by the Court and thus accepted by it. Since there is controversy regarding the implications of Ext. P-14, we shall extract it in full.

"Amtsgericht (County Court)

Xa 417/65 Hamm, August 9th 1966

Before the County Court Judge Pieper and the employee Stute as Protocol Officer

In the matter
of the law-suit
between the medical assistant officer
Dr. med.

Chacko Pulparampil
of Dortmund-Lutgendortmund, Protes-
tant Hospital,
Westricher
Stra Be 51, Petitioner

represented by the lawyer Dr. Poppin-
ghaus, Hamm and the medical assistant
officer Dr. med Margret, Pulparambil
Nee Feldmann of Hamm, GrunstraBe,
respondent

represented by the lawyer Muller and
BauB, Hamm — appeared today.

1. The petitioner and the lawyer Poppin-
ghaus.

2. The defendant (respondent) and the
lawyer Muller.

The parties entered into a discussion of
the facts and then made the following
agreement:

1. It is agreed between the parties that
the father may have access to the child
Konstanze born on July 15th 1964 once
every week on Tuesday from 15 until 18
o'clock. For this purpose the father
shall four times ring the bell at the door
of the house GrunstraBe 7, and the mother
shall bring the child to him. In the same
way the father shall return the child to
the mother.

2. The father is also entitled to see the
son Thoms Markus born on February 22nd
1966 on every fourth Thursday of the
month and to have him together with the
daughter Konstanze.

3. This agreement becomes effective from
Tuesday, August 16th, 1966.

4. The costs incurred in these proceedings are to be paid by both parties in equal parts, read and approved.

Signed: Piper Signed: Stute
Hamm, November 5th 1968

Certified

This is to certify
that the above
translation is
correct.

Signed: Manke

Protocol Officer of the
County Court.

Dortmund,
November 30th, 1968.

Sd/-
(Dr. Vins) sworn interpreter."

In the meantime, the divorce petition was dismissed on 22-6-1966 by Ext. R-2 order on the ground that it has not been established that the husband by his fault "has disturbed married life so deeply that normal relations cannot be expected to be resumed again". The petitioner appealed from that order R-2 and while that appeal was pending, on the application of the mother the father was ordered on 18-10-1966 by Ext. P-7 to pay to the children maintenance at the rate of 130 German Marks for the months from May to September, 1966. Soon after, on the 27th of December, 1966, the father took out the children in terms of Ext. P-14 but instead of returning them to the mother before 18-00 hours that day, drove them in a taxi to the Dusseldorf Airport in the company and with the assistance of a nurse named Waltraud Rose, admittedly a friend of the father, and took a plane for India for the children. Konstanze was at that time less than 2½ years old and Thomas Markus just over 10 months. The father did not inform the mother either about his departure nor did he cable her after reaching India.

After making frantic enquiries on the 27th of December, the mother moved a petition the next day before the Appellate Court where the divorce matter was pending and obtained an order Ext. P-1 dated 28-12-1966 by which it was ordered that the father hand over the custody of the children to the mother. Nothing happened pursuant to this order and the mother continued to make enquiries about the whereabouts of the children. On the 21st of April, 1967, by Ext. P-8 order, the appeal taken by the father from Ext. P-7 order directing maintenance to the children was dismissed. The mother has alleged that she came to know about the whereabouts of the husband and the children only from a letter which she received from the husband's step mother (3rd respondent) in November 1967 and that she could save adequate funds for her trip to India only by the end of that year. She came down to India in December, 1967, landing in Cochin on the 19th of that month and made attempts to get in touch with the children. She says she was not

even permitted to see them. She therefore moved this Court by this petition.

4. The appeal from the divorce matter was allowed on 16-6-1968 by Ext. P-17 order holding that both parties were guilty of such conduct which was conducive to the disruption of marital relations but that the father was more to be blamed than the mother. It appears from Ext. P-17 order that the father also, at least alternatively, claimed divorce on the ground that the mother by her conduct had made marital relations impossible. The order Ext. P-17 holds that the father would have been entitled to apply for divorce on the conduct of the mother which had been established by the evidence in the case. The marriage was dissolved by the order Ext. P. 17. On the same day another order Ext. P-11 was passed by the Court exercising jurisdiction regarding the custody of the children. This order directed that the custody of the children be given to the mother. This order was apparently passed without knowledge of the order Ext. P-17 on the appeal in the divorce matter passed the same day by the Appellate Court. The only other order that we need refer to is the order Ext. P-15 by the same Court that passed the order Ext. P-11 and this seems to be the final order regarding custody. This order dated 27-11-1968 confirmed the direction in Ext. P-11 order that the custody of the children be with the mother.

5. It is common ground that the nationality of the father is Indian and that of the mother, German. It is also agreed that both the father and the mother are Christians of the Roman Catholic persuasion and that the children have been baptized according to the rites of the Roman Catholic Church.

6. There can be no doubt that the domicile of origin of the father is Indian and that of the mother German. On the evidence on record it is a difficult question to decide whether the father acquired a German domicile of choice. It seems to us unnecessary to decide this question for the purpose of this case. It is no doubt true that according to the canons of Private International Law, the mother and the children in this case will have the father's domicile.

7. Assuming without deciding — we are not at all certain that the decision should be that way — that the father had not acquired a German domicile of choice, and therefore the father, the mother, and the children were of Indian domicile, a competent German Court will have jurisdiction to pass a decree for divorce or custody of the children on the ground that the petitioning spouse had a real and substantial connection with the country of that Court or that the children were ordinarily resident in that country. This is a rule or principle that has been adopted by

English Courts in very recent times and it seems to us that this trend manifests an important and necessary development of the law.

The case to which we shall first refer is the decision of the House of Lords in *Indyka v. Indyka*, reported in 1967 (2) All ER 689. Three of the Law Lords who decided this case recognised a foreign decree for divorce on the ground that the petitioning spouse had a real and substantial connection with that foreign Court. We shall extract the relevant passages from their speeches. Lord Morris of Borth-Y-Gest said:—

"The first wife at the time when she presented her petition in Czechoslovakia undoubtedly had a real and substantial connexion with that country. I see no reason why the decree of the Czech court should not in these circumstances be recognised."

Lord Wilberforce expressed his opinion thus:—

"Recognition might be given to decrees given on a residence basis, either generally or in the particular case of wives living apart from their husbands where to subject them uniquely to the law of their husband's domicile would cause injustice, and where the jurisdiction of the court of the country of residence is appropriate."

"How far should this relaxation go? in my opinion, it would be in accordance with the developments that I have mentioned and with the trend of legislation, mainly our own but also that of other countries with similar social systems to recognise divorce given to wives by the courts of their residence wherever a real and substantial connexion is shown between the petitioner and the country or territory, exercising jurisdiction."

Lord Pearson in his speech, summed up the matter in these terms:—

"It seems to me that, subject to appropriate limitations, a divorce granted in another country on the basis of nationality or on the basis of domicile (whether according to English case law or according to a less exacting definition) should be recognised as valid in England. Also if the law of the other country concerned enables a wife living apart from her husband to retain or acquire a separate qualification of nationality or domicile for the purpose of suing for divorce, and the jurisdiction has been exercised on the basis of that qualification, that would not, normally at any rate, be a reason for refusing recognition."

One obvious limitation is that a decree obtained by fraud or involving grave injustice should not be recognised. In addition there is a limitation which can only be indicated in rather general terms, and I will gratefully borrow some phrases. In the words of my noble and learned friend,

Lord Pearce, the court must be not "simply purveying divorce to foreigners who wish to buy it." In the words of Mr. Commissioner Lately, Q. C., the courts must not be used "for the convenience of birds of passage."

8. These observations were made in a case where the House of Lords had to decide whether they should recognise a foreign decree granting divorce and this case has been followed in England in subsequent decisions. We shall refer to the one in *Angelo v. Angelo*, reported in 1967 (3) All ER 314 where justice Ormrod extracted the passages which we have read and recognised the divorce decree passed by a foreign Court. Counsel who contended before him that the foreign decree should be accepted, urged that the real ratio decidendi in 1967-2 All ER 689 probably is to be found in Lord Morris of Borth-y-Gest's speech, in which he speaks of it being necessary for the party obtaining the decree to have a "real and substantial connexion" with the country pronouncing the decree. This contention was accepted by the learned Judge.

9. We are in this case not seriously concerned with the validity of the divorce decree that has been passed by the German Court by order dated 16-5-1968, Ext. P-17. The arguments of counsel for the petitioner before us rested on a narrower compass. He relied on Ext. P-14. We shall not, at this stage, call that an order, for, it is urged by the 1st respondent that it is nothing more than an agreement. According to the petitioner, it is an order; an order, no doubt passed on an agreement but nevertheless an order of Court. And this was passed on the 9th of August, 1966, admittedly when the father and mother as well as the children were residing in Germany. They were certainly ordinarily residents in Germany at that time.

There is of course controversy as to whether the husband was permanently residing there at that time. According to him, he had no intention of settling down permanently in Germany at any time. He went there merely to study medicine. He had, according to him, always ideas of getting back to his native land. According to the petitioner, at the time of the marriage the husband had promised that he would live with her and with their family for the rest of his life, in Germany. It is most difficult to fathom the mind of man. Hence the judicial assertion "that the Devil himself knoweth not the mind of man." Lord Bowen's dictum "that the state of a man's mind is as much a fact as the state of his digestion," has not simplified the process of ascertaining the mind of man. The state of a man's digestion is as much a mystery to a physician as the state of a man's mind to a Court called upon to ascertain it.

The facts available are that the father completed his medical studies by 1964, got employment in Germany in the same year and had married nearly an year before. Two children were born to him not in wedlock and they set up a matrimonial home however unsatisfactory according to the husband the environments were. And he lived in that home, though during the end of the period he stayed away from his wife by occupying the children's room instead of sharing their own with his wife, till 6-8-1965. On these facts, the question may arise whether the husband had acquired a domicile of choice in Germany. This may have to be determined as contended by counsel for the 1st respondent on the principles stated by the Supreme Court in the decision in *Kedar Pandey v. Narain Bikram Sah*, reported in AIR 1966 SC 160.

But we shall not, as we said, go into this question. It is however clear that there was such a residence of both spouses and the children in Germany at the time Ext. P14 came into existence, namely, on 9-8-1966 and earlier when the Court was moved by the father (in the first instance and by Ext. P9) as would give the German Court jurisdiction and competence to pass an order binding on the father. This is so not only on the basis of 'real and substantial connection' with the country of the Court, the principle which we have already referred to; but on the principle of residence emphasised by Lord Denning in his speech in *Re P (G. E.)* (an infant), reported in 1964 (3) All ER 977. Lord Denning expressed himself strongly on the limitations of the principle of domicile adopted by the Scottish Courts. These are his words:—

"I do not think that we should follow the Scottish courts in this matter. The tests of domicile are far too unsatisfactory. In order to find out a person's domicile, you have to apply a lot of archaic rules. They ought to have been done away with long ago. But they still survive. Particularly the rule that a wife takes the domicile of her husband. And the rule that a child takes the domicile of its father. If you were to ask what was the domicile of the child in this case, you would have a pretty problem. The child would take the domicile of the father. But what was the father's domicile? His domicile of origin was Palestine. His domicile of choice was England. But in Nov. 1962, he left England for Israel, taking the child with him. What was the father's domicile then? It all depends on his intention. Goodness knows how you are to find that out. His intention may at first have been to go to Israel for a short time. Later, when he found work there, he may have intended to make his home there permanently. When did his domicile change? Are you to take his word for it. If so, he could always defeat the jurisdiction of the court by saying that, from the very outset, he in-

tended never to return to England, and abandoned his English domicile.

As an alternative to domicile, counsel for the mother invited us to apply the test of ordinary residence, and supported it by references to some cases where the word "residence" was used and also to a case in the State of New York, *Descollenges v. Descollenges*, 1959-1963 NYS 2d 943. I think that this is the right test. The fount of the jurisdiction of the Court of Chancery is the Crown which, as *parens patrie*, takes under its protection every infant child who is ordinarily resident within the realm, whether he is a British subject or an alien. As Lord Campbell said in *Johnstone v. Beattie*, 1843-10 Cl and Fin 42:

"I do not doubt the jurisdiction of the Court of Chancery on this subject, whether the infant be domiciled in England or not. The Lord Chancellor, representing the Sovereign as *parens patriae* has a clear right to interpose the authority of the court for the protection of the person and property of all infants resident in England."

10. We have therefore to take it that if Ext. P14 is an order of Court, it was an order passed by a competent court having jurisdiction to grant the custody of the children to the mother and permitting only access to the father. Nothing said in the decisions of the Supreme Court in *Raj Rajendra Sardar Moloji Nar Singh Rao v. Shan kar Saran*, reported in AIR 1962 SC 1737 and in *Viswanathan v. Rukn-ul-Mulk Syed Abdul Wajid*, reported in AIR 1963 SC 1 relied on by counsel for the 1st respondent militates against this view. In fact we do not find any question such as the one we are called upon to resolve being considered or decided in these decisions.

The circumstances under which Ext. P-14 came into existence, we have already referred to. We shall briefly recapitulate. The father was dissatisfied with the access to the children he was enjoying under two agreements made in succession, the earlier of which was according to the father, "engrafted in an order of Court". Hence he again approached the Court Ext. P9 in his petition before the Court. He claimed in that petition that "since the wife does not comply with the terms of this agreement, (apparently the second one) an order must be passed by the Guardianship Court". Thereafter the difference between the father and mother in this regard were resolved with the help of mutual friends and an agreement was reached. This was placed before the Court that was moved by the father. The Court found the terms of the agreement acceptable. It approved these terms, accepted them, and embodied them thus in an order of Court. This is clear from Ext. P14 itself. We may also refer to the fact that in Ext. P11, the German Court that passed it has referred to Ext. P14 as a decree of Court. We are satisfied that Ext. P14 cannot be treated merely as an

agreement. It is an order of Court. This order, we consider is binding on the father.

It was suggested on the principle of the decision in *Great North-West Central Railway Co. v. Charlebois*, reported in 1899 AC 114 that the order Ext. P14 cannot have any greater validity than the agreement itself and that the agreement merely postulated joint custody of the father and mother and that the permission given to the mother by the father by such an agreement was revokable at any time by the father. Reference was also made to the decision of the Privy Council in *Mrs. Annie Bcsant v. Narayaniah*, reported in AIR 1914 PC 41. It was therefore, contended that the father could act against the terms of the order Ext. P14 as and when he liked. We are unable to agree. The decision in 1899 AC 114 is only to the effect that when a previous decree of the court is based on an invalid agreement, the invalidity of the agreement not having been raised at the time the decree was passed thereon, the decree can be set aside in a subsequent proceeding on the ground of the invalidity of the agreement.

This is no authority for the proposition that the decree based on such an agreement can be flouted or ignored by one of the parties to the decree. Nor do we find anything in the Privy Council case referred to above which supports the contention raised by counsel on behalf of the 1st respondent. On the other hand, it is clear from the decisions of the Supreme Court in *Shankar Sitaram v. Balkrishna Sitaram*, reported in AIR 1954 SC 352 and *Sailendra Narayan Bhanja Deo v. The State of Orissa*, reported in AIR 1956 SC 346 that a decree passed on consent is as much binding upon the parties as a decree passed by invitum.

11. This leads us to the question how far this Court, which undoubtedly has jurisdiction to decide the question of the custody of the children who are Indian nationals, born of an Indian father, and who are now present in this country should respect and honour the orders of the German Court. Recently in a few cases concerning the custody of children which came up for decision before the English Courts where a similar question came up for consideration the view has been expressed that all Courts in all countries should respect each other's orders passed with jurisdiction and passed after a fair contest, subject to any material and sufficient change in circumstances that would justify the alteration of the terms of the order passed by the foreign Courts. Two of these cases were decided by Cross J. at trial stage and the Court that heard the appeals from the decision consisted of Willmer Lord Justice as well. In the earlier case, the appellate decision of which is in *Re H (infants)* reported in 1966 (1) All ER 886 Willmer L. J. fully ap-

proved the following passage from the judgment of Cross, J.

"The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing."

The learned Judge went on to observe:

"That, I think, would be the ordinary common-sense approach of anyone in the absence of authority."

These observations were made in a case where the mother removed the children who by an order of a New York Court were to be under the control and jurisdiction of the State of New York, without having obtained the approval of the New York Court and without having consulted with the father. She went over to England, ignored a subsequent order passed by the Supreme Court of New York State to return the boys there, and issued an originating summons in England in July 1965 under which the boys became wards of the Court. On a motion on notice given by the father, the trial Judge, Cross, J. made an order that the mother deliver the boys forthwith unto the care of the father to whom liberty was given to take them back to New York. This order was upheld by the Court of Appeal.

12. It is no doubt true that in all cases the Courts need not blindly follow the order of custody passed by a foreign Court. The case in *Re E (an infant)*, reported in 1967 (2) All ER 881 illustrates this point. Cross J. was the trial Judge and Lord Willmer was a member of the Court that decided the appeal. Lord Willmer in his judgment approved the passage from the judgment of the trial Judge reading as follows:

"The Courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. 'This substitution of self-help for due process of law in this field can only harm the interests of wards generally, and a judge should, as I see it, pay regard to the orders of the proper foreign Court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child'". (The underlining (here into ' ' is ours).

The learned Judge fully agreed with this opinion and said:

"First of all, I would like to say, by way of comment on that passage, that I wholly agree with, and would wish to support, everything that the Judge said about the duty of all courts not to countenance behaviour of the kind there referred to."

The ward Diana regarding whose custody the question arose in that case was "kidnaped" by her paternal grandfather with the assistance of her aunt (father's sister). Diana's father having died in tragic circumstances, the child was brought over to England contrary to the terms of a foreign

Court's order and the mother subsequently came over to England and claimed custody. It was in these circumstances that the above comments were made because the removal by the paternal grandfather was against the terms of the foreign Court's order. Even so unlike in 1966 (1) All ER 886, custody was refused to the mother for the reason that "to take Diana away from her (the plaintiff) would be utterly disastrous for the child".

13. We may also refer to the observations of Harman, L. J. in *Re T. (infants)*, reported in 1968 (3) All ER 411:

"What is said against the mother is that she has determined for her own selfish reasons to cut these children off altogether from the society, comfort and help of the father, and that because she thinks she would prefer to live in England she comes to live in England and will have none of his proposals for reconciliation.

This court sets itself against these unilateral movements of children which has been far too frequent in the last few years. The right view is that the court should, other things being equal, set its face against such conduct and I am supported in that by the observations of Willmer, L.J., in *Re E. (an infant)* where discussing Cross, J.'s Judgment he said: At the outset of his judgment, after expressing his concern at what he described as the growing tendency, which has recently been apparent, of kidnapping children in this way and removing them from the jurisdiction of a foreign Court, the Judge proceeded as follows: 'The Courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. The substitution of self-help for due process of law in this field can only harm the interests of wards generally, and a judge should, as I see it, pay regard to the orders of the proper foreign Court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child. First of all, I would like to say, by way of comment on that passage, that I wholly agree with, and would wish to support, everything that the Judge said about the duty of all courts not to countenance behaviour of the kind there referred to.'

14. Following the above decisions we hold that this Court should respect the order of the German Court and allow this petition unless such a course is not in the interests of the welfare of the children.

We are aware that the father is the legal and the natural guardian. And it is arguable that even when the children are in the control of the mother, the legal custody continues with the father and that if the father takes the children from the mother his custody will not be illegal as he has got legal authority for the custody of the children. This certainly will not

apply in all cases and in all circumstances. This is clear even from the decision in *Air 1914 PC 41* relied on by 1st respondent's counsel. Whether the rule will apply in a case where there was a solemn agreement between the father and the mother that the children should be with the mother is doubtful. Authority is not wanting that in such cases a unilateral breach of that agreement by the father or the mother will not be countenanced by Courts. Whatever that be, if such an agreement is accepted by a court of competent jurisdiction and embodied in an order of that Court, we feel no doubt that that order can neither be ignored nor flouted with impunity by one of the spouses.

15. On the facts of this particular case, we must in this connection refer also to *Ext. P-7* order dated 18-10-1966 passed by the German Court granting maintenance for the children in favour of the mother. The effect of the conduct of the husband in removing the children is certainly to avoid the obligations imposed by this order to pay maintenance for the children who were in the care and control of the mother. We cannot conceive of an order for maintenance being passed against the father at the instance of the mother without postulating that the mother is in lawful custody of the children. This order *Ext. P-7* too cannot be permitted to be violated with impunity by the father. The attempts of the father to have the order *Ext. P-7* vacated in appeal turned futile as is seen from *Ext. P-8* order dated 21-4-68 passed in appeal. It was during the pendency of this appeal that the children were spirited away from the custody of the mother.

16. In ordinary circumstances therefore it is required that we honour the orders passed by the German Court to which we have referred to in detail. We have adverted to only such of those orders that have been passed before the children were taken away from Germany on 27-12-1966. The order *Ext. P-1* came to be passed thereafter, the order *Ext. P-11*, on the 16th May, 1968 *Ext. P-15* still later, and the order of divorce on 16-5-1968 the date of *Ext. P-11*. These perhaps do not enter into picture in the view we are taking.

17. There can be no doubt that the removal of the children by the father against the terms of *Ext. P-14* and that in a clandestine manner was illegal. His conduct showed scant respect for orders of Court which he himself invited. He was also callously indifferent to the feelings of the mother. If the allegation of the mother that the younger child on the day of removal was suffering from a bad cold is true the father was also indifferent about the health of the children. Whatever that be the custody of the children so obtained by the father is illegal and this was the nature of his custody when this Court in this petition ordered Rule nisi to issue.

18. That the writ of Habeas Corpus can be pressed into service in circumstances such as these for granting custody to the deserving spouse has been well established for a long number of years by decisions of the English Courts. This is clear from a reference to Halsbury's Laws of England, Volume II, Page 33. In Paragraph 57, there is the following passage:

"A parent, guardian, or other person who is legally entitled to the custody of a child can regain that custody when wrongfully deprived of it by means of the writ of habeas corpus."

19. We may also refer to the decision in *R. v. Greenhill*, reported in (1836) 4 Ad and El 624 at p. 640; where Lord Denman C. J. said:

"When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody."

The above passage was quoted with approval by the Supreme Court of India in *Gohar Begum v. Suggi Begum*, reported in AIR 1960 SC 93 a case under Section 491 of the Code of Criminal Procedure. After extracting the above passage and after also referring to Halsbury's Laws of England, Vol. IX, Article 1201 at page 702 where there is the following statement:

"Where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be enquired into on the return to a writ of habeas corpus, and the custody awarded to the proper person" the Supreme Court continued to observe as follows:

"Section 491 is expressly concerned with direction of the nature of a habeas corpus. The English principles applicable to the issue of a writ of habeas corpus, therefore, apply here. In fact the courts in our country have always exercised the power to direct under S. 491 in a fit case that the custody of an infant be delivered to the applicant: *Sree Rama Iyer v. Nataraja Iyer*, AIR 1948 Mad 294, *Zara Bibi v. Abdul Razzak*, (1910) 12 Bom LR 891 and *Subbaswami Goundan v. Kamakshi Ammal*, ILR 53 Mad 72=(AIR 1929 Mad 834). If the courts did not have this power, the remedy under Section 491 would in the case of infants often become infructuous."

20. In using the writ of habeas corpus for the custody of infants the jurisdiction exercised by the court in deciding whether the custody should be entrusted with one or other of the contesting parties depends not on the legal right of one of those parties to the custody of the child but as to whether in the best interests and welfare of the child the custody should be entrusted with one or the other. This is clear

from the following passages from the American Jurisprudence, Volume 25, pages 202, 203, 204 and 205:

"Habeas corpus is a proper remedy to obtain the discharge of an infant from a detention which is illegal and to determine controversies concerning the right to the custody of the infant, at least under the conditions requisite to the issuance of the writ generally. Where the writ is availed of for the latter purpose, the proceeding partakes of the incidents of a suit in equity and is considered to be one in rem, the child being the res."

"The writ of habeas corpus is a proper remedy on the part of one parent to recover a child from the other parent, either before or after the parents have been legally separated or divorced. Since the welfare of the child is the primary consideration in making an award for the custody of it, such an award may be made in a habeas corpus proceeding without reference to where the domicile of the parents may be, and the fact that the infant was brought within the jurisdiction in violation of an order of the court of another State does not preclude the exercise of jurisdiction in a habeas corpus proceeding to make an order in respect of its custody, at least to the extent of determining whether changes in circumstances following the rendition of the foreign order require, in view of the best interests of the child, a new order for the custody of the child, and whether the interests of the child can be served best by leaving further proceedings to the foreign court that acted first in the matter of its custody."

... ..

"It should be observed that as a general rule, where the writ is prosecuted for the purpose of determining the right to the custody of a child, the inquiry extends far beyond the issues that ordinarily are involved in a habeas corpus proceeding. The controversy does not involve the question of personal freedom, because an infant, for humane and obvious reasons, is presumed to be in the custody of someone until it has attained its majority. The court, in passing upon the writ in a case involving the custody of a child, deals with a matter of an equitable nature; it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, these cases are decided not upon the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the cases of an adult, but on the court's view of the best interests of those whose welfare requires that they be in custody of one person or another; and hence a court is in no case bound to deliver a child into the custody of any claimant or of any person, but should, in

the exercise of a sound discretion, after a careful consideration of the facts, leave it in such custody as the welfare of the child at the time appears to require. In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to due consideration."

21. Even so, it has been urged by counsel on behalf of the respondent, that due to various reasons, this Court should not and even cannot exercise jurisdiction to grant custody of the children to the mother even if it be found by us that such a course would be in the best interests of the infants. Therefore, before considering the test of the best interests of the children, we have to examine whether there are any such impediments to the exercise of our jurisdiction. It must be remembered in this connection that the jurisdiction that we exercise when we decide on the question of custody of infants brought before this Court in habeas corpus proceeding is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular section in any special statute. In this view we consider that none of the provisions contained in the enactments, The Guardians and Wards Act, 1890, and The Travancore Christian Guardianship Act, 1116 to which reference has been made by counsel on behalf of the 1st respondent stand in the way of our exercising our *parens patriae* jurisdiction arising in a case of this nature. We are satisfied that nothing in those enactments trammel such jurisdiction of ours in any manner. The question that arose for decision in *Mrs. Sara Dorine Ramanathan v. Swamynathan Ramanathan*, reported in 1961-39 Mys LJ 189 is about the ambit and scope of Section 25 of the Guardians and Wards Act, and the case cannot be an authority for the limitations of our inherent jurisdiction as *parens patriae*. The other cases cited by counsel for the 1st respondent also turned on the powers of the court under one statute or other.

22. Our attention has been invited to Article 25 of the Constitution of India, and it was emphasised that all persons have the right in India freely to profess, practise, and propagate religion and that this fundamental right guaranteed by the Constitution when taken along with the rights of a father who is the natural and legal guardian of his child to bring up the child in his own faith and according to his own views, and impart to the child such training and education that he considers best for the child, would be a complete answer to the claim of any other person for the custody of the child. We must particularly mention that it was emphasised that the father is a Roman Catholic, the doctrines of which religion have to be taught to the children and that this is not only a right of the father but an obligation and duty cast upon the

father by the canons of the Roman Catholic Church. We do not understand Article 25 of the Constitution as conferring any right on the father which in any manner impinges on the right of this Court as *parens patriae* to decide the custody of the children in the best interests of the children.

The scope of the first amendment which introduced to the American Constitution provisions similar to that contained in Article 25 of the Indian Constitution was the subject matter of decisions in the United States. It is useful to refer to a passage from the Commentary on Article 25 of the Constitution of India by Basu, Fifth Edition page 149:

"Again, the State may legislate for the protection of minor children, founded upon its position as *parens patriae*, even though such legislation runs contra to a particular parent's religious beliefs. Thus, the right to practise religion freely does not include liberty to expose the children to ill-health or death. Similarly, a law forbidding children to sell merchandise on the streets cannot be challenged on the ground that it interferes with the freedom to disseminate religious literature".

The decisions relied on for the above propositions are *People v. Pierson*, reported in (1903) 176 NY 201, *Wallace v. Labrenz*, reported in (1952) 344 US 824 and *Prince v. Massachusetts*, reported in (1944) 321 US 158. Following the principles in those decisions, we hold that there is nothing in Article 25 of the Constitution of India that abridges or abrogates our jurisdiction as *parens patriae*.

If the argument is that the father alone can decide and not the Court, then a decision by the Court is bad not because it violates Article 25 of the Constitution but because there is an unwarranted interference with parental authority. If every father were to say that he alone can decide then the *parens patriae* jurisdiction of Courts will cease to exist. This argument has only to be mentioned to be rejected.

23. Counsel then relied on Articles 19 (1) (e) and 21 of the Constitution of India. Neither of these Articles compels a citizen of this country to reside and settle only within the territory of India. He is at perfect liberty to travel abroad and reside in any foreign country without prejudice to his right to return to this country at any time he chooses (See *Satwant Singh Sawhney v. D. Damarathnam*, Assistant Passport Officer, New Delhi reported in AIR 1967 SC 1838). In the case of a minor child it will ordinarily be left to the parent to decide where the minor child should reside, whether inside the territory of India or outside it. But circumstances can arise when this decision for the minor will have to be taken not by the parent but by Court. If in such a case the Court as *parens patriae* comes to the conclusion

that it is necessary in the paramount interests of the minor to entrust it to the custody and care of one of its parents who is residing outside the territory of India it has full power to pass orders permitting the child to be removed out of India and we are unable to find anything in Article 19(1)(e) or 21 of the Constitution which abrogates to any extent the Court's jurisdiction in this respect.

24. Nor are we impressed by the argument that we will lose jurisdiction to entrust the children with the mother even if we come to the conclusion that it is in their best interests since this would involve the children being sent out of the jurisdiction of this Court. That there is no such absolute rule is clear from the following passage from Simpson on the Law of Infants, Fourth Edition page III.

"The general rule of the Court is that a ward of Court may not be removed out of the jurisdiction, and in several cases an order of this kind has been enforced on the father, as well as on other guardians; and orders have been made to bring backwards who are out of the jurisdiction.

Though the rule is as above stated, it will bend to special circumstances, and non-enforcement of it is much more easily obtained now than formerly; but some undertaking is usually required from responsible persons, or some security insisted on, that the infant will be brought back if necessary, and will be under proper control when abroad. The Court now gives leave without a case of necessity being shown, if it considers that it is for the benefit of the ward, and that there is sufficient security that future orders will be obeyed".

To the same effect are the comments in Eversley on Domestic Relations, Sixth Edition, page 611:

"Before an infant ward can be properly removed out of the jurisdiction, the leave of the court must be obtained. The Court was wont not to grant permission readily, but did accede from time to time to the request to remove them. Its practice was to refuse an order permitting its infant wards to be removed out of the jurisdiction, with a view to their residing permanently abroad, except in a case of imperative necessity, as where it was clearly proved that a constant residence in a warmer climate was absolutely essential to their health; and such an order, if made, would comprise a scheme for the education of the infants, as well as a provision for informing the Court from time to time of their progress and condition, and an undertaking to bring them within the jurisdiction when required. But in modern times the Court is less strict in the exercise of this jurisdiction, and leave is now given to take an infant ward out of the jurisdiction without a case of necessity being shown; but

the Court must be satisfied that the removal is for the infant's benefit, and that future orders will be obeyed".

We may also refer to the following passage from Joseph H. Beale on Conflict of Laws, Volume Two, page 720.

"The fact that the parent to whom the award of custody would otherwise be made is likely to take the child into another State is not usually a ground for refusing to make the award. Even if the child is to be taken into another country the award will be made, at least if it is a friendly country with a similar civilisation, like England, though it might be different if it were a barbarous country, or one with an alien civilisation or religion, and clearly a child's custody will not be awarded to a parent who is an alien enemy. Nevertheless, the court in awarding custody may order the parent not to remove the child from the State, though the case would have to be 'a very extreme one indeed' to justify such interference with the natural and legal rights of a parent. If the court allows a child to be taken out of the State, it may require the parent to give a bond to return the child at the end of a fixed time, or on order of the court; but this will not usually be required."

The decision of the Court of Chancery in England in *Re Kernot* (an infant) reported in (1964) 3 All ER 339 shows that on facts very much similar to those that we have in this case Plowman, J., had passed an order granting custody to the Italian mother giving her liberty to take the child out of the jurisdiction of the court. It is significant that the order was passed by an English Court in the case of an English father, the child having the father's domicile and permitting the child being taken to Brescia in Italy. It is thus clear that the fact that the child may have to leave the jurisdiction of the court granting custody is no bar to the passing of appropriate orders in the interests of the child.

25. We are therefore, left with the sole question, and the most difficult question as to whether it will be against the interests of the children to give their custody to the mother in accordance with the order of the German Court.

No order of custody can ever be considered to be permanent as situations will alter and the welfare of the children will not be a constant quantity throughout their minority. The only security that the children may have in view of the wreckage of their home is the companionship of each other and no direction to separate them should be given except perhaps on the consent of the parents after a very careful consideration by them of every aspect of the case.

We have to remember that the children are of tender age even now. The eldest is hardly 4½ years old. The younger one, as we have said, has not yet attained 3 years.

A mother's protection for such children is indispensable. We cannot think of any other protection which will be equal in measure and substance to that of the mother in such circumstances. We cannot help referring to the eloquent passage of a jurist:

"The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretense of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate. (Bailey on Habeas Corpus, Vo. I, page 581)."

26. The father before us in this case is now staying at Palai, about 50 miles from here, and he is having a Nursing Home. His place of residence is not the same where he runs the Nursing Home. In his home there is no relative staying with him at the moment. No doubt, his father, the 2nd respondent, aged 62, and his step-mother whom his father married after the death of his mother are staying at a place about 17 miles away from the place where the 1st respondent is staying and it has been suggested that if the children are entrusted to the custody of the father, the 1st respondent's step-mother will look after them and that there would be no lack of affection. It has also been pointed out emphatically by counsel on behalf of the 1st respondent that a reference to Ext. P-17, the order of the German Appellate Court granting divorce would make it clear that the petitioner's mother and the petitioner's brother had taken a hostile attitude to the marriage of the petitioner and the 1st respondent and that hostile attitude continued till he left Germany and that there is no reason to think that there has been since then any change of heart in them. It was therefore stressed that the effect of sending the children with the mother will be to send them to a hostile atmosphere, to use the words of counsel, to the "father's enemies" and that they can get little solace and attention which is essential for their upbringing.

It was even suggested that their upbringing will not be in accordance with the

ethics of the Roman Catholic religion to which the father belongs and that it will result in the utmost harm in that the children will lose the Indian way of life, the Indian culture and will become aliens to this ancient land of ours and will acquire a foreign culture and that in course of time, might develop a tendency to dislike everything Indian and even their father. This is a lurid picture that counsel has painted which only helped to enhance the anxiety which a Court will always feel in deciding a case of this nature. We have bestowed our best attention to the question involved. We have already pointed out that any order that we can pass in this case can only be of a temporary nature and may have to be modified, according to the circumstances that may arise in future, and must contain the necessary safeguards that any direction given by this Court will be implemented to the full extent. Nobody can predict now as to what will happen in years to come. Counsel on behalf of the petitioner has stressed that we have reached the age where barriers between nations have started to crumble and according to him have even ceased to exist.

These considerations cannot be of much help when we are dealing with a case of this nature. But we have to remember certain aspects. If the children are entrusted to the mother they are being taken to a very civilised and cultured country on very friendly terms with the Indian people and the Indian nation. These are days of comparatively easy travel and even Germany is only a few hours by air from India. And above all, we have to remember that in those days many of our young men and women are seeking higher education and the hospitality of countries like West Germany, the United Kingdom, the United States, Japan etc. This is as it should be. There must be a greater mingling of various cultures and excessive nationality and any particular way of life or culture should not be considered as an impediment to such international friendly relations. Indian culture had been, and we hope still is, famous for its great tolerance and for the unstinted hospitality extended to foreigners who landed up on our shores. This culture and way of life demand that our young men and women when they enjoy hospitality of other countries honour and respect the culture and the way of life of other peoples and what is more respect their institutions, and the competent decrees of these institutions. That is the image that Indian culture should create in other countries.

The religion of the mother is the same as that of the father. It is difficult to accept the argument that she will be practising the Roman Catholic faith in a manner different from that of the father. If, as was suggested by counsel for the 1st respondent, she has incurred "latse santatia"

according to ecclesiastical canons because she sued for divorce, the 1st respondent too is in the same position because he too asked for divorce at least alternatively before the Appellate Court. He has at present no 'home' with proper persons there to look after the children. However much the 3rd respondent may be fond of the children we do not consider that in the circumstances in which she is placed and considering where she is staying she will be able to take the position of the mother. The children are of tender age. And we feel no doubt that these young children will be well looked after by their mother. No doubt she is employed and she will have to spend perhaps long hours in connection with her work, and it is suggested that the grandmother on the maternal side, the only person who can then be in charge of the children, will be hostile to them. We have not however been shown any specific material from which it is possible to infer that the grandmother of these children on the maternal side at any time showed the slightest dislike for the children or for that matter exhibited the slightest lack of affection for them. Human nature is such that we find it difficult to conceive that she will look at her own daughter's children with anything other than the affection naturally and normally shown to grandchildren by a grandmother.

27. After an anxious consideration of all the aspects we have come to the conclusion that we must entrust the children to the petitioner, the mother. As we indicated, we have to introduce sufficient safeguards for the enforcement of the further orders of this Court. The safeguards that we consider that are necessary in this regard are the following:

1. The petitioner will execute a bond to this Court to produce the children whenever ordered by this Court to do so.

2. An undertaking from the German Consulate Authority in Madras that they will render all assistance possible for the implementation of any order passed by this Court from time to time within the framework of the German Law will be produced by the petitioner.

3. The petitioner will obtain and send a report from the Parish Priest within the Parish in which they propose to live every three months to this Court giving sufficient details about the children, their health and welfare and send a copy thereof to the father.

4. The petitioner will inform the Registrar of this Court the address of her residence from time to time and any change of address will be immediately notified.

5. She will not take the children outside West Germany without obtaining the previous orders of this Court excepting when they are brought to this country as directed in this order.

6. Once in three years, she must bring the children to this country for a minimum period of one month at her own expense. At that time, the father will have access to the children on terms and conditions to be directed by this Court when the children have reached this country. The three years' period will be determined from the date on which the children are taken by the mother from this country. They will be brought to India earlier as directed by the Court at the instance of the father provided that it is not within an year from today, if the father is willing to meet the expenses for the trip from Germany to India and back for the mother and children.

7. The father, if he is visiting Germany, will be allowed access to the children on terms and conditions as ordered by this Court on motion by the father intimating his desire to go and see the children and requesting for permission for access.

8. When the children are brought to India at the end of 3 years the whole question of custody may be reviewed suo motu by this Court or at the instance of the father or mother and the present order maintained, modified, altered or cancelled.

28. We have given these directions with the full awareness that once the children are taken out of India, this Court will cease to have jurisdiction in the sense that our writs will not run outside India. But the anxiety that we feel in this regard is more than allayed not only by our faith but by the hope and confidence that we have that the directions of this Court will be respected and implemented to the full extent by the German Courts just the same way as we have honoured the orders of the Courts in Germany.

29. The children will be taken from India only on the bond being executed and only on this Court being satisfied that the undertaking that we have said must be given by the Consulate in Madras is in accordance with the terms mentioned in this Order and on being satisfied that we can rely on such undertaking. On these formalities being completed, the Registrar will hand over the children to the mother, the petitioner. Till then, they will continue to be with the St. Theresa's Convent subject to the same terms and conditions as agreed upon in the petition C. M. P. No. 694 of 1968 which was accepted by order dated 18-1-1968.

30. This original Petition is ordered on the above terms. We make no direction regarding costs.

Order accordingly.

AIR 1970 KERALA 14 (V 57 C 2)

M. S. MENON C. J. AND P.

GOVINDAN NAIR, J.

Income Tax Officer, Kottayam, Appellant v. R. M. Subramania Iyer s/o Ramasubba Iyer, Respondent.

W. A. No. 202 of 1967. D/- 29-10-1968, from Judgment of M. U. Isaac, J. reported in AIR 1968 Ker 182.

Constitution of India, Art. 226 — Writ proceedings — Plea that notice under Section 147, I. T. Act is barred by limitation — Cannot be permitted to be raised — Jurisdiction conferred on High Court under Art. 226 is not intended to supersede jurisdiction and authority of Income Tax Officer to deal with merits of contentions that the assessee may raise before them — Objections relating to notice well within jurisdiction and competence of Income Tax Officer to decide, can and ought to be considered by him — (Income Tax Act (1961), S. 147) — (1965) 55 ITR 415 (SC) Foll. AIR 1968 Ker 182, Reversed.

(Para 2)

Cases Referred: Chronological Paras (1965) 1965-55 ITR 415 = 1965-1

SCVR 236. Lalji Haridas v. R.

H. Bhatt 1

C. T. Peter, for Appellant; V. Sivaraman Nair, for Respondent.

JUDGMENT:— The Income-tax Officer, Kottayam is the appellant. He has challenged the decision of Mr. Justice M. U. Isaac allowing an original petition 805 of 1966 moved by the respondent seeking to quash a notice Ext. P-1 purported to be under Section 147 of the Income-tax Act, 1961 as well as a further notice Ext. P-5 under Section 143 (2) of the same Act. Various contentions were raised before the learned Single Judge and had been considered by the Single Judge and many questions have also been argued before us on which we express no opinion whatever in view of the injunction contained in the Judgment of the Supreme Court in Lalji Haridas v. R. H. Bhatt, (1965) 55 ITR 415 (SC). A part of the judgment was quoted by the learned Judge. But it appears to us that the full impact of the judgment has not been realised by the learned Judge.

The relevant passage runs thus: —

"Mr. Pathak for the appellant attempted to argue that the notice issued against the appellant is, on the face of it, invalid, because it is barred by time. We did not allow Mr. Pathak to develop this point, because we took the view that a plea of this kind must ordinarily be taken before respondent No. 1 himself. The jurisdiction conferred on the High Court under Article 226 is not intended to supersede the jurisdiction and authority of the Income tax Officers to deal with the merits of

all the contentions that the assessee may raise before them, and so it would be entirely inappropriate to permit an assessee to move the High Court under Article 226 and contend that a notice issued against him is barred by time. That is a matter which the income-tax authorities must consider on the merits in the light of the relevant evidence.

Apart from this aspect of the matter however, the plea of limitation sought to be raised by Mr. Pathak was not even specifically made as it should have been in the writ petition filed before the High Court. One of the grounds taken in the writ petition was that the Appellate Assistant Commissioner had 'instead of treating the assessment order as a nullity and having the same set aside, illegally remanded the case back to the Income-tax Officer to save limitation'. It would be noticed that at its highest, this ground can mean that the result of the remand order was to attempt to save limitation; it has no relevance on the point sought to be raised by Mr. Pathak that the notice issued against his client initially was barred by time. But, as we have already indicated, a plea of this kind cannot be permitted to be raised in writ proceedings, and so we refused Mr. Pathak permission to develop this point."

2. The sentence underlined (here in ' ') above was not extracted in the judgment under appeal and we think that concludes the matter about the purported exercise of the jurisdiction under Article 226 of the Constitution in matters such as that before us. One of the points raised by the assessee is that the notice under Section 147 is barred by limitation. No doubt there are other points as well. These also pertain to the question as to whether a notice under Section 147 can and should be issued; matters well within the jurisdiction and competence of the Income-tax Officer to decide.

3. The assessee has filed a return in pursuance of the notice and has taken his objections as evidenced by Ext. P-4. The objections raised in Ext. P-4 and all other objections, if any, can and ought to be considered by the Income-tax Officer. The petitioner in the original petition may raise his objections before the Income-tax Officer and it will be considered by the Income-tax Officer and appropriate orders passed. Subject to the above, we must set aside the judgment under appeal and dismiss the original petition. We do so. We direct the parties to bear their costs.

Appeal allowed.

AIR 1970 KERALA 15 (V 57 C 3)

T. C. RAGHAVAN, J.

Kunnammal Raghavan, Appellant v. M. Narayana Menon, Respondent.

Criminal Appeal No. 150 of 1968, D/-26-8-1968, from District Magistrate Court, Tellicherry in C. C. No. 63 of 1963.

(A) Criminal P. C. (1898), Ss. 479-A and 476 — Application by a party under S. 476 — Person sought to be prosecuted given opportunity of being heard in that motion — Fresh show cause notice unwarranted.

In a case falling under Section 479-A (or even under Section 476) where the court suo motu proposes to prosecute a person, the court has to issue a notice to him calling upon him to show cause. But, in a case where the court is moved by a party under Section 476 and the court hears the person sought to be prosecuted in that motion before it decides to prosecute him, the notice in that proceeding is the show cause notice. There is no need for another notice. (Para 2)

(B) Criminal P. C. (1898), Ss. 479-A and 476 — Disposal of judicial proceeding — Court not deciding to take action under S. 479-A — S. 476 cannot be resorted to subsequently.

Where the Court does not form an opinion, when it disposes of a judicial proceeding, that the witness has given intentionally false evidence or intentionally fabricated false evidence, it cannot later on resort to Section 476 and make a complaint against the witness under that section. It is not as if the court has an option to proceed either under S. 479-A or under Section 476, and that if it does not take action under Section 479-A, it can do so under Section 476. AIR 1963 SC 816, Foll. (Para 3)

(C) Penal Code (1860), Ss. 191 and 192 — Swearing to a false affidavit amounts to giving false evidence and fabricating false evidence. AIR 1967 SC 68, Foll. (Para 4)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 68 (V 54) = 1967 Cri LJ 6, Baban Singh v. Jagadish Singh 4

(1963) AIR 1963 SC 816 (V 50) = (1963) (1) Cri LJ 803, Shabir Hussain Bhola v. State of Maharashtra 3, 4

T. Karunakaran Nambiar, for Appellant; State Prosecutor, for Respondent.

JUDGMENT: — The appellant was directed to be prosecuted for offences under Sections 182 and 193 of the Penal Code by the District Judge of Tellicherry. The appellant (the defendant in a suit) lost before the trial court and filed an appeal before the District Court. He filed an application for stay of execution of the decree of the trial court; and in the

affidavit in support of that petition, he alleged that he had executed a bond before the trial court to secure the decree that might be passed against him. The District Judge ordered interim stay; but, when the other side (the plaintiff) appeared and it was brought to the notice of the District Judge that no such security bond was completed by registration though a bond was prepared, the District Judge called for a report from the trial court. The report said that no security bond was registered; and then the District Judge vacated the interim stay and dismissed the petition for stay. Subsequently, the plaintiff filed an application under Section 476 of the Code of Criminal Procedure requesting the District Judge to file a complaint against the appellant for offences under Sections 182 and 193 of the Penal Code. The District Judge issued notice to the appellant, heard him and ultimately, passed the order now impugned before me.

2. The first argument of Mr. T. Karunakaran Nambiar, the counsel of the appellant, is that the District Judge did not issue a show cause notice to the appellant. The argument is that after the disposal of the application filed by the plaintiff seeking to prosecute the appellant, the District Judge should have issued another notice calling upon the appellant to show cause why he should not be prosecuted. I do not think that such a notice is contemplated by either Section 476 or Section 479-A. In a case falling under Section 479-A (or even under Section 476) where the court suo motu proposes to prosecute a person, the court has to issue a notice to him calling upon him to show cause. But, in a case where the court is moved by a party under Section 476 and the court hears the person sought to be prosecuted in that motion before it decides to prosecute him, the notice in that proceeding is the show cause notice. There is no need for another notice as claimed by the counsel of the appellant.

3. The next argument of the counsel is that this was a case coming under Section 479-A of the Code, so that the District Judge should have issued notice when he dismissed the application for stay; and that the District Judge had no jurisdiction to take action under Section 476 subsequently at the instance of a party, e.g., the plaintiff. In support of this argument, he draws my attention to the decision of the Supreme Court in Shabir Hussain Bhola v. State of Maharashtra, AIR 1963 SC 816. More particularly the counsel draws my attention to paragraph 8 of the judgment. The Supreme Court has said in unmistakable terms that under S. 476 the action may proceed suo motu or on application, while under Section 479-A no application seems to be contemplated. The Supreme Court has also said that it is not

as if that court has an option to proceed either under Section 479-A or under Section 476, and that if it does not take action under Section 479-A, it can do so under Section 476. The Supreme Court has said further that if the court does not form an opinion, when it disposes of the matter, that the witness has given intentionally false evidence or intentionally fabricated false evidence, no question of making a complaint can properly arise, and that, when the court has formed an opinion that though the witness has intentionally given false evidence or intentionally fabricated false evidence the nature of the perjury or fabrication committed by him is not such as to make it expedient in the interests of justice to make a complaint, it has the discretion not to make a complaint. The Supreme Court has proceeded to lay down that once a court does not think it necessary to act under Section 479-A, it cannot later on resort to Section 476 and make a complaint against the witness under that section.

4. In the case before me, the appellant swore to a false affidavit in a petition for stay. He was a party and was also a witness before the appellate court when he swore to the affidavit. Swearing to a false affidavit is giving false evidence and fabricating false evidence, there cannot be any doubt; and if any authority is required for this, the decision of the highest tribunal in the land, the Supreme Court, in *Baban Singh v. Jagdish Singh*, AIR 1967 SC 68 may be perused. The said decision lays down that swearing to a false affidavit is an offence falling under Ss. 191 and 192 of the Penal Code. At the time when the District Judge dismissed the stay application, he could have issued notice under Section 479-A of the Code to the appellant to show cause why the appellant should not be prosecuted for giving false evidence, if the District Judge thought that, for the eradication of the evils of perjury and fabrication of false evidence and in the interests of justice, it was expedient that the appellant should be prosecuted. Since he did not think it necessary or expedient in the interests of justice to prosecute the appellant nor did he record a finding that the appellant should be prosecuted stating his reasons therefor, he cannot subsequently proceed against the appellant under Section 476 of the Code at the instance of the other side, the plaintiff in the case. The position appears to be clear in the light of the decision of the Supreme Court in *Shahir Hussain Bholu's case*, AIR 1963 SC 816 already referred to.

5. For these reasons, I allow the appeal and quash the complaint filed by the District Judge.

Appeal allowed.

AIR 1070 KERALA 16 (V 57 C 4)

FULL BENCH

M. S. MENON, C. J., P. GOVINDAN NAIR AND T. S. KRISHNAMOORTHY, IYER, JJ.

Kaniyankandiyl Kunhiraman Nambiar, Appellant v. Pairu Kurup of Mannunkandiyl Tarwad and another, Respondents.

Second Appeal No. 1047 of 1965, D/- 6-8-1968, against Judgment of Suh. J., Badargara in A. S. No. 164 of 1962.

(A) Transfer of Property Act (1882), Ss. 8, 58, 98, 105 — Kerala Land Reforms Act, 1963 (1 of 1964), S. 2 (22) — Deed — Construction — Document described as "kanyadharam" — Transaction whether a Kanom or a mortgage — Depends upon interpretation of document — Intention of parties must be looked into — Nature of transaction to be decided from terms of document — Held, on construction of document that it was a mortgage and not a Kanom under Kerala Act (1 of 1964) — Merely because a 'marupat' was executed on same date in favour of executant of "kanyadharam" it could not be said that transaction was a lease — (Evidence Act (1872), S. 92.)

The question whether the transaction evidenced by a document from North Malabar described as a "Kanyadharam" where kanartham was heavy and rent payable was very little is a kanom or a mortgage depends upon the interpretation of the document. The intention of the parties must be looked into. A Kanom in Malabar has got the incidents of a usufructuary mortgage and a lease. Even though a document is styled as a kanom it has to be considered and treated as a mortgage in some cases and has to be construed and treated as a lease in other cases. A kanom and a mortgage with possession have therefore many features in common and the only way by which a conclusion can be reached is to find out the object for which the transaction was entered into, namely whether it is the transfer of a right to enjoy the property or it is only a transfer of interest in property for securing the repayment of debt. Case law discussed. (Paras 2, 11, 13)

Further, the nature of the transaction evidenced by the document is to be decided from its terms. Section 92 of the Act forbids the admission or consideration of evidence to prove the intentions of the parties and the nature of the transaction will have to be decided "on a consideration of the contents of the documents themselves with such extrinsic evidence of the surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts." (Para 8)

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THE All India Reporter

1970

Madhya Pradesh High Court

AIR 1970 MADHYA PRADESH 1
(V 57 C 1)

FULL BENCH

B. DAYAL, C. J., K. L. PÁNDEY AND
G. P. SINGH, JJ.

Firm, Ratanchand Darbarilal, Satna and others, Appellants v. Rajendra Kumar Khoobchand and others, Respondents.

Second Appeal No. 867 of 1968, D/-16-7-1969, decided by Full Bench on Order of Reference made by Shiv Dayal J., D/-15-4-1969.

Houses and Rents — Madhya Pradesh Accommodation Control Act (41 of 1961), Ss. 13, 12 — Word 'proceeding' in sub-ss. (1) and (2) of S. 13 — Has to be construed to mean 'appeal' — Suit under S. 12 — Appeal by landlord against dismissal — S. 13(1) becomes operative — Appeal by tenant against decree of ejectment, not included in S. 13(1)—(Words and Phrases — "Proceeding").

The words 'suit or proceeding' as they occur in the opening portions of sub-sections (1) and (2) of Section 13 must be construed to mean 'suit or appeal' which are the words used in the concluding portion of sub-section (2). The opening words in sub-sections (1) and (2) make a reference to 'suit or proceeding'. The same subject-matter, however, in the concluding portion of sub-section (2) is referred to as 'suit or appeal'. By including 'appeal' within the word 'proceeding' as it occurs in the opening portions of sub-sections (1) and (2), the word proceeding is given a meaning which is consistent with the use of the words 'suit or appeal' in the concluding portion of sub-section (2). On such construction, when an appeal or second appeal is preferred by landlord against the dismissal of his suit under S. 12, sub-section (1) of S. 13 will become

operative. An appeal by tenant against decree for ejectment passed against him, on any ground referred to in S. 12, will not be included in sub-section (1) of S. 13, for it cannot be described as a proceeding being instituted by the landlord. Similarly such appeal will also not fall under sub-section (2) of S. 13, for that sub-section is also limited to a suit or proceeding referred to in sub-section (1) of S. 13 and so are the other sections.

(Para 6)

Cases Referred: Chronological Paras

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| (1966) AIR 1966 SC 1423 (V 53)= | |
| 1966-3 SCR 275, Dayawati v. Indrajit | 4 |
| (1963) AIR 1963 SC 553 (V 50)= | |
| 1963-3 SCR 858, Ram Sarup v. Munshi | 8 |
| (1957) AIR 1957 SC 540 (V 44)= | |
| 1957 SCR 488, Garika Pati v. Subbiah Choudhary | 4 |
| (1941) AIR 1941 FC 5 (V 28) = | |
| 45 Cal WN FC 66, Lachmeshwar Prasad Shukul v. Keshwarlal | 5 |

B. L. Seth, for Appellants; K. N. Agarwal, for Respondents.

SINGH J. :— The questions of law referred to the Full Bench are:

"(1) Where the landlord's suit under Section 12 of the M. P. Accommodation Control Act, 1961, is dismissed and he prefers an appeal, is such appeal governed by Section 13 of the Act?

(2) Where a decree for ejectment is passed against the tenant on any of the grounds referred to in Section 12 of the Act, and the tenant prefers an appeal from that decree, is such appeal governed by Section 13 of the Act?"

2. The Madhya Pradesh Accommodation Control Act, 1961, which repealed and replaced the Madhya Pradesh Accommodation Control Act, 1955, according to its long title is "an Act to provide for

the regulation and control of letting and rent of accommodation and the eviction of the tenants therefrom." Restriction on eviction of tenants is imposed by S. 12 which enacts that notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any Civil Court against a tenant for his eviction except on one or more of the grounds mentioned in Cls. (a) to (b) of sub-section (1). Then follows Section 13, which has given rise to this reference. The section is worded as follows:

"S. 13 When tenant can get benefit of protection against eviction. — (1) On a suit or proceeding being instituted by the landlord on any of the grounds referred to in Section 12, the tenant shall, within one month of the service of the writ of summons on him or within such further time as the Court may, on an application made to it, allow in this behalf, deposit in the Court or pay to the landlord an amount calculated at the rate of rent at which it was paid, for the period for which the tenant may have made default including the period subsequent thereto upto the end of the month previous to that in which the deposit or payment is made and shall thereafter continue to deposit or pay, month by month, by the 15th of each succeeding month a sum equivalent to the rent at that rate.

(2) If in any suit or proceeding referred to in sub-section (1), there is any dispute as to the amount of rent payable by the tenant, the Court shall fix a reasonable provisional rent in relation to the accommodation to be deposited or paid in accordance with the provisions of sub-section (1) till the decision of the suit or appeal.

(3) If, in any proceeding referred to in sub-section (1), there is any dispute as to the person to whom the rent is payable the Court may direct the tenant to deposit with the Court the amount payable by him under sub-section (1) or sub-section (2) and in such a case, no person shall be entitled to withdraw the amount in deposit until the Court decides the dispute and makes an order for payment of the same.

(4) If the Court is satisfied that any dispute referred to in sub-section (3) has been raised by a tenant for reasons which are false or frivolous, the Court may order the defence against eviction to be struck out and proceed with the hearing of the suit.

(5) If a tenant makes deposit or payment as required by sub-section (1) or sub-section (2), no decree or order shall be made by the Court for the recovery of possession of the accommodation on the ground of default in the payment of rent by the tenant, but the Court may allow

such cost as it may deem fit to the landlord.

(6) If a tenant fails to deposit or pay any amount as required by this section, the Court may order the defence against eviction to be struck out and shall proceed with the hearing of the suit."

3. Three constructions of this section were suggested at the bar:

(A) An appeal being a continuation of the suit, it must be taken to be included within the word 'suit' in sub-section (1) and the tenant is bound to continue to deposit rent till the disposal of all appeals arising in a suit instituted by the landlord on any of the grounds referred to in Section 12 irrespective of whether the appeal is by the landlord or by the tenant;

(B) An appeal is neither a 'suit' nor 'proceeding' and is not at all included within sub-section (1) and a tenant is not bound to deposit any rent in appeal whether the appeal be by the landlord or by the tenant; and

(C) An appeal is a 'proceeding' and falls within that word as it occurs in sub-sections (1) and (2) and if an appeal is by the landlord for obtaining a decree on any of the grounds referred to in Section 12, the provisions of Section 13 are attracted and the tenant is required to make deposit of rent as provided in sub-sections (1) and (2). But an appeal by a tenant although a proceeding is not "a proceeding instituted by the landlord" and does not fall within sub-section (1) and therefore, the tenant is not required to deposit rent in such appeal which falls outside the purview of Section 13.

4. The first construction is supported on the reasoning that an appeal is a continuation of the suit and when Section 13(1) requires the tenant to deposit in Court or pay the landlord arrears of rent and to continue to deposit or pay rent month by month by 15th of each succeeding month, the obligation to deposit or pay the rent continues till the disposal of all appeals arising from the suit. It is no doubt true that on general principles "the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding". *Garika Pati v. Subbiah Choudhary*, AIR 1957 SC 540 at p. 553. It is also true that as an appeal "is intended to interfere in the cause, it is a part of it and in connection with some matters and some statutes it is said that an appeal is a continuation of the suit"; *Dayawati v. Inderjit*, AIR 1966 SC 1423 at p. 1427. It does not, however, follow that in every statute whenever the word 'suit' is used, appeals arising from suit must be included within it. To find out the real content of the word 'suit' and

for that matter any word when used in a statute the setting and the context in which the word is used must be taken into account. There are three reasons why appeal cannot be held to be included within the word 'suit' as it occurs in sub-sections (1) and (2) of Section 13. First, the language used in the opening words of sub-sections (1) and (2) is "suit or proceeding".

Now it is difficult to comprehend any proceeding instituted on the grounds mentioned in Section 12 other than a suit and an appeal by a landlord. If an appeal by a landlord be also included within the word 'suit', the word 'proceeding' occurring in sub-secs. (1) and (2) would become superfluous. Secondly the language used in the concluding portion of sub-section (2) is "suit or appeal" which goes to show that the intention of the draftsman was to describe appeal separately and not to use the word 'suit' as inclusive of appeal. Thirdly, if an appeal, being a continuation of the suit, is included within the word 'suit' in sub-section (1) then even after a landlord's suit is dismissed and before he actually files an appeal, the tenant must continue to go on depositing rent on the 15th of each month. That is to say, a tenant must, in all cases, assume that an appeal would be filed against him although, in fact, the landlord may not afterwards file any appeal. Unless, the tenant proceeds on this assumption, he cannot comply with the requirement of sub-section (1) of continuing to deposit month by month on the 15th of each succeeding month a sum equivalent to the rent. Such a result is so unreasonable that by itself it goes to show that the legislature could not have intended to include appeal within the word 'suit'. In our opinion, there are many difficulties in the way of accepting the first construction, which has to be rejected.

5. The second construction suggested at the bar seeks its support on the ground that under Section 5 of the repealed Act, express provision was made authorising the appellate Court, on an appeal being preferred, to order the tenant to deposit rent from the date of filing of appeal till the decision of appeal, and if the legislature intended to apply Section 13 of the present Act to appeals, it would have similarly used express language embracing appeals within sub-section (1). It is also pointed out that sub-section (6) of Section 13, which authorises the Court in case of failure of the tenant to deposit or pay rent as required by the section, to strike off the defence against eviction and to proceed with the hearing of the suit, goes to show that the entire subject-matter of Section 13 is limited to the hearing of the suit and does not apply to appeals. Reference to the language of a repealed

Act as an aid to construction of a later Act cannot ordinarily be made unless the words used in the later Act do not by themselves give out their meaning clearly. Moreover, it is not correct to say that Section 13 of the present Act does nowhere expressly refer to appeals. Sub-section (2) of Section 13, which provides for fixation of a reasonable provisional rent in case of dispute, clearly says that the rent so fixed shall be "deposited or paid in accordance with provisions of sub-section (1) till the decision of the suit or appeal." The express use of the word 'appeal' in sub-section (2) clearly contemplates that appeals are also within sub-sec. (1) and at least in some appeals the tenant would be bound to deposit or pay rent as required by sub-section (1).

The construction suggested that Section 13(1) does not deal with any appeal at all will result into making the word 'proceeding' as it occurs in the opening words of sub-sections (1) and (2) and also the word 'appeal' in the concluding portion of sub-section (2) wholly redundant and devoid of any meaning. Sub-section (6) in our opinion, does not create any difficulty in holding that appeals are also included within sub-sections (1) and (2). The language used in sub-section (6) "that the Court shall proceed with the hearing of the suit" can apply to appeals, for appeal in its true sense is a rehearing of the suit; Lachmeshwar Prasad Shukul v. Keshwarlal, AIR 1941 FC 5 at p. 13 and Ram Sarup v. Munshi, AIR 1963 SC 553, p. 563. The Appellate Court while hearing an appeal can also be said to be hearing the suit. In face of express mention of appeal in sub-sec. (2), it is difficult to accept the extreme contention that no appeals are included within Section 13.

6. The third construction suggested at the bar, which adopts a middle course, appears to us to be the most acceptable. By including 'appeal' within the word 'proceeding' as it occurs in the opening portions of sub-sections (1) and (2), the word 'proceeding' is given a meaning which is consistent with use of the words "suit or appeal" in the concluding portion of sub-section (2). It must be noticed that the opening words in the sub-sections (1) and (2) make a reference to "suit or proceeding". The same subject-matter, however, in the concluding portion of sub-section (2) is referred to as "suit or appeal". This clearly goes to show that the word 'proceeding' in the opening portions of sub-sections (1) and (2) was used by the draftsman to signify appeal. It is true that the word 'instituted' and the words "writ of summons" as used in sub-section (1) are not very appropriate to appeals. According to the terminology employed in the Code of

Civil Procedure a suit is 'instituted' and an appeal is 'preferred', and a 'summons' is issued in a suit and a 'notice' is issued in an appeal. But the words 'instituted' and 'writ of summons' used in sub-sec. (1) fit in with the word 'proceeding' and if an appeal be included within the word 'proceeding', it cannot be excluded merely because of the use of the words 'instituted' and 'writ of summons'. In a loose sense even an appeal may be said to be instituted and notice of appeal may be described as writ of summons. What is more important is that by construing the word 'proceeding' to signify appeal, we are able to give meaning to the word 'proceeding' as it occurs in sub-sections (1) and (2) and further, we are also able to give effect to the use of the word 'appeal' in the concluding portion of sub-section (2).

Thus, on this construction, the entire language used in this section is made operative and effective. The word 'proceeding' in a general sense means "the form and manner of conducting judicial business before a Court or judicial officer;" (Black's Law Dictionary p. 1368). A suit, appeal or second appeal can all be described as proceedings. Indeed, in sub-section (3) of Section 13 the word 'proceeding' alone is used and it must, according to its context, mean "any suit or proceeding" referred to in sub-section (1). Thus, in sub-section (3) the word 'proceeding' embraces even a suit. But in the context of sub-sections (1) and (2), where suit is separately mentioned, the word proceeding can only mean an appeal. To put it briefly, the words "suit or proceeding" as they occur in the opening portions of sub-sections (1) and (2), must be construed to mean "suit or appeal" which are the words used in the concluding portion of sub-section (2). On this construction, which we find to be most acceptable when an appeal or second appeal is preferred by the landlord against the dismissal of his suit, sub-section (1) will become operative and the tenant within one month of the service of the notice of appeal or within such further time, as the appellate Court may allow, will have to deposit all arrears of rent and thereafter will have to continue to deposit or pay month by month on the 15th of each succeeding month rent till the decision of the appeal.

An appeal by a tenant will not be included in sub-section (1), for it cannot be described as a proceeding being instituted by the landlord. Similarly, such appeal will also not fall under sub-section (2), for that sub-section is also limited to a suit or proceeding referred to in sub-section (1) and so are the other sub-sections. A tenant has occasion to appeal when a

suit for eviction filed against him is decreed. Now in such appeal, the question of payment of rent for a period after the decree, does not really arise until the tenant obtains a stay of execution of the decree. If the tenant does not apply for stay, the landlord can execute the decree and obtain possession and he will not be interested in rent. If and when a tenant applies for stay of execution and the Court is inclined to grant his prayer, it can impose terms and direct the tenant to deposit or pay all arrears of rent and to continue to deposit or pay rent month by month till the disposal of the appeal. This power can be exercised under Order 41, Rule 5 read with Section 151 of the Code of Civil Procedure. Imposition of such terms is a very common practice of the Courts in this State whenever stay of execution of an ejectment decree against a tenant is granted. The Legislature must have been aware of this practice and therefore, no provision was made for payment or deposit of rent during the pendency of an appeal preferred by a tenant against whom a decree for eviction is passed.

On the other hand, if we include an appeal by a tenant within the language of Section 13, the tenant will have to deposit rent in appeal whether he applies for stay of execution or not and whether he is actually evicted or not. This again is an unreasonable result, which could not have been intended by the legislature. In our opinion, the third construction suggested at the bar is the proper construction of Section 13. To say the least, the section is drafted in a slovenly manner. The problem of construction, which this Full Bench has to face, could have been easily avoided if instead of using the words "suit or proceeding" in the opening portions of sub-sections (1) and (2), the words "suit or appeal" were used. However, the careless drafting has not made the section so ambiguous that its meaning cannot be gathered. As we have already pointed out, the key to the solution is in the use of the words "suit or appeal" in the concluding portion of sub-section (2) for the same subject-matter, which is described as "suit or proceeding" in the opening portions of sub-sections (1) and (2) which clearly shows that the word proceeding is used to mean an appeal.

7. For the aforesaid reasons, we answer question No. (1) in the affirmative and question No. (2) in the negative.

Order accordingly.

AIR 1970 MADHYA PRADESH 5

(V 57 C 2)

K. L. PANDEY AND A. P. SEN, JJ.

M. G. Tipnis, Appellant v. The Secretary, Ministry of Commerce, Union of India, New Delhi and others, Respondents.

Misc. (First) Appeal No. 76 of 1968, D/- 28-4-1969, against order of Addl. Dist. J., Rajnandgaon, D/- 3-1-1968.

(A) Court-fees and Suits Valuations — Court-fees Act (1870), Sch. I, Art. I — Memorandum of appeal filed against order rejecting plaint under O. 7, R. 11(a) and (d) of Civil P. C. (1908)— Court-fee payable is governed by Sch. I, Art. I: AIR 1968 Andh Pra 239 (FB), Dissented from.

In a case where memorandum of appeal is filed against an order rejecting a plaint under O. 7, R. 11(a) and (d) of the Civil P. C., what has to be valued is the subject matter involved and not the abstract question of law raised for consideration in appeal. The subject matter of appeal is not different even in case of appeals against rejection of plaints under O. 7, R. 11(a) and (d) of the Civil P. C. on these grounds because it will be readily seen that the real relief involved in either case is the same, namely, reversal of the decree or order of rejection of plaint having the effect of a decree and remand of the suit for trial on merits for the purpose of granting the reliefs claimed in the plaint. Court-fee payable in such a case is governed by Sch. I, Art. 1 of the Court-fees Act, 1870 and it must be ad valorem on the subject-matter in dispute in appeal which is the same as that in the Court of first instance. AIR 1949 Nag 1 (FB), Ref.; AIR 1968 Andh Pra 239 (FB), Dissented from. (Para 6)

(B) Civil P. C. (1908), S. 80 — Suit against Government and others — Notice under Section 80 not given — Suit not maintainable against Government but can continue against others. AIR 1951 Nag 419 and AIR 1964 Pat 275 & AIR 1962 Raj 36, Ref. (Para 2)

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(V 55)=1968-2 Andh WR 301

(FB), Subarna Rekha v. Ram Krishna Deo

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(1964) AIR 1964 Pat 275 (V 51)=

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Custodian Evacuee Property

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Chandani v. Rajasthan State

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v. Mohan Lal

(1951) AIR 1951 Nag 419 (V 38)=

ILR 1949 Nag 560, Shankar Rao

Balaji v. Sham Bihari

(1949) AIR 1949 Nag 1 (V 36)=

ILR (1948) Nag 565 (FB), Apparao

Sheshrao v. Mt. Bhagubai 3, 4, 5

P. R. Padhye, for Appellant; Ku. Rama Gupta, Govt. Advocate, for State.

PANDEY J. :— The question for consideration in this appeal relates to sufficiency of Court-fee paid on the memorandum of appeal. It arises in this manner. The appealing plaintiff brought a suit claiming Rs. 15,000 as arrears of salary against a Secretary to the Union of India, the State of Madhya Pradesh and others. It transpired that the plaint was rejected under Order 7, Rule 11(d) of the Code of Civil Procedure on the ground that notice under Section 80 of the Code was not served either on the Secretary to the Union of India or the State of Madhya Pradesh. Thereupon, the plaintiff filed this appeal challenging the order of rejection of the plaint and paid on the memorandum of appeal a court-fee of Rs. 7/8/- only.

2. The learned counsel for the plaintiff made the point that, in a case like this, the plaint as a whole ought not to have been rejected and the suit should have been allowed to proceed against defendants other than those to whom a notice under Section 80 of the Code had to be given. For this view, reliance is placed upon Shankarrao Balaji v. Shambihari AIR 1951 Nag 419, Mst. Chandani v. Rajasthan State, AIR 1962 Raj 36 and Ramcharan v. Custodian Evacuee Property, AIR 1964 Pat 275. We are inclined to think that that course could have been followed in this case. The fact, however, is that it was not adopted and the question we have to consider is what court-fee ought to be paid on a memorandum of appeal filed against an order rejecting a plaint on the ground of non-compliance with the requirements of Section 80 of the Code.

3. It is argued that the rejection of a plaint is, as such, not a decree but is, by virtue of the definition in Section 2 of the Code, deemed to be a decree and, in that sense, it is treated in the same way as the determination of any question under Section 47 or Section 144 of the Code. The further submission that, even for purposes of court-fee, the rejection of a plaint should be similarly treated, cannot be accepted. The Court-fees Act, 1870, is a fiscal statute and, while the one is covered by a specific provision, the another cannot be regarded as so covered by analogy. So, in Apparao Sheshrao v. Mt. Bhagubai, AIR 1949 Nag 1, the Full Bench observed:

"It is obvious that the matter falls to be governed by Sch. I, Art. 1, Court-fees

Act and not by Sch. II, Art. 11. This latter Article refers to a memorandum of appeal when the appeal is not from a decree or an order having the force of a decree. By virtue of S. 2(2), Civil Procedure Code, the rejection of a plaint amounts to a decree and therefore this Article has no application to such a case."

4. The counsel for the appellant further submits that, in any event, this appeal cannot be treated for purposes of court-fee as on par with an appeal from a decree which completely and finally determines the rights of the parties. It is pointed out that, in a case like this, there is no decree but the order of rejection of the plaint is deemed to be a decree by fiction. What is more, as provided by Order 7, Rule 13 of the Code, the order of rejection of the plaint, far from being a conclusive determination of the rights of parties, permits the plaintiff to file a fresh suit on the same cause of action. In this connection, reliance is placed on the following observations of the Full Bench case of AIR 1949 Nag 1 (supra):

"We have no doubt in our mind that under Sch. I, Art. 1, Court-fees Act the Court-fee must always be ad valorem on the subject-matter in dispute unless it is incapable of valuation. In other words, the court-fee has always to be ad valorem unless for the special reasons given in Sch. I, Art. 17, the appeal can be brought on fixed fee." In the present case, therefore, the question resolves itself into this:

"Has the ad valorem court-fee to be paid on the full value of the claim or the difference between the court-fee paid and the court-fee demanded?"

In our opinion, the latter is the amount on which court-fee can be demanded. It is well known that the Court-fees Act is a fiscal measure and like all fiscal measures, must be strictly construed. Schedule 1, Art. 1, itself requires that attention should be paid to the subject-matter of the dispute. In our opinion, the subject-matter in dispute in so far as the appellant is concerned is the extra court-fee demanded of him by the Court. The whole of the claim which he prefers in the Court below is never dismissed when the plaint is rejected. This is clear from the definition of decree given in Section 2(2), Civil Procedure Code read with Order 7, Rule 13 of the Code. For the purposes of the Civil Procedure Code, the rejection of a plaint is deemed to be a decree because the definition given in Section 2 includes the rejection of a plaint, but that does not mean that the rejection of a plaint is a conclusive determination of the rights of the parties.

Under Order 7, Rule 13, the aggrieved party can file another plaint on the same cause of action after paying the court-fee demanded. This shows that there is no conclusive determination of the rights of the parties when the rejection of the plaint takes place. After the rejection of the plaint the unsuccessful plaintiff has two courses open to him. He can accept the decision of the trial Court and present a fresh plaint, or he can appeal against the order which amounts to a decree. In the second case the dispute involves only the demand for the extra court-fee and with the other alternative open to him it is not right to say that the dispute covers the entire controversy in the suit about which no decision has really taken place." (Pages 2-3)

5. In the Full Bench case, AIR 1949 Nag 1 (supra), the plaint was rejected under Order 7, R. 11(c) of the Code and it was held that the court-fee was payable under Sch. 1, Art. 1 ad valorem on the value of the subject matter of appeal and that, in that particular case, the value of the subject-matter of appeal was the difference between the court-fee paid in the lower Court and the court-fee demanded there. So far as the rejection of a plaint under Order 7, Rule 11(b) or (c) is concerned, the same view has been widely taken for the obvious reason that the value of the subject-matter of appeal need not be the same as the one in the Court of first instance. In this connection, besides the cases noticed by the Full Bench, the counsel cited *Atma Singh v. Mohan Lal*, AIR 1959 Punj 387 and *Navneethalal v. Manilal*, AIR 1968 Ker 58. Here, however, we are concerned with the rejection of a plaint under Order 7, Rule 11 (d) of the Code on the ground that the suit appeared from the statement in the plaint to be barred by law in that notices requisite under Section 80 of the Code had not been served.

6. It is argued that the subject-matter of appeal against an order rejecting a plaint either under Rule 11(a) or Rule 11(d) of Order 7 of the Code is incapable of valuation. For this contention, reliance is placed upon certain observations made in *Subarna Rekha v. Ramkrishna Deo*, AIR 1968 Andh Pra 239. We are, with respect, unable to share that opinion because, in such cases, what has to be valued is the subject matter involved and not the abstract question of law raised for consideration in appeal. So, in a given suit, if a preliminary issue relating to limitation is tried and the suit is dismissed as barred by time, it cannot be successfully contended that, on the memorandum of appeal against the decree passed in the suit, court-fee should be paid only in regard to that question of limitation. Similar considerations arise if a suit is dismissed as disclosing no

cause of action or barred by any law. In our view, the subject matter of appeal is not different even in case of appeals against rejection of plaints under R. 11(a) and (d) of Order 7 of the Code on these grounds because it will be readily seen that the real relief involved in either case is the same, namely, reversal of the decree or order of rejection of plaint having the effect of a decree and remand of the suit for trial on merits for the purpose of granting the reliefs claimed in the plaint. In our opinion, court-fee payable in this case is governed by Schedule I, Article 1 of the Act and it must be ad valorem on the subject matter in dispute in appeal which, as we have shown, is the same as that in the Court of first instance.

Order accordingly.

AIR 1970 MADHYA PRADESH 7

(V 57 C 3)

SHIV DAYAL AND S. P. BHARGAVA, JJ.

Dwarka Prasad Mishra, Applicant v. Kamalnayan Sharma and another, Opp. Parties.

Misc. Civil Case No. 82 of 1969, D/- 7-4-1969, for leave to appeal to Supreme Court against decision of High Court of M. P. in F. A. No. 49 of 1967, D/- 12-3-1969.

(A) Constitution of India, Art. 133(1)(b) — Loss which may occur in future is not contemplated by clause (b) — Election to Legislative Assembly declared void by High Court in appeal — Certificate on ground of loss of future emoluments cannot be granted.

When a certificate is sought under clause (b) of Art. 133(1) on the ground that some question or claim respecting property is involved (in addition to or other than the subject-matter of the disputes in the proceeding) the amount of money must be Rs. 20,000 or upwards on the date of the judgment appealed from. The loss which may occur in future is not contemplated by clause (b), nor (a), for that matter. Case law discussed.

(Paras 8 and 12)

In an appeal arising out of an election petition, the applicant's election to the Legislative Assembly was declared void by the High Court. The applicant contended that he was entitled to grant of a certificate of fitness under clause (b) because as a result of the judgment he would be put to a loss of over Rs. 20,000 by way of future emoluments for the next three years, that is, from the date of the judgment to the date of the dissolution of the Assembly, after the next general election in 1972.

Held, that, a certificate under clause (b) could not be granted. (Para 12)

GM/HM/C841/69/JHS/B

(B) Constitution of India, Art. 133(1)(c) — Grant of certificate under Clause (c) is discretionary — Principles stated.

Grant of certificate under clause (c) is no doubt a discretionary matter, but the discretion must be exercised on sound judicial principles. The broad principles which guide the discretion under clause (c) are these:— (1) Where there is a question of law of unusual difficulty on which there is no authoritative decision, a certificate should be granted. (2) when there is a question of general importance, which has not yet been decided by the Supreme Court, a certificate should be granted. A question of law alone can be of general importance. A question of fact, arising from the peculiar facts and circumstances of a particular case, being restricted to that case, is not of general importance. (3) A point of law already decided by the Supreme Court cannot be referred to it by a certificate under clause (c) for reconsideration. (4) A question of fact, the decision of which is based on appreciation of evidence cannot be a ground for a certificate under clause (c). Case law discussed.

(Paras 14 and 16)

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 Wilkes
 199 NW 643, Wilson v. Michigan
 State Board
 K. L. Misra, for Applicant; K. P. Mun-
 ahi, for Opp. Parties.

SHIV DAYAL J. :— This is an appli-
 cation under Article 133 of the Constitu-
 tion from our judgment dated March 12,
 1969, in First Appeal No. 49 of 1967,
 whereby the applicant's election has been
 declared void and he has been found
 guilty of corrupt practice under Section
 123(6) of the Representation of the People
 Act, 1951, (hereinafter called the Act).
 The applicant also seeks to challenge in
 the Supreme Court our order dated May,
 4, 1968, whereby the preliminary objec-
 tions raised by the applicant were reject-
 ed and certain preliminary points raised
 by the non-applicant (appellant therein)
 were decided.

2. Originally, the application did not
 specify the clause under which a certi-
 ficate was sought, but it was obviously
 under clause (1)(c). Later on, the appli-
 cant made an application for amendment
 of the application claiming a certificate
 under clause (b) as well.

3. It will be convenient to continue to
 call, in this order, the non-applicant as
 "the appellant" and the applicant as
 "the respondent."

4. There were many allegations of
 corrupt practices, which were dealt with
 under four heads: (1) bribery; (2) pro-
 curing vehicles for conveying electors;
 (3) publication of three false statements;
 and (4) election expenses incurred in
 excess of the prescribed limit. We have
 found the first two not proved. With re-
 gard to the third, we have found that all
 other ingredients were proved but on the
 question of consent, we have given the
 respondent benefit of doubt. Regarding
 election expenses, we have found that
 the respondent did not include in his
 return of election expenses four items of
 expenditure incurred or authorised by
 him. Also there was a clerical error in
 one of the items of expenditure shown in
 the return. Then, there were two items
 which are shown in the return as election
 expenses, but we have held them to be
 outside the purview of Section 77 of the
 Act, and have excluded them from the
 total of expenditure entered in the return.

5. Two of these four items, on which the decision of the appeal turned, are (1) Rs. 500/- paid to the Congress party as security deposit for party ticket; and (2) Rs. 510/- for which cloth was purchased for banners and boards. When these two items are added to the total expenditure shown in the return, the grand total exceeds the prescribed limit. With regard to the first item we have found (1) that this amount of Rs. 500/- together with Rs. 200/-, application fee (the latter we have found to have walked out of Section 77), were paid to the Congress party by the respondent through Ramkrishna Shriwas; (2) that this amount of Rs. 500 which was initially a deposit, became expenditure the moment party ticket was given to the respondent and (3) that it is an election expense. The first is a finding of fact and the other two are based on Supreme Court decisions.

As regards the other item of Rs. 510/- we have found that (1) large number of banners and boards were got painted by the respondent through Basant Kumar Tiwari, who was an agent of his, from Kathote (P. W. 6) of Bhartiya Chitra Mandir, Raipur; (2) that Rs. 570/- was paid to the painter as painting charges only; (3) that voucher No. 28, which is for payment of advance, shows that it was for painting charges purely; (4) that the voucher No. 39 for the purpose of filing with the return was subsequently obtained by Basant Kumar Tiwari from the painter in which the words "including cost of cloth" were got introduced by Basant Kumar Tiwari for the first time; (5) that the yardage of cloth was proved by the painter's evidence, which was nearly the same as the cloth purchased by Basant Kumar Tiwari for Rs. 510 from Keshrichand; (6) that the painting of banners having been admittedly authorised by the respondent, the purchase of cloth for them was necessarily authorised; and (7) that there is no item of cloth shown in the respondent's return of election expenses. These findings are based on the evidence of Kathote and Keshrichand, who were examined by the appellant before the Tribunal. The respondent desires to prefer an appeal to the Supreme Court to challenge these findings and to raise certain questions of law which we shall presently mention.

6. Shri K. L. Mishra, learned counsel for the respondent (applicant here), first of all claims a certificate under Clause (b) of Article 133(1) of the Constitution. His contention is that in consequence of the judgment to be appealed from, the respondent will be disqualified from being a member of the Madhya Pradesh Legislative Assembly and this will entail a pecuniary loss to him of more than Rs. 20,000 from the date of the judgment to the date of the dissolution of the As-

sembly, after the next general election in February/March 1972 (three years). In the application for amendment of the application, the claim is made up of six items but in view of counter affidavit filed by the appellant in this proceeding, Shri Mishra confined the claim to the following:—

(a) Membership allowance at the rate of Rs. 500/- per month, for three years.	...Rs. 18,000/-
(b) Daily allowance @Rs. 15/- per day, during the sessions of the Assembly, average sittings 40 in a year, for three years.	... Rs 1,800/-
(c) Travelling allowance.	... Rs. 1,886/-
	<hr/> Total: Rs. 21,686/-. <hr/>

It is urged that in this way, the judgment to be appealed from involves, directly or indirectly, a claim or question respecting money, the amount of which is more than Rs. 20,000 and this entitles the applicant to a certificate under cl. (b).

7. Shri Munshi's argument is four-fold. Firstly, no pecuniary loss flows from our judgment as such. The loss contemplated by the respondent may result from an order which may in future be passed by another statutory authority (the Governor), by virtue of the provisions of the Constitution and the Representation of the People Act. Learned counsel argued that a question or claim can arise only if and when the Governor makes an order under Article 192 of the Constitution. In other words, the loss apprehended may result from the supervening order of another authority, but not by force of the judgment to be appealed from. If the Governor refuses to unseat the respondent because of some interpretation of the Constitutional provision, which he may accept, or if he withholds his order indefinitely, there will be no pecuniary loss to the respondent. Secondly, uncertainty cannot be ruled out. There has been a demand for dissolution of the Assembly and for holding mid-term elections, in which case, the loss of emoluments will not be for three years. A member may be offered, a suitable post in the executive, in which case he has to relinquish his membership of the Assembly. Thirdly, the pecuniary loss to be the basis for a certificate under clause (b) must be one which had occurred before the judgment to be appealed from, so that a question or claim was involved in the judgment on that date, and not any loss which may occur or may periodically occur in future. Fourthly, the expression "question or claim" postulates a dispute, but there cannot be any dispute about the title to or the quan-

turn of salary and allowances for which there are statutory provisions. Reliance was placed on Printers (Mysore) Pvt. Ltd. v. Union of India, AIR 1966 Mys 237, where it was held that the subject matter of the writ petition, namely, that the newspapers are new newspapers and therefore, a direction should be issued to the Government forbidding it from granting any news print or news print quota is not something that was capable of valuation. It was further held that it cannot be considered as "property". And, then it was laid down.—

"To come within Art. 133(1)(b), the decision sought to be appealed against must involve directly or indirectly some claim or question regarding property. There must be some connection direct or indirect between the decision and some property. Some remote chain reaction is not within the contemplation of that Article."

In that case Chittarmal v. Shah Pannal Chandulal, AIR 1965 SC 1440, State of Bihar v. D. N. Ganguly, AIR 1958 Pat 26 and Mohammad Ghouse v. State of Andh Pradesh, AIR 1960 Andh Pra 194 were relied on.

8. In our opinion, when a certificate is sought under clause (b) on the ground that some question or claim respecting property is involved (in addition to or other than the subject-matter of the disputes in suit), the amount of money must be Rs. 20,000 or upwards on the date of the judgment appealed from. The loss which may occur in future is not contemplated by clause (b), nor (a), for that matter. In Surendra Nath v. Dwarka Nath, AIR 1917 Cal 496, the suit was for ejectment from certain property on the ground of tenancy being at will. The defendants alleged that they had a permanent tenancy. The plaintiff eventually lost in the High Court. A question arose whether the value of the property itself was Rs. 10,000 or upwards. It was held that "the material date is the date of the decree of the High Court from which the appeal is to be made." In Nathulal v. Babu Ram, AIR 1933 All 8, the question was that the decree of the High Court would affect the plaintiff's right with reference to some other property. No cause of action had up-till then accrued in plaintiff's favour and there was a mere shadowy right of expectancy "which may never materialise". It was held:

"The words 'must involve directly or indirectly some claim or question to or respecting property of Rs. 10,000 or upwards in value' in section 110 Civil P. C. refer to questions arising between parties to a pending suit and not to questions relating to the title of only one of the parties which might be made the basis of a prospective suit."

An earlier decision of that High Court in Hanuman Prasad v. Bhagawati Prasad

(1902) ILR 24 All 236, was followed, where it was laid down that the reference was to suits in existence and not to suits in gremio futuri. Reliance was also placed on Raja of Ramnad v. Kamith Ravuthan AIR 1922 Mad 34 and Bon Kwi v. S. K. R. S. K. R. Firm, AIR 1926 Rang 128. The same view was taken in Madho Prasad Singh v. Sher Bahadur Singh, AIR 1936 Oudh 181.

9. In Radhakishan v. Shridhar, AIR 1954 Nag 267 it was held:—

"No decision has been brought to our notice that in determining the value of the suit for purposes of Section 110, 'potential market value' as distinguished from the actual market value is to be the criterion. If actual increase in value during the suit is irrelevant, 'potential market value' has no claim for consideration at all in deciding the present question."

See also Bhawar Lal v. Lachmandas, AIR 1929 Nag 75.

10. Shri Mishra relies on Kastur Bhai v. Hiralal D. Nanavati, AIR 1923 Bom 23 (1); Ram Lakshman Singh v. Girindra Mohan, AIR 1963 Cal 13, Amarsingh v. Karnell Kuar, AIR 1956 Raj 169; G. Appaswamy v. R. Sarangapani, AIR 1966 Mad 197 and State of Andhra Pradesh v. Digyadarsan, AIR 1969 Andh Pra 8. In each one of these cases, the value of the immovable property in respect of which a claim or question was involved, other than the dispute in suit, was taken into account. But it seems to us quite clear that no future or potential value was taken into consideration, and, that in all these cases, it was the value of the property on the date of judgment appealed from which was evidently considered.

11. Shri Mishra resorts to the analogy of calculating the present value of an immovable property on the basis of the profits it will fetch. But it seems to us that, in the first place, that is only one of the several modes of determining the present value of an immovable property, and the fact still remains that what is worked out is the 'present value' and not a future value, meaning, that it can fetch that price today. Secondly, that analogy does not hold good in case of money. For instance, a person cannot say that the value of Rs. 18,000 in his hands today is really Rs. 20,000 on the basis of future return on investment. We are clearly of the opinion that for the purposes of clause (b) the amount of money, which has actually fallen due on the date of the judgment to be appealed from, will be the value of the claim involved. For instance, in the Rajasthan case, AIR 1950 Raj 169 (supra), relied on by Shri Mishra, if the property of the deceased had consisted of money only or, in the Andhra Pradesh case AIR 1969 Andh Pra 9

(supra), the property of the Math had consisted of money only, then in our opinion, in either case, to satisfy the requirements of clause (b) the amount on the date of the judgment had to be Rs. 20,000 or upwards (and not what it would swell to in a couple of years).

12. From 1956 to 1966, the High Courts exercised appellate jurisdiction under Section 116-A of the Representation of the People Act. Many appeals went to the Supreme Court from appellate judgments of High Courts. We are not aware of a single case, and Shri Mishra conceded that even after a research he also could not find a single case, where certificate was granted under clause (b) of Article 133(1) of the Constitution on the ground of loss of future emoluments for 3, 4 or 5 years. In *C. V. K. Rao v. Bhaskarrao*, AIR 1964 Andh Pra 185 (FB), it was conceded that no certificate could be granted under clause (b). This is not to say that a point which did not occur to anybody during 10 years or more must necessarily be rejected. For the reasons we have already stated, a certificate under clause (b) cannot be given.

13. Shri Mishra then urges that this is a fit case for a certificate under clause (c) because the applicant has an arguable case against our findings on questions of law and fact; because the case is of great private importance to the applicant; because our observations in paragraphs 202 and 203 of the judgment themselves make it a fit case under clause (c); and because in an election matter a certificate under clause (c) is invariably granted by High Courts in exercise of their discretion.

14. Grant of a certificate under clause (c) is no doubt a discretionary matter, but the discretion must be exercised on sound judicial principles. Marshall, C. J., succinctly expressed himself in *Wilson v. Michigan State Board*, 199 NW 643, 644 thus.

"Courts are mere instruments of the law and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion—a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the legislature, or, in other words to the will of the law." Lord Mansfield said in *R. v. Wilkes* (1769) 4 Burr 2527:—

"Discretion, when applied to a court of justice means sound discretion guided by law. It must be governed by rule, not humour; it must not be arbitrary, vague and fanciful, but legal and regular."

These two cases are cited in *M/s. Godhan*

Das Baldev Das v. The Governor General in Council, AIR 1952 Punj 103 (FB). We respectfully adopt the language of Bhandari, J., as our own, when he said:—

"Decisions of eminent judges have indicated the grooves in which discretion should run and this Court, and all other Courts, are supposed to ascertain the principles of law and to follow them. Justice is administered in the Courts on fixed and settled principles and does not vary like the Chancellor's foot."

Before we recall certain observations made in certain decisions of the High Courts, we must bear in mind the weighty and emphatic observations of the Supreme Court in *Babu v. State of U. P.*, AIR 1965 SC 1467.

"The sub-clause (Article 134(1)(c)) does not state the conditions necessary for such certification. No rules under Article 145 regulating generally the practice and procedure of the Supreme Court for the grant of certificate by the High Court have been framed. The power which is granted is, no doubt, discretionary, but in view of the word 'certifies', it is clear that (such power must be exercised with great circumspection and only in a case which is really fit for appeal.) It is impossible by a formula to indicate the precise limits of such discretion. Under Article 134(1)(c), this Court has not been made an ordinary Court of Criminal appeal and the High Courts should not, by the certificates, attempt to create a jurisdiction which was not intended. The High Courts should therefore exercise their discretion sparingly and with care. The certificate should not be granted to afford ('another hearing on facts unless there is some error of fundamental character').

There is no doubt whatever that sub-clause (c) does not confer an unlimited jurisdiction on the High Courts. The power gives a discretion, but discretion must always be exercised on some judicial principles. A similar clause in Article 133, which allows appeals in Civil cases, has been constantly interpreted as including only those cases which involve a ('question of general public importance') That test need not necessarily be applied to a criminal case, but it is clear that ('mere questions of fact should not be referred for decision').

The Constitution does not contemplate a criminal jurisdiction for this court except in those two cases covered by clauses (a) and (b), which provide for appeals as of right.

The High Court, before it certifies the case, must be satisfied that it involves ('some substantial question of law or principle') . . . It is thus obvious that only a case involving something more than mere appreciation of evidence is contem-

plated by the Constitution for grant of a certificate. What that may be will depend upon the circumstances of the case."

[Portions underlined in judgment are put in brackets here — Ed].

These observations were made regarding Article 134(1)(c), but their Lordships have indicated that the dictum should be more rigidly applied to case under Art. 133.

15. We shall now refer to the observations contained in certain decisions of different High Courts. There must be a difficult question of law or principle involved requiring further clarification by the Supreme Court (*Electrical Mfg. Co. Ltd. v. D. D. Bhargava*, AIR 1967 Delhi 97). Where the question is covered by Supreme Court decision, certificate cannot be granted (*State of West Bengal v. Ram Ajodhya Singh*, AIR 1965 Cal 348). Unless the Court is satisfied that the case involved matters or questions of importance and considerable difficulty which ought to be finally decided by the highest Court of the land, the High Court would withhold its hand from granting certificate. The term used in the Article is a strong term requiring the High Court to be satisfied of the fitness of the case for appeal to the highest court of the land. *P. Seetharamareddy v. Chinn Ramareddy*, 1959 ALT 61 Where the High Court does not feel any difficulty, nor is there a doubt on the points raised in the appeal, the High Court will not be justified in granting certificate. (*Hotha Sita Rama v. State of Andhra Pradesh*, AIR 1959 Andh Pra 359.) Where, though the Court has dealt with various questions of law in deciding the case, it has only applied the principles contained in the Supreme Court decisions, the Court cannot certify the case to be fit for appeal (*Union of India, Delhi v. Jogendra Kumar Choudhury*, AIR 1964 Tripura 23.) Although the matter may be of general importance, if the question of law involved in the appeal has been settled definitely by the judgment of the Privy Council, the case should not be sent to the Privy Council for a fresh decision on the same point. (*Rama Kumar Singh v. Muhammed Salim*, AIR 1929 All 339).

16. It has been said time and again that consideration which will govern the Court's discretion cannot be crystallised into hard and fast rules or formulae. But whether we say so or keep it at the back of our mind, the broad principles which guide the discretion under clause (c) are these :— (1) where there is a question of law of unusual difficulty on which there is no authoritative decision, a certificate should be granted. (2) When there is a question of general importance, which has not yet been decided by the Supreme Court, a certificate should be granted. A question of law alone can be

of general importance. A question of fact, arising from the peculiar facts and circumstances of a particular case, being restricted to that case, is not of general importance. (3) A point of law already decided by the Supreme Court cannot be referred to it by a Certificate under clause (c) for reconsideration. (4) A question of fact, the decision of which is based on appreciation of evidence cannot be a ground for a certificate under clause (c). (*See Jagdish Prasad v. State*, AIR 1957 Madh Pra 226). We are not aware of a single case—nor has any been cited by the learned counsel—where a certificate was given under clause (c) by any Division Bench of this Court for a reconsideration on a finding of fact by the Supreme Court.

17. On these principles, we shall test each and every question which has now been raised before us for a certificate under clause (c).

(1) On the authority of *Vidya Charan Shukla v. Khubchand Baghel*, 1964-6 SCR 129=(AIR 1964 SC 1099) we held that the appeal was not barred by time.

(2) We held that when in an election petition there is a charge of corrupt practice, the petition or appeal arising from it does not become infructuous, although the Assembly has been dissolved. (Paragraphs 8 to 22 of our order dated May, 4 1963). That point has now been decided by the Supreme Court in *Sheo Sadan Singh v. Mohanlal Gautam*, 1969-1 SCR 408: (AIR 1969 SC 1024).

(3) We gave the appellant leave to amend the election petition (paragraphs 33 to 45 of the order dated May 4, 1968), by applying *Harishchandra Bajpai v. Triloki Singh*, 1957 SCR 370=(AIR 1957 SC 444), *S. M. Banerji v. Shri Krishna*, 1960-2 SCR 289=(AIR 1960 SC 368) and *Babu Lal Sharma v. Brijnarayan*, 14 Ele LR 72=(AIR 1958 Madh Pra 175) (FB). The last mentioned case has been cited with approval in a recent pronouncement of the Supreme Court in *Samant N. Balkrishna v. George Fernandez*, Civil Appeals Nos. 895 and 896 of 1968, D/- 12-2-1969=(AIR 1969 SC 1201) containing a lucid exposition of the law in clear terms which we venture to sum up thus:—

"(a) When, in an election petition, as initially filed, there is no allegation of a particular kind of corrupt practice at all, it cannot be introduced subsequently by amendment.

(b) A mere repetition of words of statute, without stating any material facts, is not setting out a ground or charge. If material facts, on which standing by themselves the charge can be made out, have not been stated, material facts cannot be supplied by way of amendment.

(c) When, in an election petition, as initially filed, (i) a ground or charge,

that is, "the kind of corrupt practice" is alleged; and (ii) material facts, which if proved, will by themselves constitute the corrupt practice, have been stated, then the particulars which are stated, may be amplified or corrected so as to make them "better"; and new instances or "more" particulars can be added." (per Civil Appeals Nos. 895 and 896 of 1968, D/- 12-2-1969=(AIR 1969 SC 1201) (supra). If our order granting leave to amend the election petition did not satisfy these requirements, we would have readily granted a certificate under clause (c). But we find that it is fully within this subsequent pronouncement of the Supreme Court.

Initially, in the election petition it was alleged in Paragraph 7(a) that the respondent had incurred election expenses exceeding the prescribed limit of Rs. 7,000 and this was in contravention of Section 77 of the Act, which is a corrupt practice under Section 123(6) of the Act. This allegation satisfies the first test. Then, in 8 sub-paragraphs, which were numbered as 7(b)(i) to (viii), material facts were given, and each of these sub-paragraphs constituted a complete cause of action. Each one of these 8 sub-paragraphs by itself made out the said charge. This fulfilled the second requirement.

Thus, both the conditions having been fulfilled in the election petition, as it was initially filed, the election petitioner made two applications before the election tribunal for leave to amend it. By application, dated December 1, 1965, he sought to introduce an item of expenditure, as sub-paragraph (ix) in paragraph 7(b), alleging that about Rs. 625, the price of cloth, was not included in the return of election expenses. He averred that on November 30, 1965 he came to know of that item of expenditure incurred by the respondent. This application was rejected by the election tribunal by its order of the same date in a single sentence on the ground of delay.

By another application of December 6, 1965, the election petitioner sought to introduce (among several others), another item of expenditure as paragraph 7(c)(i), alleging that the respondent had paid Rs. 200 as application fee and Rs. 500, as deposit, total Rs. 700, to the Congress Party but did not include it in the return of his election expenses and that this came to the petitioner's knowledge on December 4, 1965. The Tribunal, by its order dated December 16, 1965, rejected that application without even making a mention of this item of expenditure. The Tribunal does not appear to have applied either Harishchandra's case, 1957 SCR 370=(AIR 1957 SC 444) (supra) or Babulal's case, 14 Ele LR 72=(AIR 1958 Madh Pra 175 (FB)) (supra), the latter being a Full Bench decision of this Court.

Both these applications were pressed before us, as a preliminary point, when the appeal came up for hearing on the very first occasion. We granted leave to introduce both these items of expenditure and some others (Paragraph 44 of the order dated May 4, 1968).

Leave to amend the petition was clearly within the ratio decidendi of Civil Appeals Nos. 895 and 896 of 1968 D/- 12-2-1969=(AIR 1969 SC 1201) (supra).

Shri Misra's argument that an election petition can never be amended so as to add a new instance of expenditure, when the charge is under Section 123(6) of the Act, stands repelled by the Supreme Court decision in C. A. Nos. 895 & 896 of 1968, D/- 12-2-1969=(AIR 1969 SC 1201), (supra) where among other things their Lordships have themselves given illustrations to lay down that new instances can be furnished provided the two conditions, to which we have already referred, are satisfied.

Kathote and Keshrichand had already been examined before the election tribunal to prove the item of expenditure on purchase of cloth. Ramnarayan Purohit was examined by the appellant in this Court to prove payment of Rs. 700 to the Congress party for Congress ticket.

Fresh opportunity was given to the respondent to produce in this Court, oral and documentary evidence in rebuttal. He filed a list of four witnesses but later on abandoned them and did not examine any.

(4) Our finding that the amount of Rs. 500 was paid to the Congress Party by the respondent through Ramkrishna Shrivastava is one of fact.

(5) Our findings that the payment of Rs. 500 to the Congress Party, which was initially a deposit, became 'expenditure' the moment party ticket was given to the respondent, and that it is an election expense, are covered by the decision of the Supreme Court in S. Khader Shariff v. Munuswami Gounder, 1955-2 SCR 469 = (AIR 1955 SC 775) and Vidya Sagar Joshi v. Surinder Nath Gautam, AIR 1969 SC 288, on which we relied in the judgment.

(6) Our finding that an expenditure of Rs. 510 was incurred or authorised by the respondent for purchase of cloth from Keshrichand is one of fact.

18. Shri Misra then urges that this is a fit case for a certificate under clause (c) because it is of great private importance to the applicant. Learned counsel relies on P. A. Pleader Bansi v. Judges of Allahabad High Court, AIR 1937 All 167, where a certificate was granted for appeal to the Privy Council to a pleader, whose name had been struck off the roll of pleaders for misconduct. It appears from the judgment that what mainly

weighed with the High Court was that on two earlier occasions the names of two vakils had been struck off the rolls, that certificates were granted to them and that the Privy Council set aside the orders of the High Court. In that context, it was observed: "Although the Calcutta and Patna High Courts have taken a different view, it has been the practice in this court to treat such orders as falling under Section 109(c) Civil P. C." Thus, that decision is based on a certain practice which then prevailed in that High Court. It is not urged before us that there has been any such practice in this Court. In *Rudra Pratap Singh v. Mritunjay Pratap Singh*, AIR 1957 All 28, it has been held that if the question is one of private importance, it will not be a fit case under the clause, if the points of law are not substantial, and, it has been held in 1969 Andh. L. T. 61 that a question of law does not become substantial merely because much is at stake on the answer to it, or that the decision thereon is likely to materially affect one of the parties.

19. Shri Misra then asks us to certify this as a fit case for appeal under clause (c) because of our observations in paragraphs 202 and 203 of the judgment. The former arose from our feeling which we had when we gave benefit of doubt to the respondent (paragraphs 96 and 97 of the judgment) on the question of respondent's consent for publication of the false statements (annexures I, II and III). That question will not be before the Supreme Court in the respondent's appeal, because he has been absolved from that charge. The observation in paragraph 203 of our judgment has reference to Shri Misra's argument that non-compliance with the provisions of Section 77(1) of the Act, is not a corrupt practice as has now been held by the Supreme Court in *Dalchand Jain v. Narayan Shankar*, 1969 SC (Notes) 161, and that vouchers to be filed with a return of election expenses can be obtained at any time, not necessarily when payments are made. In the present case, the respondent's accounts of election expenses, said to have been maintained by *Laxmishankar Bhatt*, were not available, as they were said to have been lost. Since we accepted this argument and gave benefit to the respondent about the alleged items of payment to *Laxmi Press Raipur*, and to *Nawalchand Nathmal, Bhatapara*, this question will not be before the Supreme Court in the respondent's appeal.

20. Shri Misra, learned counsel for the respondent, remarked in passing that in election appeals it was a practice to invariably grant a certificate under clause (c). We are not aware of any such practice in this Court or in any other High

Court. There are at least 29 cases reported in the AIR from 1956 to 1966 (when appeals lay to the High Court under Section 116-A of the R. P. Act) where appeals were heard on special leave under Art. 136 of the Constitution, which means that certificates under Art. 133(1)(c) were refused by the High Court, in those cases. No doubt when a substantial question of law is involved in an election matter it is usually of general public importance and, on that ground, certificate under clause (c) is granted.

21. As our decision on the crucial items of expenditure (Rs. 500 and Rs. 510) is based on questions of law which have already been decided by the Supreme Court, and on findings of fact, it cannot be certified under Art. 133(1)(c) that this is a fit case for appeal to the Supreme Court. Therefore, this application is dismissed. Stay order passed on March 19, 1969, stands automatically vacated. The respondent (applicant) shall pay the appellant (Non-applicant) Rs. 50 as costs.

Application dismissed.

AIR 1970 MADHYA PRADESH 14 (V 57 C 4)

(INDORE BENCH)

P. K. TARE AND H. R. KRISHNAN, JJ.

Radhikabai, Appellant v. Sadhuram Awatrai, Respondent.

Misc. Appeal No. 88 of 1964, D/- 25-11-1965, against order of Addl. Dist. J., Indore, D/- 18-3-1964.

Hindu Marriage Act (1955), S. 24 — Suit by husband for judicial separation — Application by wife for grant of interim maintenance and litigation expenses — Considerations—Good-will or clarity of relations and friends cannot be taken into account while ordering any grant — Test is whether she has any independent income sufficient for her support and to bear necessary expenses of proceedings — Merely because of a potential capacity to earn something the Court cannot refuse to grant maintenance — Further, Section 24 does not envisage substitution of customary ornaments for income nor can court refuse to make a grant merely because wife can pull on for some time by selling ornaments. (Paras 4, 5, 6)

Dewandas, for Appellant; Rijharam, for Respondent.

KRISHNAN, J.: The appellant, who is the wife-defendant in the husband's suit for judicial separation, moved the Court to grant of interim maintenance and for litigation expenses under Section 24 of the Hindu Marriage Act. The Court rejected the prayer for maintenance, but granted a sum of Rs. 100/- as against the prayer for Rs. 300/- on the ground of expenses in the

proceedings. Now the wife has come up in appeal praying that a monthly allowance should have been granted for her support and the expenses of the proceedings should have been granted more liberally, the husband for his part has filed a cross-objection against the grant of Rs. 100/- for the expenses of the proceedings. The questions for decision are:

(1) Whether, simply because the wife has been and is being supported by her father and by her maternal uncle, she is not entitled to a grant of money payable by the husband;

(2) Whether she being one capable, with some effort, of earning her support the husband can still be compelled to make a payment;

(3) The quantum of monthly payment for support, in case the appeal is to be allowed; and

(4) Whether there is any substance in the cross-objection.

2. The facts of this case are of the usual kind with the refinement that the wife has been charged with physical violence. It is said that the husband's relations have started a case against the wife for hurt or grievous hurt by throwing some kitchen implement at her father-in-law. Whatever the truth of these allegations and counter-allegations, and whatever the merits of the original prayer, it does appear that matters have gone quite far between the parties.

3. It is not questioned that, in principle in a case like this, the wife is entitled, during the pendency of the proceedings, to an allowance for support and also to a lump grant towards her expenses in the proceedings. These differ from the permanent alimony that may in time be granted under the next section. Here it is a provisional arrangement to enable her to keep herself alive till the final orders in the proceedings and also contest, if she chooses, the suit filed by her husband. It is conceivable that in certain circumstances, the husband may be entitled to a grant for support and expenses to be paid by the wife; but in a society like ours that would be a much rarer happening than the present situation while the wife is praying for the grant.

4. The test is whether the wife or the husband, as the case may be, has any independent income sufficient for her or his support and to bear the necessary expenses of the proceedings. It does happen that, even in the absence of independent income, the party manages to keep alive and even to contest in law-courts on the help provided by relations or friends. But while considering whether any grant should be ordered, the good-will or charity of relations and friends cannot be taken into account. What is to be examined is whether there is sufficient independent income by which is meant actual income and not merely possible or potential income. It is admitted in this case there is no actual independent income of

the appellant. Whether or not the father or maternal uncle have been helping her willingly or from a mere sense of duty, the Courts cannot compel them to shoulder this additional burden. Obviously whatever they give, cannot become the independent income of the appellant.

5. There are two other circumstances which, the husband seems to feel, would justify his refusal to give anything. Firstly, that the woman's behaviour has not been correct. For one thing, the whole matter is under the consideration of the Courts; for another, it is nobody's case that the woman is living in adultery which is the only possible excuse for the refusal of maintenance in the circumstances in case there is no sufficient independent income. The other circumstances suggested is that when she left her husband's place, the wife took away some ornaments. Though there is no material in support of the husband's statement that these were worth Rs. 2,100/-, it is not unlikely that the woman went away with such ornaments as she had been actually wearing; but these ornaments cannot be treated as sufficient independent income. S. 24 does not envisage the substitution of the customary ornaments for the income nor can the Court, in our opinion, refuse to make a grant for support simply because the wife can pull on for some time by selling the ornaments. Accordingly, we would find that there being no sufficient independent income, in fact no independent income at all, there was a case for a grant for support. There was also a case for a grant of expenses which has of course been met at least in part.

6. One ground raised here is that by the standards of their class, the appellant is educated and capable, if she exerts herself, of earning sufficient money for her support. It is said that she has passed the matriculation examination and has also picked up some useful crafts like embroidery. Further it is said, she had once worked as a school teacher. All this is likely to be true, at any rate, broadly so, may be subject to some slight exaggeration by the husband who is anxious to avoid having to pay anything; but the real point is, whether because of a potential capacity to earn something, the Court can refuse to grant maintenance, in other words, is the phrase "independent sufficient income" equivalent to "potential earning capacity". In our opinion, it is not. The earning capacity is problematic and, further, no husband can be relieved of his duty to maintain the wife simply by compelling her to earn her livelihood. That way also the case for maintenance is not satisfactorily explained away.

7. Coming to the quantum, it is obvious that the monthly grant should bear a reasonable relation to the income of the husband. The proper formula would be to make an estimate of the average monthly income, after allowing for uncertainties, and to divide

it by the total number of dependents including the wife and grant one share to her. In the instant case, the estimates by the respective parties are poles apart. The husband is doing some small scale industry and tells that his income is Rs. 70/- or Rs. 75/- per month and uncertain at that. The wife on the other hand asserts that it is Rs. 200/- to 300/-. There are no data either way but since we are going to saddle the husband with a liability to make a monthly payment, it would be proper to accept his word in the absence of anything definite coming from the other side. Again, the wife asserts that the husband and his father are separate; but we have it in the evidence that during the domestic sensation, the wife is supposed to have thrown something on her father-in-law's head. The circumstances in which that happened are still being investigated; but it is clear that the husband is not completely separated from his father. Making allowance for the uncertainty of the trade, it would be fair to make a grant of allowance, for the appellant's support of Rs. 25/-. This is not much; but in the state of evidence, it may not be possible to put a heavier burden on the husband.

8. The ground for expenses of the proceedings was correct and Rs. 100/- is by no means excessive.

9. The appeal is allowed in part in the manner noted above. The cross-objection is dismissed. The parties shall bear their own respective costs.

Appeal partly allowed.

AIR 1970 MADHYA PRADESH 16

(V 57 C 5)

A. P. SEN AND G. P. SINGH, JJ.

Modern Stores (Cigarettes) and another, Petitioners v. Krishnadas Shah and others, Respondents.

Misc. Petn. No. 185 of 1968, D/- 20-2 1969.

(A) Constitution of India, Art. 226 — Award of arbitrator appointed under S. 10A of Industrial Disputes Act — Award vitiated by errors apparent on face of record — Certiorari will issue for quashing award: AIR 1963 SC 874 & 1969 MPLJ 582, Foll. (Para 3)

(B) Industrial Disputes Act (1947), Section 25F — Re-organisation of business for reasons of economy or convenience resulting into discharge of some employees — No inference can be drawn that discharge is mala fide.

An employer has the right to re-organise his business, and if such re-organisation becomes necessary for reasons of economy or convenience, then the fact that it may lead to discharge of some of employees will not matter and no inference can be drawn that such discharge

is mala fide. In other words, such discharge will be an inevitable, though a very unfortunate consequence of a re-organisation scheme, which the employer acting bona fide is entitled to adopt: AIR 1958 SC 1012 & (1960) 64 Cal WN 186 Foll., AIR 1967 SC 420 Ref.

(Para 4)

(C) Industrial Disputes Act (1947), Section 2 (K) — Industrial dispute — When body of workmen, acting through their Union or otherwise, sponsor workmen's dispute with management, it becomes industrial dispute: AIR 1960 SC 1328 & AIR 1963 SC 318 & AIR 1967 Madh Pra 275, Foll.; AIR 1967 Madh Pra 44, Disting. (Para 9)

(D) Industrial Disputes Act (1947), Section 10-A(3) — Section is partly mandatory and partly directory.

The requirements of Section 10A (3) are partly mandatory and partly directory. On a true construction of the Section, it is clear that although the first condition as regards the publication of an agreement in the official Gazette is obligatory, i. e. a sine qua non, the other requirement, namely, of its notification within one month from its receipt, is only directory and not imperative.

(Para 10)

Cases Referred: Chronological Paras.

(1969) Misc. Petn. No. 153 of 1967

D/- 10-2-1969 = 1969 MP LJ 582, Hindustan Steel Ltd. v. Presiding Officer Industrial Cum Labour Court (Central) Jabalpur 3

(1967) AIR 1967 SC 420 (V 54) = 1964-3 SCR 602, Workmen of Subong Tea Estate v. Outgoing Management of Subong Tea Estate 4, 7

(1967) AIR 1967 Madh Pra 44 (V 54) = 1966 MPLJ 354, Aulia Bidi Factory Burhanpur v. Industrial Tribunal, Madhya Pradesh 0

(1967) AIR 1967 Madh Pra 275 (V 54) = 1967 MPLJ 184, Suman Varma v. Nava Bharat Karma-chari Sangh 5

(1966) AIR 1966 Cal 31 (V 53) = 1966-1 Lab LJ 535, Parry's (Calcutta) Employees' Union v. Parry & Co., Ltd. 3

(1963) AIR 1963 SC 318 (V 50) = 1961-2 Lab LJ 436, Bombay Union of Journalists v. The Hindu Bombay 9

(1963) AIR 1963 SC 874 (V 50) = (1963) Supp 1 SCR 625, Engineering Mazdoor Sabha v. Hind Cycles Ltd. 3

(1963) 1963-1 Lab LJ 684 = 1963 (6) Fac LR 440 (SC), Agnani v. Badri Das 3

(1961) AIR 1961 Punj 515 (V 48) = 1962-1 Lab LJ 526, Badri Das v. Industrial Tribunal Punjab, Patiala 8

THE

All India Reporter

1970

Madras High Court

AIR 1970 MADRAS 1 (V 57 C 1)

FULL BENCH

M. ANANTANARAYANAN C. J.,
RAMAKRISHNAN AND
NATESAN JJ.

Chief Controlling Revenue Authority
Revenue Board, Madras, Referring Authority
v. Swami Gounder, Respondent.

Refd. Case No. 1 of 1963, D/-28-1-1969.

Stamp Duty — Stamp Act (1899),
Schedule 1, Arts. 55, 23 and 17 — Instru-
ment by which vendor of immovable
property gives up his right of reconvey-
ance — It is release and not conveyance
or cancellation.

An instrument by which a vendor of
immovable property who had taken an
agreement for reconveyance from the
vendee, gives up that right, is not a 'con-
veyance' falling under Art. 23 of Sch. I
of the Stamp Act but the instrument is
a 'release' falling under Art. 55, and this
is not a deed of cancellation provided for
in Art. 17 of Sch. I of the Stamp Act.
(Para 3)

The effect of such a transaction is to
extinguish the outstanding right or claim
which the vendors had against the vendees
with reference to the property. After the
transaction the right given up is no longer
subsisting or outstanding as such in any
one. If the agreement for reconveyance
had been transferred to any third person
other than the vendees who were obliged
to retransfer the property under the
agreement, then the instrument would be
a 'conveyance'. But where the original
vendor who can call upon the vendees to
reconvey the property sold back to them
renounces that right, the transaction
squarely falls within the definition of 're-
lease' read in Art. 55. AIR 1967 SC 1395,

Rel. on; AIR 1968 Mad 159 (FB) & AIR
1962 Mad 378, Disting. (Para 2)

Cases Referred: Chronological Paras
(1968) AIR 1968 Mad 159 (V 55) =
ILR (1968) 1 Mad 651 (FB), Chief
Controlling Revenue Authority v.
Rustorn Nusserwanji Patel 3

(1967) AIR 1967 SC 1395 (V 54) =
(1967) 1 SCR 275, Kuppuswami
Chettiar v. Arumugham Chettiar 3

(1962) AIR 1962 Mad 378 (V 49) =
75 Mad LW 89, Andalammal v.
Alameluammal 2

Addl. Government Pleader, for Refer-
ring Authority; Vittal V. Souli for V. P.
Raman R. Krishnaswami and N. R.
Chandran, for Respondent.

NATESAN J.:— The short question for
consideration in this case is, whether an
instrument by which a vendor of immo-
veable property who had taken an agree-
ment for reconveyance from the vendee,
gives up that right, is a 'conveyance'
falling under Art. 23 of Sch. I of the
Indian Stamp Act, or a 'release' falling
under Art. 55; an alternative suggestion
is that it is a deed of cancellation falling
under Art. 17. The respondent and his
brothers purchased a certain property
from one Kaliammal and others under a
registered sale deed on 7-4-1958 for a
consideration of Rs. 5000. On the very
same day, and as part of the same transac-
tion, the vendees executed an agreement
for reconveyance of the property for the
same consideration of Rs. 5000, of which
Rs. 10 was paid as consideration for the
agreement of reconveyance. On 1-6-1959
the vendors executed the instrument in
question, styled as a deed of release of
the agreement for reconveyance. It is
contended for the Revenue that this in-
strument, must be stamped as a con-
veyance. It is admitted that the stamp
duty payable as for a release has been
paid, but the claim is that the instrument
is a 'conveyance' and not a release deed.

2. The learned Additional Government Pleader contends that this right to secure a reconveyance is 'property' and that when that is dealt with, there is a transfer of the right and therefore, the instrument in question would be a 'conveyance.' The question for consideration is not whether the agreement for reconveyance is property of one kind or other, but the question is whether the transaction is a 'conveyance.' That this right to secure a reconveyance is capable of transfer is not in the least in doubt. Our attention is drawn to the decision of one of us in *Andalammal v. Alameluammal*, AIR 1962 Mad 378, where it has been noticed that a right to reconveyance of land is property and not a mere right to sue, that such a right could be assigned and the assignee could enforce the same.

Under the definition of 'conveyance' in the Stamp Act, conveyance may be in respect of any property, whether moveable or immovable; but the essential requisite is a transfer inter vivos of the property. Now, when the vendors, who had obtained the right of reconveyance under an instrument executed by the vendees, give up their right to get a reconveyance, can it be said that there is a transfer inter vivos of that right? The effect of such a transaction is to extinguish the outstanding right or claim which the vendors had against the vendees with reference to the property. After the transaction the right given up is no longer subsisting or outstanding as such in any one. There can be no doubt that if the agreement for reconveyance had been transferred to any other person any third person other than the vendees who were obliged to retransfer the property under the agreement, then the instrument would be a 'conveyance'. But here, admittedly, the instrument is in favour of the original vendees, Art. 55 of Sch. I of the Stamp Act, which provides for duty in respect of a release, indicates what a release is. The Article runs—

"Release, that is to say, any instrument whereby a person renounces a claim upon another person, or against any specified property."

Under the instrument now under consideration, the vendor who could call upon the vendees to reconvey the property in question back to them, renounced that right. Squarely, the transaction falls within the definition of 'release' which one reads in Art. 55.

3. The learned Additional Government Pleader drew our attention to our decision in *Chief Controlling Revenue Authority v. Rustorn Nusservanji Patel*, AIR 1968 Mad 159 (FB) and contended that unless the parties to the instrument are co-owners, there can be no release. We find absolutely no warrant whatsoever for

such an inference from the decision in question. Therein we have categorically held that the essential ingredients of a release are, that there should already be a legal right in the property vested in the releasee and the release should operate to enlarge that right into an absolute title for the entire property, as far as the parties are concerned. In that case, we were concerned with undivided co-owners. We have referred therein to the decision of the Supreme Court in *Kuppuswami Chettiar v. Arumugham Chettiar*, AIR 1967 SC 1395, wherein their Lordships point out that a release deed can only feed title, but cannot transfer title. They indicate that a release is, in essence, a renunciation in favour of a person who has already title to the estate.

In Stroud's Judicial Dictionary 'release' is defined as 'the giving or discharging of the right of action which any hath or claimeth against another, or his land.' There cannot be the least doubt that the instrument in question is a 'release' as described here. In our view, this is not a deed of cancellation of a former instrument, provided for in Art. 17 of Sch. I of the Stamp Act, a residuary Article. The transaction in question can only be a release.

4. The Reference is answered accordingly. No order as to costs.

Reference answered accordingly.

'AIR 1970 MADRAS 2 (V 57 C 2)
FULL BENCH
M. ANANTANARAYANAN C. J.,
RAMAKRISHNAN AND
NATESAN J.J.

Chief Controlling Revenue Authority,
Board of Revenue, Madras, Applicant v.
M. Abdulla, Respondent.

Ref. Case No 4 of 1966. D/-12-2-1969.
Stamp Duty — Stamp Act (1893), Sections 6, 5 — Instrument for dissolution of partnership — Instrument also effecting division of property — Higher duty under S. 6 is payable on the instrument.

While it may not be possible to predicate that every instrument of dissolution of partnership will also involve a division or partition of property, in specific instances the ingredients of an instrument of partition may be attracted. (Para 6)

Where the instrument makes a division of property by allotting the wholesale business to one partner and the retail business to the other partner, the instrument operates both as a deed of dissolution of partnership as well as a deed of partition and therefore, under Sec. 6 of the Stamp Act, the higher duty payable

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for a deed of partition is payable on the instrument. The property, consisting of the wholesale and retail business, has to be viewed as owned by the two partners, at the time of the execution of the instrument as co-owners. There is no inherent incompatibility between the conception of co-ownership and the position of partners. (Case law discussed).

(Paras 4, 10)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 1300 (V 53) =

(1966) 1 SCWR 934, Narayanappa v. Bhaskara Krishnappa 8

(1963) AIR 1963 Andh Pra 474 8
(V 50) = (1963) 1 Andh LT 249 11

(FB), Kalyan Shetty v. I. G. of Stamps 6

(1961) AIR 1961 Mad 504 (V 48) =
ILR (1961) Mad 926 (FB), Board of Revenue v. Narasimham 5

(1959) AIR 1959 Andh Pra 380
(V 46) = 1959 Andh LT 377 8
(FB), Narayanappa v. B. Krishnappa 7

(1956) AIR 1956 SC 35 (V 43) =
1955-2 SCR 842, Board of Revenue v. A. P. Benthall 7

(1937) AIR 1937 Mad 308 (V 24) =
ILR (1937) Mad 553 (SB), Board of Revenue v. Alagappa 4, 6, 7

(1901) 3 Bom LR 132, Choturam v. Ganesh 5

(1866) 2 Ex 46 = 36 LJ Ex 11,
Christie v. Commr. of Inland Revenue 6

Addl. Govt. Pleader, for Applicant;
S. K. L. Ratan and A. J. Abdul Razack,
for Respondent.

RAMAKRISHNAN J.:— The Chief Controlling Revenue Authority, the Board of Revenue, Madras, has referred to us, for our decision, under Section 57 of the Indian Stamp Act, about the correct classification, for the purposes of levy of stamp duty under the Indian Stamp Act, of an instrument. The specific question propounded to us for decision is whether the instrument dated 20-3-1965 (Deed of dissolution of Partnership) operates both as a deed of dissolution of partnership and a deed of partition.

2. Under Art. 45 of Sch. I to the Stamp Act, for an instrument of partition, as defined by Section 2 (15) of the Act, the stamp duty leviable is the same as on a bond for the amount of the value of the separated share or shares of the property. Under Art. 46 of the same Schedule, an instrument of dissolution of partnership has to be levied stamp duty of a fixed sum of Rs. 20 in Madras State. Section 5 of the Indian Stamp Act provides that any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such

matters, would be chargeable under the Act. In contradistinction, Section 6 of the Act provides that, subject to the provisions of Section 5, an instrument so framed as to come within two or more of the descriptions in Sch. I, shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties. The view of the Chief Controlling Revenue authority is that the instrument in question though dealing with a single matter, has been so framed as to come within the classification of an instrument of partition as well as an instrument of dissolution of partnership, and, therefore, under Section 6, the higher stamp duty payable in the case of instrument of partition should be levied on it. On the other hand, the contention of the respondent is that the instrument is only a deed of dissolution of partnership, that the provisions regarding partition are incidental and form part and parcel of the dissolution and cannot be separated and that, consequently, the document can be viewed only as an instrument of dissolution of partnership and assessable to stamp duty as such.

3. To decide the question, it will be appropriate to give briefly the main provisions of the instrument, which is in Tamil:—

"Agreement of dissolution of a business partnership between the two partners Abdul Hai and M. Abdulla. The said partners, in pursuance of the partnership deed dated 24-8-1960, have been carrying on retail cloth business at New Karachi Stores, at No. 58 Big St., Kumbakonam, and also wholesale cloth business in the premises No. 283, Bazar St. Kumbakonam, belonging to M. Abdulla. After discussion, the two partners have decided to dissolve the above partnership business with effect from 20-3-1965. In accordance with the agreement, the following arrangements are made for the dissolution of the partnership:

1. M. Abdulla will take over the entire retail business in cloth at the New Karachi Stores at No. 58 Big St., with its goodwill, trade name and assets and liabilities;

2. M. Abdul Hai will take over the wholesale cloth business, being conducted at No. 283, Bazar St., Kumbakonam, with its goodwill, trade name and assets and liabilities;

3. If any of the partners fail to discharge the liability as mentioned above, and, as a result, the other partner suffers any loss, the former will be bound to reimburse the latter for the loss;

4. After settling the accounts with the help of an auditor, the two partners

have agreed to settle their claims inter se as follows:

4(a) The second partner is liable to pay to the first partner Rs. 55,000 after adjusting the share of the net profits due to him. This amount has been paid to him in the following manner: (i) Rupees 25,000 which he had already received by a cheque drawn on the Indian Overseas Bank, Kumbakonam, on 27-7-1964, and (ii) another cheque for Rs. 30,000, drawn on the United Commercial Bank, Kumbakonam, paid on the date of the instrument by the second partner to the first partner;

4(b) After the execution of the above instrument, neither partner will have any claim against the assets and liabilities of the two businesses—New Karachi Stores allotted to the second partner or the wholesale business allotted to the first partner....."

4. It is clear from the purport of the instrument that it deals with a single matter. Secondly, it puts an end, by dissolution to the partnership business that the two partners had been conducting from 1960 in regard to the wholesale as well as the retail business in cloth. An instrument of partition, as defined in Section 2 (15) of the Stamp Act, means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any revenue authority or any Civil Court and an award by an arbitrator directing a partition. The instrument in question also makes a division of property by allotting the wholesale business to one partner and the retail business to the other partner. This property, consisting of the wholesale and retail business, was owned by the two partners, at the time of the execution of the instrument, as co-owners. That the relationship in similar circumstances has to be viewed as one of co-ownership, has been settled by a long chain of decisions of this Court as well as of other Courts, and this view is binding on us. We will, briefly, refer to these decisions. In Board of Revenue v. Alagappa, AIR 1937 Mad 398 (FB) while repelling an argument put forward by Mr. Rajah Aiyar that the document will not be an instrument of partition because it would not be proper to regard partners as co-owners of the partnership property, Varadachariar, J., speaking for the Special Bench, observed:

"The difficulty in applying the conception of co-ownership to individual items of partnership assets, is no reason against applying that description to the net assets of the partnership on a dissolution." Section 265, Contract Act, was worded in a

form suggesting that it was for the Court to distribute the net assets as amongst the partners; but Section 46 Partnership Act, 1932, puts it clearly as a right of the partners to claim to have the surplus distributed amongst them or their representatives according to their rights. There is in our opinion accordingly no inherent incompatibility between the conception of co-ownership and the position of partners."

5. The Bench followed, for the above-said view, an earlier decision of the Bombay High Court in Choturam v. Ganesh, (1901) 3 Bom LR 132, where a similar view has been held that a deed of dissolution of partnership could also amount to an instrument of partition. In Board of Revenue v. Narasimham, AIR 1961 Mad 504 (FB), Jagadisan, J. while speaking for the Bench, considered compendiously the several forms in which a dissolution of partnership may have to be worked out:

"If the partnership business had ended in loss a partner might retire from the partnership after making his contribution towards the loss sustained. The accounts of the partnership might be taken and settled and adjusted between the partners and as a result of such account taking one partner may owe another partner a particular sum of money. Partners may also agree to have the net assets of the partnership divided between them as a result of dissolution. In the last instance if the transaction is embodied in writing it may operate as an instrument of partition, though it came about as a result of the dissolution of the partnership. But in the other instances referred to above any document embodying the transaction cannot certainly be called a deed of partition."

6. This would show that, while it may not be possible to predicate that every instrument of dissolution of partnership will also involve a division or partition of property, in specific instances dissolution may involve division of property or assets. To such instances, the ingredients of an instrument of partition will be attracted. In this connection, we may also usefully refer to the decision in Christie v. Commissioners of Inland Revenue, (1866) 2 Ex 46 where at page 52 Channell, B. observed:

"We are not called upon in this case to say what would have been the state of things in the case of one partner paying another out, and where there might have been no conveyance. Here there has been a conveyance, and the only question therefore, that can arise is, whether it is a 'conveyance on the sale' of property within the meaning of the Act of Parliament."

The Court held, in the circumstances of the case, that the instrument involved a conveyance. In Kalyan Shetty v. I. G. of

Stamps, AIR 1963 Andh Pra 474 (FB) a Full Bench of the Andhra Pradesh High Court adopted the view of this Court in AIR 1937 Mad 308 (FB) and held that, where, in a deed of dissolution of partnership, the partners agreed to divide the assets between themselves, the instrument could rightly be described as one of partition chargeable to duty as one under Art. 31 of the Schedule to the Hyderabad Stamp Act.

7. In Board of Revenue v. A. P. Benthall, AIR 1956 SC 35, Venkatarama Aiyar, J. at page 38 of the report, has referred with approval to the decision of this Court in AIR 1937 Mad 308 (FB) and observed that, if a partnership carried on by members of a family is wound up and the deed of dissolution effects also a partition of the family properties as in AIR 1937 Mad 308 (FB), the instrument can be viewed both as a deed of dissolution and a deed of partition, and under Section 6, the duty payable will be the higher duty as on an instrument of partition. It is urged by learned counsel Sri Ratan appearing for the respondent, that, in the above observations of the Supreme Court, there is a reference to the partnership carried on by members of a family which would imply that in that case there was a deed of partition of properties held by the family members under a different title from that of partners, and therefore, it was urged that the decision of the Supreme Court could not be treated as approving the principle laid down in the above cases. But we are unable to agree with this submission. A reference to the decision in AIR 1937 Mad 308 (FB) shows that the business in that case was conducted by five partners, three of whom were undivided members of a family, the fourth was a distinct and separated coparcener and the fifth was a stranger. Therefore, the rationale of the decision in AIR 1937 Mad 308 (FB) did not turn upon the partners being members of a family before the partnership was formed. The principle laid down there would apply, apart from any previous relationship of the partners as members of a family, nor does the observations cited above of the Supreme Court, indicate to our mind that any difference would arise between partners who belonged to single family and partners who were strangers.

8. Learned counsel for the respondent referred to a decision of the Supreme Court in Narayanappa v. Bhaskara Krishnappa, AIR 1966 SC 1300. That decision dealt with an entirely different question, viz, whether an instrument of dissolution of partnership in that particular case was compulsorily registrable under Section 17 (1) (c) of the Registration Act. The test for the purpose of compulsory registration is whether the

document involves a transfer of interest in immoveable property. The Supreme Court held that the interest of the partners of a family in the partnership assets was moveable property and the document evidencing the relinquishment of that interest was not compulsorily registrable under Section 17 (1) of the Registration Act. The decision of the Andhra Pradesh High Court in Narayanappa v. Krishnappa, AIR 1959 Andh Pra 380 (FB) which formed the subject-matter of the Supreme Court's decision on appeal can also be referred to. The Full Bench held that the interest of a partner in partnership assets comprising of moveable and immoveable property cannot be regarded as a right or interest in immoveable property within the meaning of Section 17 (1) (b) of the Registration Act. It is obvious, therefore, that the point decided by the Supreme Court in the decision cited above covers an entirely different matter, and has no application to the facts of this reference.

9. Learned counsel Sri Ratan appearing for the respondent made a final plea that, if we are to uphold the view of the Revenue in the present case, it would make it necessary for partners, who dissolve their partnership, to pay a heavy stamp duty, and this would impose an oppressive burden on trade and business interests. But that cannot be viewed as a ground for us to interpret the question of law in any different manner than what several prior decisions of the Courts have done consistently.

10. The reference is, therefore, answered in favour of the Revenue. We hold that the instrument dated 20-3-1965 operates both as a deed of dissolution of partnership as well as a deed of partition, and therefore, under, Section 6 of the Indian Stamp Act, the higher duty payable for a deed or partition will be payable on the instrument. There will be no order as to costs.

Reference answered accordingly.

AIR 1970 MADRAS 5 (V 57 C 3)

FULL BENCH

M. ANANTANARAYANAN C. J.,
RAMAKRISHNAN AND
NATESAN JJ.

Chief Controlling Revenue Authority, Applicant v. Chidambaram, Partner, Thachanallur Sugar Mills and Distilleries and others, Respondents.

Refd. Case No. 4 of 1964, D/-27-1-1969.

Stamp Duty — Stamp Act (1899), Schedule 1, Arts. 46, 23 (as amended by Madras Amendment Act 19 of 1958) —

EM/EM/C154/69/DVT/D

Parties to suit for partition entering into partnership by executing a document — One of parties throwing family property in partnership after releasing it from Court on payment — Document is deed of partnership simpliciter — Dutiable as such under Art. 46 and not under Art. 23 — Partnership Act (1932), S. 14 and Transfer of Property Act (1882), S. 10.

The parties to a protracted partition suit, in which assets of a trading joint Hindu family were involved, executed an instrument styled as a partnership deed. By virtue of the decree in suit one of the parties to litigation agreed to take the assets on payment of certain amount in Court and those assets were declared as properties of the partnership firm, under a clause of the instrument.

Held, that the instrument was not a conveyance and could not be construed as such. It was only a deed of partnership and dutiable as such under Art. 46 of the Schedule I. (1875) 20 Eq 25 & ILR 1946-1 Cal 191 (FB) & (1862-63) 1 Mad HCR 226, Rel. on; AIR 1951 Mad 209 (FB), Disting. (Paras 4, 7)

By virtue of Section 14 of the Partnership Act, property could be thrown into the partnership stock without any formal document, and would, therefore, become the property of the firm. Moreover, when the very partnership firm formally came into existence under the document, and there were no words whatever of a dispositive character, which, expressly or by implication amounted to a transfer of interest as between the partner who threw his property in the partnership and the rest of the partners, it could not be presumed that the partner sold his property to the partnership firm.

(Paras 4, 6)

Cases Referred: Chronological Paras
(1951) AIR 1951 Mad 209 (V 38) —
(1953-2) Mad LJ 218 (FB), Sahaya
Nidhi (Virudhunagar) Ltd. v.
Subramania Nadar 3
(1946) ILR (1946) 1 Cal 191 (FB),
Premraj Brahmin v. Bhaniram
Brahmin 4
(1875) 20 Eq 25 = 44 LJ Ch 542,
Robinson v. Ashton 4
(1862-63) 1 Mad HCR 226, Chinnaiya
Nathan v. Muthusami Pillai 5
Addl. Govt. Pleader, for Applicant; V.
Thyagarajan for M. A. Sathar Sayeed
A. Ramanathan, for Respondents.

M. ANANTANARAYANAN C. J.:—
The reference before us arises from the following situation and facts. There was a trading joint Hindu family, the assets of which were involved in certain protracted partition proceedings in A. S. No. 223 of 1959 in this Court from O. S. No. 97 of 1952 of the Court of the Subordinate Judge of Devakottai. By virtue of a decree of Court, Chidambaram

Chettiar, one of the parties to that litigation and a member of the family, agreed to take certain mill properties and machinery relating thereto, for Rs. 3,30,000. An instrument was executed on 6-6-1962 as between the ten parties who are respondents, including this Chidambaram Chettiar, styled a partnership deed, under Cl. (8) of which the aforesaid sugar mills, distilleries, rice mill and accretions, dealt with by the decree in A. S. 223 of 1959, were declared as properties of the partnership firm, including Chidambaram Chettiar as a member thereof. The partnership was created under this document Cl. (4) purporting to set forth the respective shares or interests of partners, and Cl. (21) et seq admittedly providing for dissolution, for accounting etc. The Chief Revenue Authority has raised the point that this document is liable to be charged as a conveyance under Art. 23 of Sch. I of the Indian Stamp (Madras Amendment) Act, 19 of 1958, or that, even if it is construed as a document of partnership under Article 46 of the said Schedule, it is liable to be considered as a composite document, and liable to be charged with the higher duty, under Section 5 or Section 6 of the Indian Stamp Act. This is only the issue which is involved in the reference.

2. We have already referred, very briefly, to the situation in which the document came into existence. It may be here necessary to clarify the matter a little further. We find from the record that these persons earlier agreed to form such a partnership, and that, even when Chidambaram Chettiar made a deposit in accordance with orders of Court and took possession from the receiver of the Sugar Mills, Distilleries etc, viz. the deposit of Rs. 3,30,000, the other persons had already contributed their respective shares, so that the acquisition of the properties by Chidambaram Chettiar by virtue of the decree of Court must be held to be essentially, a joint acquisition by these persons, with Chidambaram Chettiar (the 5th defendant) as the ostensible acquiring party in the partition suit. Nevertheless the argument of the learned Additional Government Pleader (Sri Ramaswami) is that the document before us, fairly considered, would also amount to a conveyance by the aforesaid Chidambaram Chettiar, of his interest in the properties, to the partnership firm of himself and the other nine persons, retaining for himself the value or interest of five shares as set forth in Cl. (4).

3. The learned Additional Government Pleader contends that, even where such document has expressly created a partnership, and even though the partnership firm is acquiring partnership assets, thereunder including the vendor as one of the partners, the document is liable to duty as a

conveyance, on the principle of the decision of the Full Bench in *Sahaya Nidhi (Virudhunagar) Ltd. v. Subramania Nadar* 1950-2 Mad LJ 216 = (AIR 1951 Mad 209) (FB). Delivering the judgment on behalf of the Bench Viswanatha Sastri, J., observed (at page 219 of Mad LJ) = (at pp. 211 & 212 of AIR) that the question was not whether the relevant arrangement could not be effected otherwise than by the execution of a document like the one concerned in that case, but, whether, when such a document was duly executed as a formal conveyance, it was not liable to stamp duty, though the properties could otherwise have been pooled by the partners or a partner as assets of the partnership, without any conveyance, on the principle of S. 14 of the Partnership Act. The short point therefore, is whether the document will bear the construction that it is a conveyance, and whether this argument of the learned Additional Government Pleader is well founded.

4. Upon this, we are of the view that this is not a conveyance and cannot be construed as such. It is only a deed of partnership, and, as such, it is dutiable under Art. 46 of Schedule I of the Stamp Act. There are two related aspects of reasoning, upon which this matter must be held conclusively determined. First of all, as we earlier observed, under Section 14 of the Partnership Act, it is always possible for a partner to bring into the partnership, property belonging to him by the evidence of his intention to make it part of the assets of the partnership. There is a very early decision of the English Court, namely, *Robinson v. Ashton*, (1875) 20 Eq 25, which embodies this principle, where a man became a member of a partnership, and the agreement was that the business should be conducted at the mill belonging to him, and he was credited in the books of the partnership with the value of the Mills. Jessel M. R. said that it made no difference that his contribution was in the form of mill and machinery, and not in the form of money. The property, therefore, became the property of the partnership. On the same principle of Section 14, we have the decision of the Full Bench of the Calcutta High Court in *Premraj Brahmin v. Bhaniram Brahmin*, ILR 1946-1 Cal 191 and the learned Judges pointed out that, by virtue of Section 14, property could be thrown into the partnership stock without any formal document, and would, therefore, become the property of the firm.

5. This aspect of the probabilities is strengthened in the present case, by the fact that there was a preceding agreement, under which it is clear that the very funds which were deposited into Court, were funds to which the other partners

had made proportionate contributions. We may also refer to a very early decision of this Court in *Chinnaiya Nattan v. Muttusami Pillai*, (1862-63) 1 Mad HCR 226 in which an agreement between two persons, by which the second person advanced a sum of Rs. 2000 for payment of a deposit in respect of Abkari farm rights held by the first person, was construed as a document of partnership, and not as a conveyance.

6. We do not think it is necessary to add anything very much further on this particular aspect. The other aspect of the reasoning is this. Certainly, a partner can sell his property, to a partnership firm which includes himself as a member. But the question whether there was such a sale, would depend upon his intention and on the language of the document. In the present case, the very partnership firm formally comes into existence under the document, and there are no words whatever of a dispositive character, which, expressly or by implication, amount to a transfer of interest as between the fifth defendant and the other partners. Admittedly, Cl. (8), which is the only clause relied on, can only be taken as a declaration of the rights of the partnership in these aforesaid properties, consequent upon the fact that the properties were brought into the common stock.

7. Accordingly, we would answer the reference in the form that this document is a deed or agreement of partnership, pure and simple, chargeable to duty only under Art. 46 of Schedule I of the Stamp Act.

Reference answered accordingly.

**'AIR 1970 MADRAS 7 (V 57 C 4)
FULL BENCH**

**M. ANANTANARAYANAN C. J.,
RAMAKRISHNAN AND
NATESAN JJ.**

Chief Controlling Revenue Authority,
Board of Revenue, Madras, Referring Officer v. Messrs. Simpson and General Finance Co. Ltd., Madras, Respondent.

Refd. Case No. 2 of 1966, D/-28-1-1969.

Stamp Duty — Stamp Act (1899), Sections 9, 76 (2), 3 — Madras City Municipal Corporation Act (4 of 1919), Ss. 98 (h), 135 (a) and (b) — Levy of tax under S. 98 (b) read with S. 135 of Corporation Act — Nature of — Liability to pay duty under Stamp Act — Grant of exemption to certain instruments — Effect — Surcharge under Corporation Act cannot be levied — Words and Phrases — "Surcharge."

EM/EM/C153/69/DVT/D

Where as a result of exemption granted to a particular category of instruments under Section 76 (2) read with S. 9 of the Stamp Act, such instrument is not liable to duty at all under the Stamp Act, the surcharge under Section 98 read with Section 135 of the Madras City Municipal Corporation Act (4 of 1919) cannot be levied on such instrument. AIR 1960 Mad 543 & C. S. Nos. 449 of 1917 and 196 of 1920 (Mad), Foll. (Paras 4, 6)

The word "surcharge" implies an excess or additional burden or amount of money charges. The provisions of S. 98 (h) read with S. 135 (a) of the Corporation Act make it clear that the tax under the Madras City Municipal Corporation Act is an additional tax or burden upon a pre-existing tax under the Stamp Act, and can be appropriately levied, only where the instrument is liable to duty under the Stamp Act, and not otherwise. The duty under Section 98 has to be in law "in the form of a surcharge on the duty imposed by the Stamp Act and hence where there is an instrument, which is not at all liable to stamp duty under the Stamp Act, as in force for the time being" no surcharge could be levied under the Corporation Act.

(Paras 4, 5)

Cases Referred: Chronological Paras
(1960) AIR 1960 Mad 543 (V 47) =
1959-2 Mad LJ 344, Rajagopalachariar v. State of Madras 5
(1920) C. S. Nos. 449 of 1917 and 198 of 1920 (Mad) 5

Addl. Govt. Pleader, for Referring Officer: C. S. Padmanabhan for King and Partridge, for Respondent.

M. ANANTANARAYANAN C. J.:—The point involved in this Reference is a short but an interesting one. Under S. 9 of the Indian Stamp Act, 1899 there is a statutory power in the Government, not merely to reduce the stamp duty upon any particular category of instruments, but to remit the stamp duty altogether. Since the provisions of any Act have to be read harmoniously, as far as possible, Section 9 has clearly to be construed as a limitation or restriction upon the scope of Section 3 which is the charging section, and which specifies the instruments chargeable with duty under the Act. This power under Section 9 is to be exercised, according to the legislature "by rule or order published in the official Gazette." Under Section 76 (2) of the Stamp Act, "All rules published as required by this section shall, upon such publication, have effect as if enacted by this Act." The facts in the present case are not in dispute. The respondent (Messrs. Simpson and General Finance Co., Ltd., Madras) executed an instrument dated 16-9-1964 (Ex. A.) transferring certain properties in favour of Simpson and Co. which is a subsidiary company of the respondent con-

cern. This instrument is not liable to stamp duty, as it is totally exempted by the exemption No. 58 of Government Notification No. 13 dated 17-12-1938. Under those circumstances, we must certainly construe this exemption as part of the rules, and an integral part of the Act itself, by virtue of Section 76, so that the clear consequence is that this instrument has been totally removed from the ambit of the provisions of the Stamp Act.

2. We may now proceed to the point immediately in issue. The Madras City Municipal Corporation Act (Act IV of 1919) contains two important provisions, with regard to the power of the Local Body to levy transfer duty upon instruments relating to transfers of immoveable property, within its jurisdiction. Section 98 is the source of power, and it is in the following terms:

"The Council may levy—

- (a) to (g)
- (h) a duty on certain transfers of property in the shape of an additional stamp duty."

That is the source of the taxing power. Actually, the taxing provision is in Section 135 of the same Act, and Section 135 (a) runs as follows:—

"The duty on transfers of property shall be levied—

- "(a) in the form of a surcharge on the duty imposed by the Indian Stamp Act, 1899, as in force for the time being in the State of Madras, on every instrument of the description specified below, which relates to immoveable property situated within the limits of the city"

Section 135 (b) need not be set forth verbatim here, but we may note that this sub-section relates to the rate at which this surcharge is to be levied, and it indicates that the rate may be as "fixed by the State Govt. not exceeding five per centum, on the amount specified below against such instrument." Under this follows the enumeration of the description of instruments, namely, sales, exchanges, gifts and mortgages with possession, of immoveable properties. The amount on which the duty should be levied is stated as, respectively, the amount or value of the consideration for the sale, as relating to sales, the value of the property of the greater value, as relating to exchanges, the value of the property, as set forth in the instrument of gifts, and the amount secured by the mortgage, as relating to mortgages.

3. The present Reference arises from a doubt felt by the concerned authority, whether notwithstanding the exemption granted under Section 9 of the Stamp Act, which, as we observed, takes that instrument out of the ambit of the Act altogether, the Madras City Municipal Cor-

poration may, nevertheless, be entitled to levy a surcharge on the amount forming the value of the consideration, under Section 98 read with Sec. 135 (a) and S. 135 (b) of the Act. The simple answer to this question depends upon our interpretation of Sections 98 and 135 (a) and (b) as those relevant provisions do specify the source of the power to levy the tax, and also the character and basis of the tax in question.

4. We have very carefully considered this question. In our view, Section 98 (h) itself makes it clear that the duty cannot be levied, in the case of an instrument, which is not liable to duty at all under the Stamp Act. For, the relevant words are—

"a duty on certain transfers of property in the shape of an additional stamp duty." These words, we think, render it clear beyond doubt that the tax is an additional tax or burden upon a pre-existing tax under the Stamp Act, and could be appropriately levied, only where the instrument is liable to duty under the Stamp Act, and not otherwise. The point in issue is rendered even more definite by the words of Section 135 (a), namely, that the duty is to be levied 'in the form of a surcharge on the duty imposed by the Indian Stamp Act 1899, as in force for the time being in the State of Madras.' These words, considered together, clearly imply that where there is an instrument, which is not at all liable to stamp duty under the Indian Stamp Act, 1899, as in force for the time being, no surcharge could be levied, because in law, this duty under Section 98 has to be 'in the form of a surcharge on the duty imposed by the Indian Stamp Act.' Undoubtedly, under Section 135 (b), the rates make it clear that this surcharge is not to be a proportion of the stamp duty itself, but will be a rate on the amount of the consideration or the value, of the concerned property, not exceeding five per cent. The learned Additional Government Pleader brings it to our notice that, as the facts stand today, surcharges do exceed the duty leviable under the Stamp Act. But it is clearly essential that the instrument should be liable to duty under the Stamp Act, before the power under Section 98 could be invoked, to lay an additional burden, or before any surcharge itself could be formulated and enforced.

5. The argument, per contra, of the learned Additional Government Pleader would not merely be illogical, but would lead to the manifest absurdity that even with regard to instruments, which are not at all liable for duty under the Stamp Act, it may be upon grounds of public interest or public policy, a Body, like the Municipal Corporation, could still claim a

power, independently to tax that property, ignoring such public interest or ground of public policy. We have no reason to think that that was ever the intendment of the Legislature. Certain arguments were also addressed upon the meaning of the word 'surcharge' and we have been at some pains to scrutinise the standard Law Lexicons and dictionaries. But, we find that what is probably the most happy and appropriate elucidation of this expression is by Ramachandra Iyer, J. (as he then was) in *Rajagopalachariar v. State of Madras*, 1959-2 Mad LJ 344 = (AIR 1960 Mad 543) in the following words. The learned Judge said—

"The word 'surcharge' implies an excess or additional burden, or amount of money charges."

In the one enactment, of a parallel kind, to which our attention has been drawn, namely, the Madras Local Revenue (Surcharge) Act, (Act 19 of 1954), we find the word employed in the very same sense, and actually, under this provision, surcharge is to be a proportion of the charge or land revenue, at a specified rate. Under Explanation (1) to Section 3, land revenue remitted 'shall not be deemed to be land revenue payable for the purpose of this section.' That is another instance of the principle that, where the tax or charge itself cannot be levied on the ground of a statutory exemption, the question of imposing a further surcharge cannot legitimately arise. Our attention has also been drawn to an early judgment of this Court C. S. Nos. 449 of 1917 and 196 of 1920 (Mad.), but we find nothing in that judgment contrary to the view that we have expressed, and indeed, by implication, it strengthens the inference that we have drawn.

6. We are, therefore, clearly of the opinion that the taxing power in this case cannot be exercised by the Madras City Municipal Corporation, for the simple reason that this power is to impose an additional burden or tax or surcharge, whatever it might be termed, further to the duty levied under the Stamp Act, and this is a case in which the instrument itself is beyond the ambit of that Act, by the force of a statutory provision. So long as that exemption is enforced, the instrument cannot either be taxed to duty under the Indian Stamp Act, or made the subject of surcharge thereon by the Madras City Municipal Corporation Act. The reference is answered accordingly. No order as to costs.

Reference answered
accordingly.

AIR 1970 MADRAS 10 (V 57 C 5)
SPECIAL BENCHM. ANANTANARAYANAN C. J.,
RAMAKRISHNAN AND
NATESAN JJ.

The Chief Controlling Revenue Authority, Board of Revenue, Madras, Ref. Authority v. M/s. Rani Pictures, Respondent.

Ref. Case No. 14 of 1965, D/-27-1-1969, reference made by Chief Controlling Revenue Authority, Board of Revenue, Madras.

Stamp Act — Stamp Act (1899), Sections 6, 5, 2 (17) and (5), Sch. I, Arts. 40 and 15 — Agreement in respect of film under production — Instrument attested — Party obliging himself to pay amounts advanced in a particular manner and in addition giving a camera as security — Instrument held not a mortgage but a bond as well as a pledge — Instrument held not consisting of distinct matters — Section 6 and not S. 5 held applicable and as such highest of the stamp duties payable thereunder was leviable — (Contract Act (1872), S. 172).

Where on failure of an earlier contract advancing moneys for the production of a film, the first party obliged himself by the attested instrument in question, styled as a deed of agreement, to pay the amounts advanced under the contract, in a particular manner, and in addition gave a camera as security:

Held, that a film under production being neither a specified property nor a property in existence the instrument was not a mortgage under Art. 40 but as it satisfied the requirements of a bond under Section 2 (5) and a pledge, it was a bond under Art. 15 and also a pledge under Art. 6. But as the instrument was attested, it did not fall under the exemption to Art. 6. Case law discussed. AIR 1963 Mad 319 (FB), Rel. on. (Paras 3, 9)

Section 5 of the Act did not apply to the matter. Section 6 alone was applicable and the highest of the stamp duties payable thereunder was leviable. The obligation to pay money was one and indivisible. As additional security, movable property was given as a pledge. It could not be said that the instrument was relating to distinct matters.

(Paras 6, 9)

- Cases Referred: Chronological Paras
(1968) AIR 1968 Mad 319 (V 55) —
ILR (1968) 1 Mad 660 (FB), Chief
Controlling Revenue Authority v.
Sudarsanam Pictures, Madras 3
(1956) AIR 1956 SC 35 (V 43) —
1955-2 SCR 842, Board of Revenue
v. A. P. Benthall 7
(1943) AIR 1943 All 218 (V 30) —
1943 All LJ 12, R. S. S. Sabha
v. Rajnarain 8

GM/GM/C866/69/LGC/D

Addl. Govt. Pleader, for Referring Authority; R. Narayanan, for Respondent.

NATESAN J.:— This is a reference under Section 57 of the Indian Stamp Act, and, the question referred to us is whether the instrument under consideration amounts to a mortgage falling under Article 40 of Schedule I of the Stamp Act, as well as a bond falling under Art. 15 and a pledge falling under Art. 6.

2. It is seen, on a perusal of the instrument, that with reference to an anterior contract, under which the second party to the instrument had advanced a sum of Rs. 40,000, for the production and completion of talkie picture "Kannadi Maligai," on the contract failing, the instrument in question styled deed of agreement came into existence. As per this document the first party agreed to repay to the second party the said sum of Rupees 40,000 with interest, under the terms and conditions set out in the document. The material parts of the document, with which we are now concerned, are found in Cl. 4 and Cl. 7. Clause 4 provides for the payment of Rs. 10,000, on the date of signing of the agreement and the issue of two post-dated cheques, each for Rs. 5000. The balance of Rs. 20,000 it is provided, will be a second charge on the distribution rights of the film under production. It is unnecessary to set out the areas in which the second mortgage over distribution rights is given. Clause 7, the next important one, provides that a certain camera, which had been pledged earlier on 27-11-1961, shall continue as security until the entire amount due under the instrument to the second party is discharged. The value of the camera is also specified as Rs. 25,000. Cl. 8 of the instrument provides for the entire balance due under the agreement to be paid within a period of six months from the date of the agreement.

3. We may immediately answer the claim of the Chief Controlling Revenue Authority that the instrument is a mortgage. In this case, the security, if at all, is created over a picture to be produced and completed, and we have in Chief Controlling Revenue Authority v. Sudarsanam Pictures, AIR 1968 Mad 319 held that a similar agreement advancing money over a film under production, does not create a mortgage. The essential ingredient for an instrument to be a mortgage, as defined under Section 2 (17) of the Stamp Act, is that the property should be 'specified property.' A film under production is manifestly not specified property, it is not property in existence. But, we have no doubt that the instrument in question is a bond. Section 2 (5) defines "bond" as including any instrument whereby a person obliges himself to pay money to another, attested by a witness.

and not payable to order or bearer. In the instant case, we have a document whereby the first party obliges himself to pay a certain sum of money to the second party. The instrument is admittedly attested. The obligation to pay the money is clear, it is in acknowledgment of a liability. This is not a case of a mere promise to pay money. The essential requisites for an instrument to be a bond are:

1. there must be an obligation to pay money,
2. the money must not be payable to order or bearer, and
3. the instrument must be attested by a witness. All the essential requisites for a bond are found in this case, and we are of the view that this instrument falls under Art. 15 of Sch. I of the Stamp Act.
4. On the question whether this instrument is also a pledge; CL 7 of the instrument, in clear words, pledges a camera for the moneys due and undertaken to be paid under the instrument. The instrument clearly says that the camera shall continue as security until the entire amount due is discharged. Article 6 (2) relating to stamp duty payable, on a pledge runs:

"Art. 6. Agreement relating to deposit of title deeds, pawn or pledge, that is to say, any instrument evidencing an agreement relating to

(2) the pawn or pledge of moveable property, where such deposit, pawn or pledge has been made by way of security for the repayment of money advanced or to be advanced by way of loan or an existing or future debt."

5. The very Article gives an indication of what is meant by pawn or pledge of moveable property. The moveable property must have been given by way of security for the repayment of money advanced or to be advanced by way of loan or an existing or future debt. In this case, moveable property has been pledged for an existing debt. Section 172 of the Indian Contract Act defines "pawn" or "pledge" as bailment of goods as security for payment of a debt or performance of a promise. Clearly, the instrument also satisfies the requirement of Art. 6. As the instrument is attested, it does not fall under the exemption to Art. 6.

6. The next question for consideration is whether the instrument falls under Section 5 or Section 6 of the Stamp Act. The learned Additional Government Pleader would contend that Section 5 applies to this case. Section 5 deals with instruments containing distinct matters. Under that section, any instrument comprising or relating to several distinct matters, shall be chargeable with the aggregate amount of the duties with which

separate instruments, each comprising or relating to one of such matters, would be chargeable under this Act. We are unable to see how this instrument can fall under Section 5. As pointed already, it is an attested instrument evidencing a pledge by way of security for money due. A bond also is an instrument whereby a person obliges himself to pay money to another, and the instrument is attested. The only condition with reference to a pledge is that moveable property is given as security. The obligation to pay money in this case is one and indivisible. As additional security moveable property is given as pledge. It is difficult to say that the instrument consists of distinct matters.

7. Reference was made by learned counsel to the decision of the Supreme Court in Board of Revenue v. A. P. Benthall, AIR 1956 SC 35. But that was a case where a person possessed rights, both in his personal capacity and in a representative capacity as trustee. The stamp duty payable on the power of attorney there in question came up for consideration, and the Supreme Court held that there was a delegation of power by the executant in both his capacities and the position in law was exactly the same as different persons jointly executing a power in respect of matters which were unrelated. Such is not the case here. In our view, Section 6 of the Stamp Act is alone applicable to the case. The instrument in question falls both under Art. 15 and Art. 6 and, in such a case, under Section 6, it shall be chargeable only with the highest of the duties payable. The Revenue cannot charge the instrument for the stamp duty payable under both the heads.

8. Reference was made by learned counsel for the respondent to the decision in R. S. S. Sabha v. Rajnarain, AIR 1943 All 218, for the contention that the instrument in question cannot be considered to be a bond. But that was a case where, with reference to a promissory note, a document was subsequently executed which provided the method of payment and reduction of interest, under certain contingencies. In that case the obligation under the promissory note did not merge in the subsequent document concerned. Here that is not the case. Here earlier, there was a contract advancing moneys for the production of a film. The contract fell through before it was completed, and, for the advances taken, the first party obliged himself by the instrument under consideration, to pay the amounts advanced under the contract. The mutual obligations between the parties were put an end to, and the first party agreed that their relationship was thereafter that of a debtor and creditor. He obliged himself by the instrument to pay Rs. 40,000, then due, in a particular

manner, and, in addition gave a camera as security.

9. In the circumstances, we answer the reference in the following manner. The instrument is not a mortgage falling under Art. 40 of Schedule I, but, it is a bond falling under Art. 15 and also a pledge falling under Art. 6. Section 5 of the Stamp Act, does not apply to the matter. The instrument would fall under Section 6 of the Act, and the highest of the stamp duties payable thereunder is leviable. No order as to costs.

Reference answered accordingly.

AIR 1970 MADRAS 12 (V 57 C 6)

SPECIAL BENCH

M. ANANTANARAYANAN C. J.,
RAMAKRISHNAN AND
NATESAN JJ.

T. M. Bashiam, Petitioner v. M. Victor, Respondent.

M. C. No. 4 of 1968, D/-17-2-1969, reference made by Dist., J. South Arcot at Cuddalore on 27-2-1968.

(A) Divorce Act (1869), Ss. 10, 7 and 22 — Decree for judicial separation cannot ripen into a decree for divorce, by mere lapse of time — Wife can obtain decree for dissolution of marriage under S. 10 only on grounds exhibited under that section — Fact that there was earlier decree for judicial separation and that though four years have passed since that decree, the parties did not resume cohabitation or matrimonial living, is not a ground entitling the wife to divorce — Provisions of S. 7 (1) to (3) of Matrimonial Causes Act, 1950, of United Kingdom cannot be invoked by virtue of S. 7 of Divorce Act, for granting a decree nisi for dissolution of marriage on that ground — Section 7 does not incorporate statutes of some other country as part of law of this land — It merely makes a provision for conforming to practice and principles of matrimonial Courts in England in matter of divorce or dissolution of marriage subject to provisions and scheme of Indian Divorce Act — Case law discussed. AIR 1955 Mad 341 (FB), Explained. (Paras 3, 5, 6)

(B) Constitution of India, Art. 14 — Divorce Act (1869), Ss. 17, 8 — Validity — No violation of Art. 14 on ground that it provides for reference to High Court to be heard by Bench of three judges, for confirmation of decree nisi for dissolution of marriage granted by District Court, whereas with regard to such cases arising under original civil jurisdiction of High Court, High Court itself exercises that jurisdiction as High Court — It is not an

unreasonable differentiation — Further, if a particular petitioner requires a trial on original side of High Court, in a suitable case, he can approach to High Court by invoking provisions of S. 8, Divorce Act. (Para 7)

Cases Referred: Chronological Paras
(1968) 1968-1 Mad LJ 289, S. D.

Selvaraj v. Mary 8
(1967) AIR 1967 SC 1480 (V 54) —
(1967) 2 SCR 650, Shamarao v. Union Territory of Pondicherry 6
(1955) AIR 1955 Mad 341 (V 42) —
ILR (1955) Mad 688 (FB), G. S.
Joseph v. Miss H. S. Edward 5

M. ANANTANARAYANAN C. J.:— This is a reference by the learned District Judge of South Arcot at Cuddalore, under Sections 10 and 17 of the Indian Divorce Act (4 of 1869), for making absolute the decree nisi granted by him dissolving the marriage between the petitioner and the respondent. As the entire reference involves an issue of law with regard to jurisdiction, and, further, an issue concerning which we are unable to see any room for doubt or difficulty, it is not necessary to canvass the merits, except to the strict extent required for the disposal of this reference.

2. It is admitted that in certain earlier proceedings between the parties, which are among the typed papers as O. P. No. 240 of 1962, a decree was granted in favour of the petitioner (the wife) for judicial separation from the respondent (the husband) under Section 22 of the Indian Divorce Act. The petitioner alleges that though four years have passed since that decree, there has been no resumption of matrimonial living between the parties. In brief she now desires that she should be granted a decree nisi for dissolution of the marriage, merely because of the lapse of an interval of four years after the decree for judicial separation under Section 22.

3. It is sufficient to point out that this is plainly opposed to the scheme and the provisions of the Indian Divorce Act (4 of 1869). Though one may doubt the wisdom of the legislative provisions of this Act, in the light of more progressive marriage laws that have since been enacted with regard to other communities, as far as the parties governed by this Act are concerned, the decree for judicial separation does not ripen into a decree for dissolution of the marriage, because of the lapse of any interval of time. On the contrary, a wife under this Act, can obtain a decree for dissolution of the marriage under Section 10 only on the grounds exhibited under that section. If she alleges adultery against the husband, it will either have to be adultery coupled with cruelty as defined in the relevant clause, or adultery coupled with desertion for two years or upwards.

4. The learned Judge (District Judge) was perfectly aware of the limited nature of the reliefs that could be granted, under the provisions of the Indian Divorce Act. But it appeared to him that, under Section 7 of that Act, it would be competent for him to invoke the clauses of S. 7 (1) to (3) of the Matrimonial Causes Act, 1950, of the United Kingdom. Under those provisions, a party may be entitled to the relief of divorce, if, for three years after the decree for judicial separation, there had been no resumption of cohabitation between the wife and the husband. The learned Judge invoked those provisions, and granted a decree nisi, subject to our confirmation.

5. It is sufficient to be very brief, to demonstrate that the learned Judge has fallen into a palpable error, in the course that he pursued S. 7 of the Act 4 of 1869 makes it clear beyond doubt (1) that the section itself is 'subject to the provisions contained in this Act'; and (2) that what the section enjoins is that the High Courts and District Courts should 'act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.' Apart from every other difficulty, there is the insuperable difficulty, that, under the provisions of the Act (4 of 1869), a decree for judicial separation cannot ripen into a decree for divorce, by mere lapse of time. That is opposed to the scheme and the provisions of the Act. For reasons best known to the Legislature, and into which we need not proceed here, the Legislature has limited the remedy of the wife to obtain divorce, to the situation and the causes set forth in the latter part of Section 10 of the Act. The fact that there was an earlier decree for judicial separation, and that the parties did not resume cohabitation of matrimonial living, is not a ground which this Act recognises as one entitling the wife to divorce.

Upon the wording of the first contingent clause of Section 7 itself, that the principles of the section must be applied only subject to the provisions of the Act, the course adopted by the learned District Judge cannot be supported and must be set aside. Even apart from this, when the Legislature enacted that relief has to be given on principles and rules, as nearly as may be conformable to those on which English Courts give that relief in such cases, it is clear enough that this does not imply that a statutory remedy per se, unknown to this Act, can be thereby introduced into the Act, as a new right or obligation between the spouses. For instance, we have recently had occasion to scrutinise the English

decisions upon several aspects of the law arising from the Indian Divorce Act, such as what kind of evidence would be reasonable proof of the act of adultery, what might reasonably amount to cruelty as defined under the law, and, under Section 14, what kind of conduct on the part of the husband, might amount to condonation of the offence of adultery by the wife. In all such matters, and in matters of the processual application of the provisions, certainly, cases in the English divorce courts can be referred to and applied under Section 7.

It is noteworthy that, in G. S. Joseph v. Miss H. S. Edward, ILR (1955) Mad 688 = (AIR 1955 Mad 341) (FB) the one relevant decision on this aspect cited by learned counsel for the petitioner what was held was that S. 7 of the Indian Divorce Act had been preserved by the Adaptation of Laws Order of 1950, and hence that the English law and practice could be applied, and should be applied in regard to decrees for nullity. The matter related to the period that should ensue between the decree nisi and the decree absolute, and it was held that the English practice could be validly adopted in this respect. The decision is no authority for the view that some statutory right, unknown to the personal law of the parties as embodied in this Act, could be introduced by virtue of Section 7; to do so would be contravening the provisions of Act 4 of 1869, and that would be opposed to Section 7 itself.

6. Apart from this, we may also point out that, as held by their Lordships in Shamarao v. Union Territory of Pondicherry, AIR 1967 SC 1480, after the Constitution came into force, the legislature cannot abdicate its functions by passing any Act to the effect that the future amendments to a foreign Act would continue to apply to the territory of that legislature. The matter related to the Pondicherry General Sales Tax Act (10 of 1965), which extended the Madras General Sales Tax Act (1 of 1959) not only as it stood on the date of enactment of the former measure, but inclusive of the subsequent modifications and amendments as well. Since, admittedly, the Matrimonial Causes Act has been subsequently amended, in several respects, it cannot be contended that those future amendments must also be accepted as applicable to India by virtue of Section 7. In our view, Section 7 does not incorporate the statutes of some other country as part of the law of this land; it merely makes a provision for conforming to the practice and principles of the matrimonial Courts in England in the matter of Divorce or Dissolution of marriage subject to the provisions and the scheme of the Indian Divorce Act. The decree nisi granted by

the learned District Judge is, therefore, lacking in jurisdiction and will necessarily have to be set aside.

7. In this context, learned counsel for the petitioner (the wife) has raised an argument that Section 17 itself may be taken as violating Art. 14 of the Constitution, because it provides for the reference to this Court to be heard by a Bench of three Judges of this Court, for confirmation of a decree nisi for dissolution of marriage granted by any District Court whereas, with regard to such cases arising under the original civil jurisdiction of this Court, this Court itself exercises that jurisdiction as the High Court, and the proceeding is a petition before a learned Single Judge of this Court on the Original Side. The argument appears to be wholly lacking in validity. Firstly, it is not an unreasonable differentiation; nor one unrelated to a very clear principle of distinction, that the jurisdiction of a superior tribunal attracts cases arising within its territory, while inferior tribunals have to deal with cases in their similar jurisdictions. If such a principle or scheme were to be held as offending Art. 14, the entire hierarchy of Courts, and the different provisions for the institution and disposal of civil matters in these Courts will have to be abolished.

Further, we may point out that under Section 8 of the same Act, the High Court has the power to remove any cause from the Court of any District Judge, to itself. If a particular petitioner requires a trial on the original side of this Court, that petitioner has a mode of approach to this Court for redress by invoking this provision, of course, in a suitable case. Again, even a decree for dissolution granted by a learned single Judge of this Court is admittedly a decree nisi, and may be subject to a Letters Patent Appeal under Section 15 of the Letters Patent. We are unable to see any principle of discrimination whatever in Section 17 of the Act, and we may finally observe that, even if such an argument has to be accepted for the sake of hypothesis, it would still involve an adverse result to the petitioner, because the reference itself will have to be quashed, as well as the decree nisi of the learned District Judge.

8. Before parting with the case, we may observe that the provisions of Act 4 of 1869 appear to be highly antiquated, and that they have not kept pace with the provisions of similar enactments relating to marriage in other communities, which are of a far more progressive character. This anomaly was noted by Alagiriswami J. in *S. D. Selvaraj v. Mary*, 1968-1 Mad LJ 289 at p. 294 and he contrasted this Act with the English Matrimonial Causes Act which amended the earlier laws in England, and "put the

husband and wife on equal footing". The learned Judge also pointed out that the law under the Hindu Marriage Act is more progressive, as well as the Parsi Marriage Act, and that this enactment alone, applying, as it does to the Indian Christians, remains at the same primitive stage. In scrutinising the provisions of the English Matrimonial Causes Act, 1950, we find under Section 1 (1) (b), if one of the spouses has deserted the other without cause for a period of at least three years immediately preceding the presentation of the petition, that itself is a ground recognised by the law for divorce. As Alagiriswami, J. points out, the Hindu Marriage Act has been equally progressive, and the Parsi Marriage Act was amended in 1936, to bring it in conformity with these progressive enactments.

It is only under this Act 4 of 1869, that the law remains where it was, when this enactment was born, so that parties governed by this law are under the grave disadvantage that, even if a husband deserts his wife for a considerable period, that will be no ground for divorce; in our view, it is a genuine hardship, and there is urgent need for re-examination of the provisions of Act 4 of 1869, as the Act governs a large body of persons in this country to see that its provisions are rendered humane and up-to-date. Hence, with respect, we entirely concur in the observations of Alagiriswami, J., in the decision referred to. But the Courts have to administer the law as it stands, and as the law is today, there can be no decree nisi in this case in favour of the wife.

9. The decree is accordingly set aside. There will be no order as to costs.

Reference rejected.

AIR 1970 MADRAS 14 (V 57 C 7)

M. ANANTANARAYANAN C. J.

AND NATESAN J.

Abdul Razack Sahib, Appellant v. Mrs. Azizunnissa Begum and others, Respondents.

Letters Patent Appeal No. 70 of 1967 and C. M. P. No. 4302 of 1967 in C. R. P. No. 708 of 1965, D/-24-7-1968, against order of Kallasam J., D/-29-11-1967.

Contempt of Courts Act (1952), S. 1 — Contempt — What constitutes — Mere failure to deposit amount into Court as ordered, does not amount to contempt.

While it is difficult to rigidly define contempt, in a general way contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of law into dis-

BM/FM/A486/69/VGW/D

respect or disregard or to interfere with or prejudice parties to the action or their witnesses during the litigation. For an act to amount to contempt punishable under the summary jurisdiction of the High Court, it must fall within the principle of those cases in which the power to punish has been decided to exist, the unfailing criterion being whether or not there has been an interference or a tendency to interfere with the administration of justice. Contempt jurisdiction is reserved and exercised for what essentially brings the administration of justice into contempt, or unduly weakens it, as distinguished from a wrong that might be inflicted on a private party by infringing a decretal order of Court. (Para 2)

Having regard to the high function of a Court of justice, proceedings by way of contempt of Court should not be used as a 'legal thumbscrew' by a party against his opponent for enforcement of his claim. AIR 1966 Mad 21 (22), Rel. on. (Para 3)

Mere failure to deposit into Court moneys claimed by the opposite party and ordered to be deposited cannot amount to contempt of Court. 1893-1 QB 105 (107), Rel. on; C. M. P. No. 4302 of 1967, D/-29-11-1967 (Mad), Reversed.

(Paras 2, 5)

Cases Referred:	Chronological	Paras
(1966) AIR 1966 Mad 21 (V 53) =		
78 Mad LW 314 = 1966 Cri LJ 35,		
Ramalingam v. Mahalinga Nadar		3
(1893) 1893-1 QB 105 = 62 LJQB		
87, Buckley v. Crawford		4

V. V. Raghavan, for Appellant; S. K. Ahmed Meeran and M. Khaja Mohideen, for Respondents.

NATESAN J.:— This appeal has been filed under Letters Patent from an order of committal of the respondent for contempt in a pending civil revision petition in this Court. The civil revision petition arises out of proceedings under the Madras Cultivating Tenants Protection Act (Act 25 of 1958) and has been preferred by the legal representatives of the landlord on the dismissal of a petition for eviction of the tenant, on the ground of wilful default in the payment of rent. The contention in the civil revision petition appears to be that the Revenue Court erroneously went into the question of title and rejected the petition for eviction. The revision petitioners moved this Court in C. M. P. No. 5345 of 1965 for a direction to the respondent therein the appellant before us, to deposit into Court the arrears of rent to the credit of T. P. No. 2 of 1964 on the file of the Court of the Ex-officio First Class Magistrate, Tirupattur, for the prior four years at the rate of Rs. 226.37 per year and future rent at the rate of Rs. 250 per year pending the civil revision petition in this Court. In this civil miscellaneous petition on 28-1-1966, after hearing counsel on both sides,

this Court passed an order in the following terms—

"The respondent will deposit the arrears of rent at Rs. 226-37 due up-to-date in the Rent Court within two months from this date and continue to deposit future rent at the same rate as and when it falls due."

The respondent, the present appellant (referred to hereafter as appellant) who failed to deposit the arrears of rent in terms of the order, applied by C. M. P. 6057 of 1966 for extension of time to pay the arrears. But this C. M. P. was dismissed on 12-8-1966. Surprisingly though other remedies may be available to the petitioners to secure the arrears of rent claimed by them, they moved this Court in C. M. P. 4302 of 1967 for committal of the appellant for contempt of Court in that he disobeyed the order of this Court dated 28-1-1966 in C. M. P. 5345 of 1965. The appellant, in his counter affidavit to this application for committal, submitted inter alia that he was unable to pay the amount directed by this Court, as he was not in possession of the lands and that further he was very old and had a paralytic attack and was bedridden. The plea that he was not in possession of the lands, had been put forward even in C. M. P. No. 5345 of 1965 and had been overruled. When this application for committal came on for hearing on 24-10-1967, before the learned single Judge, who passed the original order for deposit, the learned Judge granted time for deposit in the following terms—

"Adjourned two weeks to enable the respondent to pay as directed by this Court."

On 13-11-1967, when the matter was taken up again, the counsel on record for the appellant reported no instructions. There was no appearance by the appellant and in his stead his son appeared. In the order passed on that date, the learned judge observed—

"On the facts stated above, It is clear that the respondent has not deposited, the amount as directed. He also admitted his liability and prayed for extension of time for depositing the amount. Till now, it does not appear that the respondent has deposited any amount as directed by this Court. The respondent is therefore, guilty of contempt of Court."

The appellant's son who appeared at the hearing on the 13th, represented to the Court that some amount had been deposited in the lower Court on 6-11-1967 and that he would arrange to make the deposit as per the orders of this Court. The attitude of the appellant as disclosed by the proceedings is one of surrender praying for time and pleading inability. On the representation made by the appellant's son on his behalf the order stated:

"The respondent's son S. A. Batcha represents that some amount had been deposited in the lower Court on 6-11-1967 and that he would arrange to make the deposit as per orders of this Court. If the amount is deposited as directed, it will not be necessary to inflict any punishment on the respondent taking into consideration that he is aged 82 years. Call the petition on 27-11-1967."

On 28-11-1967, the Court passed the following order—

"The pronouncement of punishment was adjourned so as to enable the respondent or his son to deposit the amount directed. The money has not been deposited. The respondent is clearly guilty of contempt. Considering the extreme old age of the respondent, I sentence the respondent to two weeks simple imprisonment."

At this hearing the respondent was represented by counsel. It is this committal of the appellant for contempt of Court that is now challenged before us as wholly outside the contempt jurisdiction of this Court.

2. It is submitted that there was only non-compliance with a simple order, no doubt of this Court, for payment of money claimed by the landlord as due for rents and such non-compliance does not carry with it penal sanctions as contempt of Court. From the record it does not appear that the appellant before us who had succeeded in the final Court and who was only the respondent here had even bargained to deposit these arrears of rent and continue to deposit the future rent pending the civil revision petition, as a condition of his being allowed to continue in possession of the lands undisturbed till the disposal of the civil revision petition. His answer to that petition for deposit was that he was not in possession of the lands. ~~We do not find recorded any undertaking by him to the Court at any stage of the proceeding to deposit the moneys into Court. The petitioners in the civil revision petition moved for committal of the appellant for contempt only for disobedience of the order dated 28-1-1966 in C. M. P. No. 5345 of 1965. The learned Judge appears to be of the view that the failure to deposit the amount as directed by this Court is itself contempt of Court, for the learned Judge observes—~~

"Till now, it does not appear that the respondent has deposited any amount as directed by this Court. The respondent is, therefore, guilty of contempt of Court." We fail to see how mere failure to deposit into Court moneys claimed by the opposite party and ordered to be deposited can amount to contempt of Court. Counsel for the petitioners cannot place a single decision before us; nor do we recollect a single instance where default of an order

for payment of money has been held to constitute contempt of Court and the defaulting party sent to prison. While it is difficult to rigidly define contempt, in a general way contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of law into disrespect or disregard or to interfere with or prejudice parties to the action or their witnesses during the litigation. For an act to amount to contempt punishable under the summary jurisdiction of this Court, it must fall within the principle of those cases in which the power to punish has been decided to exist, the unfailing criterion being whether or not there has been an interference or a tendency to interfere with the administration of justice. Contempt jurisdiction is reserved and exercised for what essentially brings the administration of justice into contempt, or unduly weakens it, as distinguished from a wrong that might be inflicted on a private party by infringing a decretal order of Court.

3. In Ramalingam v. Mahalinga Nadar, 78 Mad LW 314 at p. 315 = (AIR 1966 Mad 21 at p. 22) we formulated the principle of contempt jurisdiction thus—

"Essentially contempt of Court is a matter which concerns the administration of justice and the dignity and authority of judicial tribunals; a party can bring to the notice of Court, facts constituting what may appear to amount to contempt of Court, for such action as the Court deems it expedient to adopt. But, essentially, jurisdiction in contempt is not a right of a party, to be invoked for the redressal of his grievances; nor is it a mode by which the rights of a party, adjudicated upon by a tribunal, can be enforced against another party."

If we may use what may be considered an irrelevant expression, having regard to the high function of a Court of justice, proceedings by way of contempt of Court should not be used as a 'legal thumbscrew' by a party against his opponent for enforcement of his claim. But that is what the petitioners have attempted in this case.

4. The inapplicability of contempt process to an order like the one before us, is too well established to require any citation. We shall, however, refer to one case where the principle is neatly brought out. In Buckley v. Crawford, 1893-1 QB 105 at p. 107 in Volume I, an application was made for an order to commit the plaintiff in the action for disobedience to an order which had been made directing him to pay a sum of money to the claimant in inter-pleader proceedings. It was argued in that case that there was a bargain and an undertaking, and a breach of the undertaking to pay amounted to contempt of Court which may be punished by attachment, just as a breach of an

injunction may. Wills, J., with whom Lord Coleridge C. J. concurred, holding that there was no jurisdiction in the Court in such a case to make an order for attachment for contempt, observed—

"This was a simple order to pay money, but it is sought to treat the default in obeying the order as a contempt of Court, on the ground that the order for payment was made in pursuance of an undertaking which had been given by the plaintiff. There is however, no difference between an order to pay money made in pursuance of an undertaking and any other order to pay a sum of money. It is true that the undertaking is the original ground of the liability, but attachment is never granted except for disobedience of an order to do or abstain from doing some specific thing."

5. It follows that the non-compliance by the appellant with the order of this Court directing him to deposit the arrears of rent due to the petitioners within the time prescribed and continue to deposit the future rent, does not amount to any contempt of Court. The penal sanction under the contempt procedure should not be invoked for default of compliance with such an order. It is not for us to suggest the processes that may be resorted to in such a case. The appeal is, therefore, allowed.

6. Normally we would not have ordered costs. But in this case, the appellant has been sentenced to two weeks simple imprisonment, at the instance of the respondents. All the while the appellant had been making vain attempts to find the money and make the deposit to escape the penal consequences of the summary proceedings initiated by the respondent. The appellant, in fact, has been able to make some deposit. Incidentally, pending the appeal before us, the petitioner had a receiver appointed for the properties without any objection by the appellant. In these circumstances, we award the appellant his costs in this appeal, which we fix at Rs. 50.

7. As the appellant has disclaimed his possession of the lands, we direct the receiver, appointed pending the L. P. Appeal to continue to function till the disposal of the civil revision petition.

Order accordingly.

AIR 1970 MADRAS 17 (V 57 C 8)

ALAGIRISWAMI J.

Ibrahim Bivi and others, Appellants v. K. M. M. Pakkir Mohideen Rowther, Respondent.

Second Appeal No. 369 of 1964. D/-13-2-1968, against decree of Sub Court Tirunelveli in A. S. No. 91 of 1962.

DM/EM/B545/69/LGC/D

1970 Mad./2 I G—31

(A) Muhammadan Law — Gift — Gift of house — Conditions necessary — Donor and donee living in house, the subject-matter of gift — Donor need not necessarily depart from house in order to make gift effective — There must be clear intention to make gift and to part with possession of property—Delivery and possession should not necessarily, in every case be effected to father as guardian of minor donee — (T. P. Act (1882), S. 122).

In the case of a gift of a house if the donor and the donee live in it that would be sufficient to show that possession has been given. The reservation by the donor of the right to reside in the house along with the donee during his lifetime does not detract from the validity of a gift. If the donee happens to be a minor and if he has attained age of discretion (in this case, the donee was aged 15 and he should certainly have attained the age of discretion) he is competent to accept the gift. It is not necessary that in all cases, the donor should hand over possession to the natural guardian of the minor donee. In proper circumstances, the donor can either constitute himself as the guardian or indicate some person, other than the natural guardian of the minor, as the guardian of the minor's property and hand over possession to such guardian if circumstances are such as to justify such a course of action. All these, of course, apply only where there is a clear intention to make a gift and to deliver possession.

There is no warrant for the contention that under Muhammadan Law whatever may be the subject matter of gift, and whatever may be the circumstances, in which the gift is made, if the donee happens to be a minor, there should be delivery of possession to the guardian of the minors. There is nothing in principle (in Mahomedan Law) or in the decisions which compels the view that regardless of the father's indifference, his wayward habits and other adverse factors, any person who desires to make a gift to the minor son could do so only by delivering the property to such a father: Case law, discussed. (Para 8)

Where the settlement deed, executed by the paternal grandmother of the settlee, provided that by the settlement, the property had been transferred to the settlee, that the settlor and the settlee were to enjoy the property together, that as the settlee was a minor, the settlor would look after the property as the settlee's guardian till he became a major, that after the settlor's lifetime, the settlee would enjoy the property absolutely, that during the settlor's lifetime, neither the settlor nor the settlee was entitled to alienate the property and that if any such alienation was made, it would not be valid:

Held, that the gift was valid. The settlement deed indicated a clear intention to part with possession of the property immediately, the fact that till the settlee became a major the settlor was to look after the property as guardian, would not in any way detract from the fact that the property was transferred unconditionally to the settlee. And the fact that the settlor and the settlee were to reside together in the property, would not in any way show that possession was not handed over. (Para 5)

(B) Civil P. C. (1908), Ss. 100-101 — Question of fact — Family arrangement — Pure question of fact — Lower Courts found that the family arrangement pleaded by plaintiff is not proved — No interference in second appeal. (Para 1)

Cases Referred: Chronological Paras

- (1966) AIR 1966 Mad 462 (V 53) = 79 Mad LW 302, Azeshabi v. Saprakara Kothoonbi 8
(1964) AIR 1964 SC 275 (V 51) = (1963) 2 SCWR 318, Kathissa Umma v. Narayanath Kunhamu 8
(1963) 1963 Ker LT 226 = 1963 Ker LJ 497, Pichakannu v. Aliyarkunju Lebba 6
(1960) AIR 1960 Bom 210 (V 47) = ILR (1960) Bom 40, Abdul Rahman v. Mishrimal 6
(1959) AIR 1959 Madh Pra 225 (V 46) = 1959 MPLJ 354, Munni-bai v. Abdul Ganj 8
(1958) AIR 1958 Mad 527 (V 45) = (1958) 1 Mad LJ 14, Md. Yusuf Rowther v. Md. Yusuf Rowther 3, 8
(1956) AIR 1956 Mad 514 (V 43) = ILR (1956) Mad 1004, K. Veeran-kutti v. Umma 7, 8
(1944) AIR 1944 Sind 195 (V 31) = ILR (1944) Kar 151, Mt. Fatma v. Mt. Atun 8
(1933) AIR 1933 Rang 155 (V 20) = ILR 11 Rang 109, Sunameah v. Pillai 6
(1932) AIR 1932 PC 13 (V 19) = 59 Ind App 1, Mohamed Sadiq Ali Khan v. Fakhr Jahan Begum 8
(1932) AIR 1932 Lah 316 (V 19) = 33 PLR 77, Mt. Saidunnissa v. Inam Ilahi 6
(1928) AIR 1928 PC 108 (V 15) = ILR 52 Bom 316, Musa Mian v. Kadar Bux 4, 6, 7
(1906) ILR 28 All 147 = 2 All LJ 778, Humera Bibi v. Najmunnissa 3
(1874) 1874-2 Ind App 87 (PC), Ameerunnissa v. Abidoonnissa 4

JUDGMENT:— The question that arises for decision in this case is about the validity of the settlement deed Ex B-5 dated 20-12-1937, executed by Kathija Bivi, the paternal grandmother of the defendant in this case in his favour. The defendant is the son by the first wife of one Mohideen

Pichai. The first plaintiff is the second wife of Mohideen Pichai and plaintiffs 2 to 6 are her children. Kathija Beevi died on 1-12-1949 and Mohideen Pichai in 1958. There was an earlier suit, O. S. 54 of 1959, filed by the defendant against the plaintiffs for partition of the family properties. That suit was decreed on 29-2-1960, holding the settlement executed by Kathija Bivi valid, A. S. 146 of 1960 filed against the decree in O. S. 54 of 1959 was dismissed on 18-10-1960, but the question regarding the validity of Ex. B-5 was left open. The plaintiffs filed the present suit on 14-2-61, claiming that there was a family arrangement on 25-12-1961 under Ex. A-1 by which they got the defendant's 14/88 share in the suit property by paying him Rs. 700. Alternatively, they claimed that the settlement Ex. B-5 is not valid and that they were, therefore, in any case, entitled to a 74/88th share in the suit property. Both the Courts below have found that the family arrangement pleaded by the plaintiffs is not proved and that being a pure question of fact, it is not open to this Court to go behind that finding of fact. Therefore, the only question that arises is, whether the settlement deed Ex. B-5 is not valid? There is no doubt that if it were not valid, the plaintiffs would be entitled to a 74/88th share and the defendant only to a 14/88th share in the suit property.

2. It appears that at the time when Ex. B-5 was executed, the defendant's father Mohideen Pichai had married the first plaintiff as the second wife, and the defendant being motherless was being brought up by the grandmother and out of natural love and affection, she executed the settlement in question. It may incidentally be mentioned that soon after the execution of Ex. B-5, Mohideen Pichai filed a suit questioning that settlement, but later withdrew it.

3. The argument on behalf of the appellants, that is, the plaintiffs, is that the settlor had not parted with possession of the property and given possession to the settlee that in any case, she was not the guardian of the settlee and therefore, she should have given possession to the defendant's father, that is, Mohideen Pichai, that Mohideen Pichai had not assented to this settlement as shown by the suit filed by him and that, therefore, the settlement would not be valid on all these grounds. In Asaf A. A. Fyze's Outlines of Muhammadan Law, 3rd Edn, at page 221, it is said—

"Delivery of possession is therefore an essential characteristic of the Islamic law of gifts Therefore, the taking possession of the subject-matter of the gift by the donee, either actually or constructively is necessary to complete a gift....."

Then at page 222 it is said—

"First, in the case of immoveable property which is in the exclusive possession of the donor it is necessary that the donor should physically depart from the premises, and hand over the possession formally to the donee, and that the donee should accept such possession. If a person lives in a house and purports to make a gift by saying to the donee 'take possession' or 'I have delivered possession' and no overt act of tender and acceptance of possession takes place, there is no gift"

Then at page 223, the following passage occurs:—

"The general principle is that possession must be handed over; to this rule there are certain qualifications and exceptions which we shall now proceed to consider —

Transfer of possession is not necessary—

(1) where the donor and the donee reside in the same house;.....

(5) where a guardian makes a gift to the ward;

(1) Residence in the same house: Where the donor and the donee reside in the same house, the donor can complete the gift without physical transfer of possession; but there must be the unequivocal manifestation by the donor of an intention to transfer exclusive possession to the donee....."

A Muslim lady, who had brought up her nephew as her son, executed a deed of gift, in favour of the nephew, of a house in which they were both residing at the time of the gift. The donor never departed from the house physically, nor was the house formally handed over to the donee, but the property was transferred, and the rents were recovered in his name. It was held that the gift was valid, although there was no physical delivery of possession: *Humera Bibi v. Najmun-nissa*, (1906) 28 All 147, Md. Yusuf Rowther v. Md. Yusuf Rowther, AIR 1958 Mad 527. If, however, certain important steps for divesting ownership were not taken, then the Court is entitled to presume that the gift was not complete. For example, a Muslim lady and her nephew resided in a house which belonged to the lady. The lady executed a deed of gift in favour of her nephew. There was no formal delivery of possession; no mutation of names was effected; the nephew continued to live in the house with his aunt; the deed was not delivered to the nephew; the aunt continued to pay the municipal taxes. In these circumstances, it was held that there was no valid gift.

4. Dealing with the question of gifts from father to child, mother to son, guar-

dian to ward, we find the following passage:—

"Where a father or mother makes a gift of immoveable property to their minor child, no physical transfer of possession is necessary. The same is the rule between guardian and ward. One reason for the rule is that this would involve the absurdity of the owner of the property (parent) handing over possession to himself as guardian of the child. In *Ameerunnissa v. Abidoonissa* (1874) 2 Ind App 87 (PC) their Lordships of the Privy Council stated that 'where there is, on the part of the father or other guardian, a real and bona fide intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor.' Where for instance, the gift is made to an infant by a person other than the father or guardian, the gift is rendered complete by the seisin of the father of the infant.

The real basis of the exception is that delivery of possession is excused only when the legal guardianship of the minor vests in the donor. Thus, a gift by a grandfather to his grandson would not be within the exception where the father is alive and has not been relieved of his legal guardianship. A decision of Privy Council makes this perfectly clear. *Musamian v. Kadar Bux*, AIR 1928 PC 108 Nor can a mother, who is not a legal guardian, accept such a gift on behalf of her minor children, from their grandfather."

5. In this case, the settlement deed provides that by the settlement, the property has been transferred to the settlee, that the settlor and the settlee were to enjoy the property together, that as the settlee was a minor, the settlor would look after the property as the settlee's guardian till he became a major, that after the settlor's lifetime, the settlee would enjoy the property absolutely, that during the settlor's lifetime, neither the settlor nor the settlee was entitled to alienate the property and that if any such alienation was made it would not be valid. Now, it is obvious that the first part of the settlement deed whereby the settlor purports to transfer the property to the settlee indicates a clear intention to transfer the property. I think the fact that till the settlee became a major the settlor was to look after the property as guardian, would not in any way detract from the fact that the property was transferred unconditionally to the settlee. The subsequent recitals in the document that the settlee was to enjoy the property absolutely after the settlor's lifetime, would not in any way, cut down the absolute transfer earlier indicated, nor would the fact that the settlor and the settlee are said to have no right to alienate the property during the settlor's

lifetime affect the transfer in any way. Though the wording of the document is a little confused, there is a clear intention to part with possession of the property immediately and the fact that the settlor and the settlee were to reside together in the property, would not in any way show that possession was not handed over. Decisions have held that where the property gifted is a house and the settlor and the settlee reside in that house, it is not necessary for the settlor formally to depart from the house in order to indicate that the settlee has been given possession of the property gifted.

6. It is, however, urged on behalf of the appellants that under Muhammadan law, only the father and the grandfather are the guardians of a minor, that the paternal grandmother is not the guardian and that therefore, as the possession of the property had not been given to the father though he was alive and the father himself had expressly repudiated the settlement deed by filing a suit, questioning the settlement, possession cannot be said to have been given to minor's guardian. It should however, be remembered that under Muhammadan law, there is no objection to a minor himself getting possession of the property and as the minor in this case resided with the settlor and the settlee had the manifestly clear intention to part with the possession of the property, the settlee should be deemed to have obtained possession. I do not think that the decision in AIR 1928 PC 108 in any way is against this position. In that case a maternal grandfather was alleged to have made a gift to his grandsons. The grandsons were minors. They and their parents lived in the house of the donor. There was no mutation of names and no deed was executed, the grandfather continued to be in possession of the property and there was no evidence to show that the donor in any way intimated that he regarded himself as a trustee for his grandsons or that he was in possession of the property on their behalf. It was, therefore, held that the case did not come within the exception to the general rule and therefore, the gift was not complete in the absence of any delivery of possession or relinquishment of control over the property by the grandfather. At page 111 of the above decision, it is observed that the rule (that possession need not be given) applies to the case of a mother making a gift to her infant son whom she maintains only when the father is dead and no guardian has been provided. It was further observed as follows—

"The rule applies also to the gift by any other person maintaining a child under these circumstances i.e., when the father is dead and no guardian has been provided. This seems to imply that when

the father, who is the natural guardian of his infant children is alive and has not been deprived of his rights and powers of guardian, the above mentioned rule will not apply."

On this it is urged on behalf of the appellants that as in this case, the father was alive, the rule as to possession not having to be given, does not apply. That case it appears to me was really decided on the fact that the grandfather did not relinquish control and except a bare declaration there was nothing else to show a clear intention on the part of the donor to part with possession of the property. In *Mt. Saidunnissa v. Inam Ilahi*, AIR 1932 Lah 316 it was held that no change of possession is necessary in the case of a gift by a grandfather to his minor grandson, if the father is dead, for the grandfather is then the proper person to take delivery on behalf of his grandson as his guardian. Then it was observed as follows—

"But if the father is alive and has not been deprived of his rights and powers as guardian there must be a delivery of possession by the grandfather to the father as guardian of his minor son; otherwise, the gift is not complete. The mere fact that the minors have always lived with their grandfather and have been brought up and maintained by him will not constitute him guardian of their property so as to dispense with delivery of possession."

This decision purported to follow the decision in AIR 1928 PC 108 already referred to. In *Sunameah v. Pillai*, AIR 1933 Rang 155, it was held as follows—

"In order to perfect a gift by a Muhammadan it is necessary to make over possession of the property to the donee. If the donee is a minor then possession must be made over to a person who is the natural guardian of the minor. The exception in case of a gift by the father cannot be extended to a gift by the maternal grandfather. Delivery of possession to the mother of the minor donee is of no use."

This case also purported to follow the decision of the Privy Council earlier referred to. In *Pichakannu v. Aliyarkunju Lebbu*, 1963 Ker LT 226, it was held as follows—

"It is a fundamental rule of Muhammadan law as regards gifts that the donor should divest himself completely of all ownership and dominion over the subject of the gift. It is essential to the validity of a gift that there should be a delivery of such possession as the subject of the gift is susceptible of. A gift with a reservation of possession by the donor during his lifetime is void. By reserving undisturbed his rights to be in possession and enjoyment the donor did not divest himself completely of all dominion over

the properties, though in a sense he purported to associate the donees with himself, nor could such associating the donees in the matter of possession and enjoyment with him be deemed to be delivery of such possession, if at all, as the properties were susceptible of. Therefore, a stipulation that the donor and the donee shall be in joint possession will not satisfy the requirement of delivery of possession in a gift under the Muhammadan law. Even where the donee resides with the donor in the property, although no physical departure by the donor or formal entry by the donee is necessary, the gift has to be completed by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject matter."

"It is quite clear, that by Ex. I, the donor did not divest himself completely of all dominion over the properties gifted but reserved possession and enjoyment with himself The donees were entitled to the properties absolutely, only after the lifetime of the donor".

These decisions seem to support the appellants' contention. In *Abdul Rahman v. Mishrimal*, AIR 1960 Bom 210, it was held that where a gift by a grandfather to his minor grandsons of immoveable property was made and delivery of possession was accepted on behalf of the minors not by their father who was alive, but by their mother, the gift was not acceptable. The decisions relied on were the decisions in AIR 1928 PC 108 and AIR 1933 Rang. 155, already referred to.

7. But the trend of later decisions is towards the liberalisation of the rigours of the Islamic Law of Gifts. As already mentioned it has been held that where what is gifted is a house, it is not necessary for the donor family to depart from the house in order to complete delivery of possession. It has also been held that as between the husband and wife, it is not necessary for either party to depart from the house and they could continue in possession in the same house gifted and delivery would still be complete. It has also been held as seen from the passage quoted earlier from the decision in AIR 1928 PC 108, that where a guardian makes a gift to the ward and the father or the grandfather is not alive, the rule regarding the delivery of possession to the natural guardian does not apply. The trend of decisions is reflected in the decision of a Bench of this Court in *K. Veerankutti v. P. Umma*, AIR 1956 Mad 514. There the document under consideration recited as follows —

"I have out of natural love and affection I have for Nos. 1 and 2, released or surrendered by assignment gift all my rights to the kanom reclamation, house and improvements thereon as per terms

stated thereunder. But till my death I shall keep and enjoy the properties of the schedule without any munpattom or creating any mortgage or debt or alienating the same and it is settled that after my death Nos. 1 and 2 should keep the properties and enjoy the same with all rights of alienation and disposition".

It was further held as follows:—

"....., that the recitals taken as a whole indicated an absolute divestment of all the rights of the donor in the property with liberty to keep possession and enjoy the income from them till his death. The clauses could not be understood as creating a life estate with a vested remainder. That the reservation to be in possession of the property and enjoy the income therefrom during the lifetime of the donor could not be understood as derogating from the earlier grant but it was only an affirmation or reservation of a subordinate right to enure for a specified period".

8. In that case there were two donees and the donor was the natural guardian of the first donee and it was, therefore, held that there was no necessity to deliver possession. It should be noticed that the facts of the present case are much stronger from the point of view of the donee than the facts in AIR 1956 Mad 514, except with regard to the fact that in this case, the donor is not the natural guardian of the donee. In AIR 1958 Mad 527 *Rajagopala Aiyangar J.* took into account the relationship between the donor and the donee, as well as the fact that they were jointly residing in the premises, to hold that there was no necessity for the donor to remove himself from the premises in order that the gift may be operative. In the decision of the Supreme Court in *Katheesan Umma v. Narayanath Kunhamu*, AIR 1964 S. C. 275 in paragraph 11 it was held as follows:—

"It is only actual or constructive possession that completes the gift and registration does not cure the defect nor is a bare declaration in the deed that possession was given to a minor of any avail without the intervention of the guardian of the property unless the minor has reached the years of discretion. If the property is with the donor he must depart from it and the donee must enter upon possession Exceptions to these strict rules which are well recognised are gifts by the wife to the husband and by the father to his minor child Later it was held that where the donor and donee reside together an overt act only is necessary and this rule applies between husband and wife.

In *Mohamed Sadiq Ali Khan v. Fakhr Jahan Begum*, AIR 1932 PC 13 it was held that even mutation of names is not

necessary if the deed declares that possession is delivered and the deed is handed to the wife. A similar extension took place in case of gifts by a guardian to his minor ward In the case of a gift to an orphan minor the rule was relaxed in this way; If a fatherless child be under charge of his mother, and she take possession of a gift made to him it is valid The same rule also holds with respect to a stranger who has charge of the orphan In the case of the absence of the guardian (Gheebut-i-Moonqutia) the commentators agree that in a gift by the mother her possession after gift does not render it invalid. Thus, also brother and paternal uncle in the absence of the father are included in the list of persons who can take possession on behalf of a minor who is in their charge. Durrul Mukhtar, Vol. 4, page 512 (Cairo Edn) in Radd-ul-mukhtar it is said:

"It is laid down in the Barjindi: There is a difference of opinion, where possession has been taken by one, who has it (the child) in his charge when the father is present. It is said, it is not valid and the correct opinion is that it is valid." Volume 4, O. 513 (Cairo Edn).

In the Bahr-al-Raiq, volume 7, page 314 (Edn Cairo). "The rule is not restricted to mother and stranger but means that every relation excepting the father, the grandfather and their executors is like the mother. The gift becomes complete by their taking possession if the infant is in their charge otherwise not The rule about possession is relaxed in certain circumstances of which the following passage from the Hadaya p 484 mentions some:—

"It is lawful for a husband to take possession of anything given to his wife, being an infant, provided she has been sent from her father's house to his; and this although the father be present; because he is held, by implication, to have resigned the management of her concerns to the husband. It is otherwise where she has not been sent from her father's house, because then the father is not held to have resigned the management of her concerns. It is also otherwise with respect to a mother or any others having charge of her; because they are not entitled to possess themselves of a gift in her behalf unless the father be dead, or absent and his place of residence unknown; for their power is in virtue of necessity, and not from any supposed authority; and this necessity cannot exist whilst the father is present;"

In paragraph 15 the conclusion was reached as follows:—

"These cases show that the strict rule of Muhammadan Law about giving pos-

session to one of the stated guardians of the minor is not a condition of its validity in certain cases. One such case is gift by the husband to his wife and another where there is gift to a minor who has no guardian of the property in existence."

The latest decision in the series is that of Ramamurti, J. in *Azeshabi v. Saprakara Kathoonbi*, 79 Mad LW 302 = (AIR 1966 Mad 462). In that case, the gift deed executed by a Muslim woman to her son and her minor daughter represented by the donor's son as guardian recited that possession of the property has been delivered over to the donee. The property was a residential house in which the donor and her children and the donees were living together. It was held that every presumption should be made in favour of the validity of the gift when the conduct of the parties spread over a long interval of 23 years shows that the gift was given effect to and they have stood by it by accepting the validity of the gift and that Muhammadan Law requires evidence of handing over possession to the donee and the donee's acceptance of the gift mainly as proof of the intention of the donor to pass title to the donee, so that if this requirement is complied with, all future disputes about the truth and factum of gifts shall be avoided, and that in applying the rules of Muhammadan Law relating to the gifts, the rigour of unmeaning technicalities should not be enforced, divorced from the realities of the particular situation in individual cases and Courts should avoid an impractical approach to the question and that there is no warrant for the contention that under Mahomedan Law whatever may be the subject matter of gift, and whatever may be the circumstances, in which the gift is made, if the donee happens to be a minor, there should be delivery of possession to the guardian of the minors, and that the rule of Muhammadan law that delivery and possession should be effected to the father as the guardian and the latter should accept the gift can have no application to a case in which the donor specifies some other person as the guardian to take possession and accept the gift on behalf of the donee, and that there is nothing in principle (in Mahomedan Law) or in the decisions which compels the view that regardless of all considerations and regardless of the father's indifference, his wayward habits and other adverse factors, any person who desires to make a gift to the minor son could do so only by delivering the property to such a father. That decision is a complete answer to the contention of the appellants.

The learned Judge referred to the decision in *Mt. Fatma v. Mt. Autun*, AIR 1944 Sind 195, wherein Tyabji, J. observed as follows—

"There is nothing in Mohamedan Law or outside it which prevents a minor from accepting a gift or taking possession of the property It is true that Section 11 of the Contract Act prevents a minor from effecting a binding contract While this disability renders a minor incompetent to act as a transferor, by reason of Section 7 of the Transfer of Property Act, a minor is not incapable of receiving benefits and being a transferee, as he is not a person legally disqualified to be a transferee within the meaning of sub-section (h) of Section 6 of the Act."

The learned Judge also referred to the decision in *Munnibi v. Abdul Gani*, AIR 1959 Madh Pra 225 where a Bench held that the donee of a gift is not precluded by minority from accepting the gift and that where the document embodying the intention of the donor to give the property in gift is delivered by the donor to the donee and accepted by him it amounts to acceptance of the gift on his part. The conclusions that flow from a consideration of the various decisions may be stated as follows:

In the case of a gift of a house, it is not necessary that a donor should depart from the house in order to make the gift effective. If the donor and the donee live in the same house that would be sufficient to show that possession has been given. The reservation by the donor of the right to reside in the house along with the donee during his lifetime does not detract from the validity of a gift. If the donee happens to be a minor and if he has attained age of discretion (in this case, the donee was aged 15 and he should certainly have attained the age of discretion) he is competent to accept the gift. It is not necessary that in all cases, the donor should hand over possession to the natural guardian of the minor donee. In proper circumstances, the donor can either constitute himself as the guardian or indicate some person, other than the natural guardian of the minor, as the guardian of the minor's property and hand over possession to such guardian if circumstances are such as to justify such a course of action. All these, of course, apply only where there is a clear intention to make a gift and to deliver possession. It follows, therefore, that the gift in favour of the first defendant in this case is valid and this appeal has, therefore, to be dismissed and it is accordingly dismissed. There will be no order as to costs. No leave.

Appeal dismissed.

AIR 1970 MADRAS 23 (V 57 C 9)
VEERASWAMI AND RAMAPRASADA
RAO JJ.

Erode Transports (P.) Ltd. Tirupur, Applicant v. Commissioner of Income-tax Madras, Respondent.

T. C. No. 262 of 1964 (Ref. 69 of 1964), D/-4-4-1968.

Income-tax Act (1922), S. 10 (2) (xv) — Capital and revenue expenditure — Expenditure incurred in obtaining new permit under Motor Vehicles Act — Expenditure is of capital character — Expenditure incurred in registering trade mark is revenue expenditure — Positions compared.

The case of a route permit has to be viewed in the light of the provisions of the Motor Vehicles Act. Section 10 (2) (xv) speaks of expenditure laid out for the purpose of a business which the assessee is carrying on. It is difficult to see how even before a permit is obtained, the assessee can be taken to carry on business of running a bus which would be covered by a permit to be obtained. It cannot be said that the expenditure in obtaining a new permit can be regarded as expenditure laid out for the purpose of the business of running buses covered by other permits.

A reference to the provisions of the Motor Vehicles Act would make it clear that each route permit is a separate entity, which is granted after elaborate proceedings. Transport business after all consists of running of buses and no bus can be run except on permit. When a new permit is obtained, it cannot be said that the expenses incurred therefor, are expenses laid out for the purpose of a business carried on by the assessee. The business carried on by the assessee before acquisition of the new permits is the business in running other transport buses for which permits had already been granted. In respect of the new permit there can be no business before a permit has been obtained. It is settled at least so far as the High Court of Madras is concerned that such a permit is property and the expenses incurred in acquisition of such property which is the basis for starting the business of running the bus to which the permit relates are, therefore, of a capital character: AIR 1966 SC 1053 & AIR 1964 SC 1722, 1728, Disting.

Expenses incurred in registering a trade mark are quite a different matter. Before registration of a trade mark, business is carried on over a length of time and has acquired a reputation. Normally there is a business carried on when registration of a trade mark is made. There can be a trade mark even without registration. Registration of a trade mark is made in order that it may be protected by the re-

lative statutory provisions. It is clear, therefore, that expenses incurred in registering a trade mark can well be said to be expenses laid out wholly for the purpose of the business which the assessee has been carrying on. (Paras 1, 2, 3)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 1053 (V 53) =
60 ITR 52, India Cements Ltd. v.
Commr. of I. T. 2
(1964) AIR 1964 SC 1722 (V 51) =
53 ITR 140, Commr. of I-T. v.
Malayalam Plantations 3

K. Srinivasan, for Applicant; V. Balasubramaniam and J. Jayaraman, for Respondent.

VEERASWAMI J: In respect of the assessment year 1959-60, the assessee claimed a deduction of Rs. 2615 as legal expenses. This amount included a sum of Rs. 1250 paid to an advocate in connection with the opening of three new bus routes. The Income-tax Officer disallowed the claim in toto. The appellate authority declined to interfere but found that the correct figure was a sum of Rs. 1250. The Tribunal also concurred with the revenue. In the circumstances the reference comes before us under Section 66 (1) of the Indian Income-tax Act 1922, and the question is—

"Whether on the facts and circumstances of the case, the sum of Rs. 1250 is not an admissible deduction in the computation of the assessee's business income under Section 10 (2) (xv) of the Indian Income-tax Act for the assessment year 1959-60?"

It is stated that the sum of Rs. 1250 was fees paid to a lawyer who appeared in proceedings under the Motor Vehicles Act to obtain the three new route permits. The assessee is a fleet owner, as we are told, and carries on transport business. It is argued that the expenditure incurred by payment of lawyer's fee in getting the three route permits is expenditure of a revenue character and is entitled to deduction under Section 10 (2) (xv). We are unable to accept the contention. A reference to the provisions of the Motor Vehicles Act would make it clear that each route permit is a separate entity, which is granted after elaborate proceedings. Transport business after all consists of running of buses and no bus can be run except on permit. When a new permit is obtained, in our opinion, it cannot be said that the expenses incurred therefor, are expenses laid out for the purpose of a business carried on by the assessee. The business carried on by the assessee before acquisition of the new permits is the business in running other transport buses for which permits had already been granted. In respect of the new permit there can be no business before a permit has been obtained. It is settled at least so far as this Court is

concerned that such a permit is property and the expenses incurred in acquisition of such property which is the basis for starting the business of running the bus to which the permit relates are, therefore, of a capital character.

2. Expenses incurred in registering a trade mark are quite a different matter. Before registration of a trade mark, business is carried on over a length of time and has acquired a reputation. Normally there is a business carried on when registration of a trade mark is made. There can be a trade mark even without registration. Registration of a trade mark is made in order that it may be protected by the relative statutory provisions. It is clear, therefore, that expenses incurred in registering a trade mark can well be said to be expenses laid out wholly for the purpose of the business which the assessee has been carrying on. Nor do we think that India Cements Ltd. v. Commissioner of Income-tax, 60 ITR 52 = (AIR 1966 SC 1053) is of assistance in deciding the question. In the course of running the business, expenditure was incurred for obtaining loans which were used in the business and such expenditure was held to be on the revenue side. That is not the case here.

3. Our attention has been invited to the following observations in Commissioner of Income-tax v. Malayala Plantations Ltd., 53 ITR 140 at p. 150 = (AIR 1964 SC 1722 at p. 1728).

"It may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for carrying on of a business; it may comprehend many other acts incidental to the carrying on of business."

In our opinion, the case of a route permit has to be viewed in the light of the provisions of the Motor Vehicles Act. Section 10 (2) (xv) speaks of expenditure laid out for the purpose of a business which the assessee is carrying on. We are unable to see how even before a permit is obtained, the assessee can be taken to carry on business of running a bus which would be covered by a permit to be obtained. We are not inclined to think that the expenditure in obtaining a new permit can be regarded as expenditure laid out for the purpose of the business of running buses covered by other permits. On that view, we answer the question against the assessee with costs, counsel's fee Rs. 250.

Order accordingly.

AIR 1970 MADRAS 25 (V 57 C 10)

VEERASWAMI AND
ALAGIRISWAMI JJ.

K. P. Abdulla and Bros. and another, Appellants v. Check Post Officer, Kandai-goundanchavadi and others, Respondents.

Writ Appeals Nos. 106 and 107 of 1968 and W. P. No. 1077/1968, D/-23-9-1968, against order of Ramakrishnan, J. in W. P. No. 1104 of 1965.

(A) Constitution of India, Art. 246, Schedule VII, List II, Entry 54 — Legislative competence — Madras General Sales Tax Act, 1959, S. 42 (3) (a) — Provision for confiscation of goods by checkpost officer irrespective of whether a taxable event has occurred — Repugnant to scheme of Sales tax law — Provision not ancillary to power to tax sales and hence unconstitutional. AIR 1968 SC 59, Applied. (Para 8)

(B) Sales Tax — Madras General Sales Tax Act (1 of 1959), S. 42 (3) — Provision for confiscation of goods and levy of penalty by checkpost officer — Ultra vires the Constitution of India — (Constitution of India, Art. 246, Sch. VII, List II, Entry 54).

Section 42 (3) is substantially in pari materia, if not identical, with Section 41 (4) and hence the separate and independent reasoning on the basis of which the Madras High Court in 1965-16 STC 708 (Mad) and the Supreme Court in AIR 1968 SC 59 struck down Section 41 (4) as invalid applies with equal force to the invalidity of Section 42 (3). Hence Section 42 (3) is unconstitutional and invalid. (Para 7)

That being so, the factual position in a given case whether a sale or purchase has, in the opinion of the checkpost officer, taken place and the transaction became exigible to tax can have no bearing on the question of the Legislative competence to enact Section 42 (3) in its present form because that question depends upon the actual language employed by the legislature. The vice lies in the fact that goods are charged to tax even before the taxable event has occurred which is repugnant to the scheme of the Act and it is not removed by the finding of the checkpost officer in respect of the goods seized and confiscated. (Para 8)

Cases Referred: Chronological : Paras

(1968) AIR 1968 SC 59 (V 55) =
1968-20 STC 453, Commr. of
Commercial Taxes, Board of Re-
venue, Madras v. R. S. Jhaver 1, 3, 10
(1967) 1967-19 STC 506 = (1967) 2
Andh WR 71, Papanna v. Dy.
Commercial Tax Officer Guntakal 10

BM/DM/A481/69/CSV/D

(1965) 1965-16 STC 708 = ILR

(1966) 1 Mad 267, R. S. Jhaver

v. Commr. of Commercial taxes

1, 3, 4, 8

K. Srinivasan and D. Meenakshisundaram and K. C. Rajappa and C. S. Chandrasekhara Sastri, for Appellants; Asst. Government Pleader and D. Raju, for Respondents.

VEERASWAMI J.:— These appeals arise from an order of Ramakrishnan, J. dismissing two connected petitions, one to quash a penalty of Rs. 1000 in lieu of confiscation of goods under Section 42 (3) (a) of the Madras General Sales Tax Act 1959, and the other for a direction to the respondents to deliver to the appellant the goods which had been seized and confiscated while on transit as Kandaigoundanchavadi check post which is the border of Coimbatore Dt. in this state and Calicut in the Kerala State. The learned Judge declined to accept that the said provision is invalid, and held that R. S. Jhaver v. Commissioner of Commercial taxes, 1965-16 STC 708 (Mad) and Commissioner of Commercial Taxes v. R. S. Jhaver, 1968-20 STC 453 = (AIR 1968 SC 59) in which this Court held, the Supreme Court agreeing with it, that Section 41 (4) was invalid, were distinguishable.

2. The lorry K.L.R. 3919 was searched by the Check Post Officer and was found to carry at the time 85 bags of which 45 contained maida, 20 atta and 20 khandasari sugar. The lorry driver, however, carried with him a sale bill and delivery note, which covered only 85 bags of atta. On the ground that the lorry attempted to transport without any sale bill or delivery note for the maida and khandasari sugar and on suspicion that there was an attempt at evasion of tax, the Check Post Officer by an order dated 2-3-1965, confiscated the goods, but gave an option to the appellant to pay a penalty of Rs. 1000 in lieu of confiscation of the goods. The Check Post Officer declined to accept the explanation of the appellant which was that he had purchased in Madras 85 bags of atta, 45 bags of maida and in Nellore 20 bags of Khandasari sugar, he being of the view, as we said, that there was really an attempt to suppress the sales of maida and khandasari sugar under the cloak of the sale bill and delivery note for atta only.

3. Before Ramakrishnan, J. no attempt appears to have been made to challenge the validity of the penalty order on its merits and the learned Judge proceeded on the basis that in the exercise of writ jurisdiction the finding of the Check post officer that the explanation of the appellant was not acceptable could not be revised. No point about this has been made for the appellant before us. The appeals have, therefore, been confined to the validity of Section 42 (3) (a) and the effect of

1965-16 STC 708 (Mad) and 1968-20 STC 453 = (AIR 1968 SC 59) on that question.

4. 1965-16 STC 708 (Mad) decided by a Division Bench of this Court, to which one of us was a party, held that the Madras General Sales Tax Act was not a law of goods and a power to confiscate is not ancillary or incidental to a power to tax on sale or purchase of goods, though of course such power to tax undoubtedly included the power to make due provisions to prevent or check evasion of tax and make it unprofitable. On that view this Court struck down Section 41 (4) which provided for search and seizure, from the premises of a dealer, of goods unaccounted for and for confiscation thereof. The section also provided for levy of penalty in lieu of such confiscation. The Supreme Court agreed with the conclusion of this Court as to the invalidity of Section 41 (4), but on a different ground. Clause (a) of the second proviso to Section 41 (4) which was introduced, by a later amendment, stated that in cases where the goods are taxable under this Act, in addition to the tax recoverable, a sum of money not exceeding one thousand rupees or double the amount of tax recoverable, whichever is greater, may be levied as penalty in lieu of confiscation. The Supreme Court with reference to this provision, observed at page 465 (of STC) = (at p. 65 of AIR):—

"But under Cl. (a) of the second proviso the tax is ordered to be recovered even before the sale, in addition to the penalty not exceeding Rs. 1000 or double the amount of tax recoverable whichever is greater."

5. Referring to the scheme of the Act, the Supreme Court considered that in a large majority of cases covered by the Act, the tax was payable at the point of first sale in the State and that, therefore, Cl. (a) of the second proviso was clearly repugnant to the general scheme of the Act. In the words of the Supreme Court at page 466 (of STC) = (at p. 65 of AIR):

"We are, therefore, of opinion that Cl. (a) of the second proviso being repugnant to the entire scheme of the Act, in so far as it provides for recovery of tax even before the first sale in this State, which is the point of time in a large majority of cases for recovery of tax, must fall on the ground of repugnancy We therefore, agree with the High Court and strike down sub-section (4) but for reasons different from those which commended themselves to the High Court."

6. In so holding, the Supreme Court made it clear that it did not propose to decide the general question whether a power to confiscate goods found on search and not accounted for in the books of account of the dealer was an ancillary power necessary for the purpose of stopping evasion of tax.

7. Section 42 (3) of the Act, with which we are concerned in the appeals before us, is substantially in pari materia, if not identical with, Section 41 (4) the only difference being that unlike the latter, which provides for goods searched and seized in the premises of the dealer, which are not accounted for, the former concerns itself with goods under transport by any vehicle or boat across the check post or barrier, and not covered by the special documents. Except for this difference, which is quite inconsequential from the standpoint of the question of invalidity, Cl. (a) of the second proviso to Section 42 (3) is word for word identical with Cl. (a) of the second proviso to Section 41 (4). The separate and independent reasoning on the basis of which this Court and the Supreme Court struck down Section 41 (4) as invalid seems, as we think, to apply with equal force to the invalidity of S. 42 (3).

8. Ramakrishnan, J. however, felt that there was difference between Section 41 (4) and Section 42 (3) but he did not proceed to detail the difference. As far as we are able to see, except the difference which we mentioned, there is no other existing between the language, scheme, object and effect of the two provisions. The learned Judge having noticed the two decisions, one of this Court and the other of the Supreme Court, held that the ratio or the principle of those decisions will not apply to the facts of the petitions before him, because in his opinion, it had been established by the finding of the Check Post officer that the taxable event had occurred and the transactions became exigible to tax. In such a case, the learned Judge was of the opinion that there might be room to hold that the power to seize and confiscate the goods was ancillary to the power to tax and further the basis of the reasoning of the Supreme Court that a power to confiscate even before the taxable event occurred, that is to say, a sale or purchase, was inconsistent with the scheme of the Act which was to charge first sales or purchases in the State, was not present here. In our opinion, the factual position in this case has or can have no bearing on the legislative competence to enact Section 41 (4) or Section 42 (3) in their present form, or the invalidity of the provisions, because they, as they exist at the moment, proceed to charge the goods to tax even before a sale or purchase thereof has occurred which is repugnant to the scheme of the Act. Legislative competency to provide for confiscation of goods entirely depends on whether such a power is ancillary or incidental to power to check evasion of tax or to make it unprofitable which is undoubtedly a part of the power to tax on sale or purchase of goods. This court held that such a power was not ancil-

lary or incidental to the power of taxation of sale or purchase of goods. That conclusion rested entirely on the scope and ambit of entry 54 in List II of the Constitution, not on the factual position, whether a sale or purchase had in a given case taken place. The learned Judge, as we have already mentioned was of opinion, that there might be room to hold that the power to seize and confiscate goods was ancillary to the power to tax sales, where a sale in a given case had taken place. That, we are bound to point out, was directly in conflict with the view in 1965-16 STC 708 (Mad), which is binding on us as well as the learned Judge. The view of this Court was untouched by the Supreme Court as expressly mentioned by it. Nor the fact that a sale or purchase had taken place in a given case could make any difference to the invalidity of Section 42 (3), because that question depends on the actual language employed by the legislature. The vice according to the Supreme Court which invalidated Section 41 (4) lay in the fact that it charged goods to tax even before the taxable event has occurred which is repugnant to the entire scheme of the Act. That repugnancy is not solved by stating that the Check Post officer has found that there has been a sale or purchase in respect of the goods seized and confiscated.

9. Apart from what we have said, we are also unable to appreciate how the finding of the Check Post officer that there had been a sale would at all in the present context be relevant to Section 42 (3), Proviso 2 (a). The appellant is an out of State dealer. So far as his purchase of khandasari sugar from Nellore is concerned, the transport by him has no reference to any sale or purchase, whether inter-State or intra-State, chargeable to tax in this State. It does not also appear that the sales of goods in question are subject to single point of taxation. Even so, it is nobody's case that the first sales or any sales, for that matter, will have been effected by the appellant. In such circumstances, two things will follow; one is if there is evasion of tax it is not on the part of the appellant. If he colluded, as the learned Judge apparently thought, that is not covered by the penal provisions in Section 42 (3). Secondly, it is only where the goods are chargeable to tax, so to speak, with reference to Section 42 (3), proviso 2 (a), that any occasion for seizure and confiscation of the goods can arise. That event does not appear, on the facts, to have happened. It is not any taxable event, but it is only a taxable event which is exigible to tax at the hands of the assessee and is the subject-matter of evasion, that will come within the

purview of Section 42 (3). That is not the case here.

10. Before we leave this case, there is one other matter to which we would like to make a reference. The learned Judge referred to Papanna v. Dy. Commercial Tax Officer, 1967-19 STC 506 (AP). But this very case was noticed by the Supreme Court in 1968-20 STC 453 = (AIR 1968 SC 59) and it was pointed out that the Andhra Act did not contain a provision like Section 41 (4) proviso 2 (a). That made all the difference as the Supreme Court itself pointed out, because the main body of sub-section (4) of Section 41, as was held by the Supreme Court ought to be read as qualified by and in the sense of the two provisos to S. 41 (4).

11. We hold that Section 42 (3) is unconstitutional and invalid, and strike it down. The appeals are allowed with costs throughout. Counsel's fee Rs. 100 in each case. We are informed that in obedience to an interlocutory order of this Court the relative bags of maida and atta have been returned to the appellant, but 20 bags of kandasari sugar, the subject-matter of confiscation, had been sold by the department in open market. In the circumstances, this will be taken note of and the respondents will pay the sale proceeds of the khandasari sugar to the appellant.

12. W. P. 1077 of 1968 — This petition is not opposed by the State. This is allowed, but with no costs.

Appeals allowed.

AIR 1970 MADRAS 27 (V 57 C 11)

SRINIVASAN AND
SADASIVAM JJ.

State of Madras represented by the Collector of Madras and others, Petitioners v. T. M. Oosman Haji and Co., Madras and others, Respondents.

Civil Revn. Petns. Nos. 1565 and 1799 of 1963; 962 of 1965 and 1297 of 1966, D/-6-1-1969, from order of City Civil Court, Madras in A. S. Nos. 272 and 273 of 1960.

Government Grants Act (1895), S. 3 — Madras City Tenants Protection Act (3 of 1922), Ss. 1 (3), Proviso and 7 (a) — Lease of Government land — State is excluded from operation of Act (3 of 1922) — Lessee cannot file petition for fair rent against State. S. A. No. 482 of 1964 (Mad), Overruled.

Section 3 of the Government Grants Act prevails over the provisions of the Madras City Tenants Protection Act (3 of 1922). The State is, therefore, not bound by the provisions of the Act (3 of 1922). It follows that the fair rent petitions filed by the lessees of Government land are

EM/FM/C169/69/CWM/D

not maintainable against the landlord, the State. S. A. 482 of 1964 (Mad). Overruled.

(Para 15)

Under the law as it stands at present, the State is bound by any legislation, unless it is expressly or by necessary implication excluded from the operation of that statute. Undoubtedly, there is such a piece of legislation, that is, the Government Grants Act, which does expressly exclude the Government from the operation of statutes in relation to certain matters covered by that piece of legislation. It is not necessary for the Madras City Tenants Protection Act to contain any provision excluding the State from the operation, for, such an exclusion from the operation of any particular enactment may be found in a different enactment covering the same field. In so far as the Madras City Tenants Protection Act provides for the control over the eviction of tenants, though the relevant section excluding its operation in the case of lands belonging to certain specified bodies are concerned does not expressly refer to the exclusion of lands belonging to the State, the Government Grants Act confers that exclusion. Case Law Discussed.

(Para 14)

It is true, that Section 3 of the Government Grants Act cannot be construed as to limit the statutory competence of the Provincial Legislature under the Constitution Act. Thus a legislature can by express words, or by necessary implication take away the effect of Section 3 of the Government Grants Act while enacting a particular legislation. But for Section 3 of the Government Grants Act, the Madras City Tenants Protection Act would apply to tenancies in respect of Government lands. The express provision contained in Section 3 of the Government Grants Act, taken along with the absence of any provision in the Madras City Tenants Protection Act extending the Act to Government lands, either expressly or by necessary implication, can only lead to one inference, namely, that the provisions of the Madras City Tenants Protection Act cannot be invoked contrary to the terms of the Government grants. (Para 11)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 360 (V 55) =
(1968) 1 SCR 447. Union of India v. Jubbi 4
- (1967) AIR 1967 SC 997 (V 54) =
1967 Cri LJ 950. Supdt. and Remembrancer of Legal Affairs, West Bengal v. Corporation of Calcutta 4
- (1966) AIR 1966 Cal 570 (V 53),
A. Subhan v. Union of India 10
- (1964) AIR 1964 SC 669 (V 51) =
(1964) 5 SCR 387. State of Punjab v. O. G. B. Syndicate Ltd. Okara 4

- (1964) AIR 1964 SC 1781 (V 51) =
(1964) 7 SCR 456. V. S. Rice and Oil Mills v. State of Andhra Pradesh 4
- (1964) AIR 1964 Andh Pra 450 (V 51). State of Andhra v. Abhishekam 9
- (1964) S. A. No. 482 of 1964 (Mad),
Nallanna Gounder v. Muthuswami Gounder 14
- (1963) AIR 1963 SC 1241 (V 50) =
(1964) 1 SCR 371. State of West Bengal v. Union of India 4
- (1961) W. P. No. 45 of 1961 (Mad),
Murugesan v. Collector of Madras 6, 13
- (1960) AIR 1960 SC 1355 (V 47) =
1960 Cri LJ 1684. Director of Rationing and Distribution v. Corporation of Calcutta 4, 6
- (1955) AIR 1955 SC 298 (V 42) =
1955 SCR 1311. Collector of Bombay v. Nusserwanji 10, 12, 14
- (1947) AIR 1947 Mad 74 (V 34) =
1946-2 Mad LJ 171. Murugesu Gramini v. Province of Madras 8, 14
- (1946) AIR 1946 PC 127 (V 33) =
1946-2 Mad LJ 29. Jagannath Baksh Singh v. United Provinces 10, 12, 14
- (1939) AIR 1939 All 263 (V 26) =
1939 All LJ 164. Gayaprasad v. Secy. of State 9
- (1926) AIR 1926 Mad 706 (V 13) =
ILR 49 Mad 349. Secy. of State for India v. Parthasarathi Appa Rao 7
- (1921) AIR 1921 Mad 409 (V 8) =
41 Mad LJ 494. Ullattuthodi Choyi v. Secy. of State 8, 14
- (1920) AIR 1920 Mad 413 (V 7) =
ILR 43 Mad 65. K. Moosa Kutti v. Secy. of State 8, 14
- (1907) 2 Mad LT 55. Haji Mohammad Nasaruddin Khan Bahadur v. Ezambara Mudaly 8
- Asst. Govt. Pleader and M. S. Sundararajan, for Petitioners; S. Parthasarathy, S. F. Rehman and T. Chengalavarayan, for Respondents

SADASIYAM J. :— These civil revision petitions have been directed by the learned Chief Justice to be posted before this Division Bench as they involve two questions of law of some importance, namely, whether Section 3 of the Government Grants Act of 1895 (originally called the Crown Grants Act) prevails over the provisions of the Madras City Tenants Protection Act of 1922, and whether the State of Madras is bound by the provisions of the Madras City Tenants Protection Act unless this is expressly stated to that effect in the Act.

2. These civil revision proceedings arise out of petitions filed by four timber merchants carrying on business in Basin Bridge Road, Madras for fixation of fair rent under Section 7 (a) of the Madras

City Tenants Protection Act 1922. It is an undisputed fact that the lands on which the timber depots are kept belong to the State of Madras and they have been leased out by the Corporation to the several timber merchants. The Government allowed the Corporation to lease their lands in the Basin Bridge Road to timber merchants, subject to their approval, on the condition that 50 per cent of the rent realised should be paid over by the Corporation to the Government. The rents collected from the timber merchants were increased from time to time and finally, at the beginning of 1953, the timber merchants were informed that the lease would be renewed only on condition of their paying a rent of Rs. 50 per ground, though the Standing Committee of the Corporation itself had suggested only Rs. 35 per ground. Oosman Hajee and Co. and Messrs. S. N. Vijayaraghavachariar succeeded in the Courts below in invoking their jurisdiction for fixation of fair rent and the State has preferred C. R. P. 1565 and 1799 of 1963. But in the other two revision petitions filed by M/s. Sundarsanam Iyengar and Sons, the Courts below took the opposite view that the provisions of the City Tenants Protection Act cannot be invoked for fixation of fair rent, in respect of the lands owned by the Government.

3. It was urged on behalf of the State, in the Courts below that the Corporation of Madras acted only as the agent of the Government in leasing the lands. In the appeals preferred by M/s. Sudarsanam Iyengar and Sons to the City Civil Judge, Madras, there is a specific finding that "the position which the Corporation occupies is only that of an agent subject to the control of the Government with regard to the acceptance of the terms of the lease." Even in the appeals preferred by the State of Madras against Oosman Hajee and Co. and M/s. Vijayaraghavachariar, the appellate Court has found in the penultimate paragraph of its judgment that "all that the Government order provides is that the Corporation was entitled as the 'agent of the State of Madras to lease the properties in question on terms approved by the Collector," and it is in this view, the learned Principal City Civil Judge has considered the scope and effect of Section 3 of the Government Grants Act. Thus the finding of the lower appellate Court in all these cases that the Corporation acted as the agent of the Government in leasing the lands of the Government to the timber merchants is justified on the evidence on record and it correctly represents the jural relationship between the parties.

4. The common law of England is that the King's prerogative is illustrated by the rule that the Sovereign is not necessarily bound by statute law which binds

the subject. This is further reinforced by the rule that the King is not bound by a statute unless he is expressly named or unless he is bound by necessary implication or unless the statute being for the public good, it would be absurd to exclude the King from it. It was pointed out in *Director of Rationing and Distribution v. Corporation of Calcutta*, AIR 1960 SC 1355, that this was the law applicable to India also until the advent of the Constitution. It has been held in the above decision that the rule of interpretation of statutes that the State is not bound by a statute, unless it is so provided in express terms, or by necessary implication, is still good law. This was relied on and followed in *State of West Bengal v. Union of India*, AIR 1963 SC 1241, *State of Punjab v. O. G. B. Syndicate Ltd.*, AIR 1964 SC 669 and *V. S. Rice and Oil Mills v. State of Andhra Pradesh*, AIR 1964 SC 1781. But in *Supdt. and Remembrancer of Legal Affairs, West Bengal v. Corporation of Calcutta*, AIR 1967 SC 997, the above decision in AIR 1960 SC 1355, was overruled and the minority view of Wanchoo J. in that decision was approved. It has been held in that decision that the rule of construction that the King is not bound by a statute unless he is expressly named or brought in by necessary implication, which was accepted by the Privy Council in interpreting statutes vis-a-vis the Crown is inconsistent with and incongruous in the present set up and that in the context of modern notions of the functions of a Welfare State, there is no sufficient reason to justify any distinction in the application of the rule of interpretation of statutes and that the general Act applies to citizens as well as to State unless it expressly or by necessary implication exempts the State from its operation. It is pointed out in that decision that the State can make an Act, if it chooses, providing for its exemption from its operation and that though the State is not expressly exempted from the operation of an Act, under certain circumstances, such an exemption may necessarily be implied. This decision was followed in the later Supreme Court decision in *Union of India v. Jubbi*, AIR 1968 SC 360, where it has been held that "a statute applies to State as much as it does to a citizen unless it expressly or by necessary implication exempts the State from its operation."

5. The Madras City Tenants Protection Act, as it originally stood, was applicable to the tenants in the City of Madras and there is a provision in the Act as amended by Madras Act 19 of 1955 to extend it to other Municipal towns, and specified villages within five miles from the city of Madras, or municipal towns, by Government notification. In 1960, a proviso was added to Section 1 (3) of the Act em-

powering the tenancies of lands owned by the Corporation of Madras in the City of Madras and certain other public bodies, such as the Municipal Council, Panchayat Union, District Board and Board of Trustees constituted under the Madras City Improvement Trusts Act. But there is no such exemption in the case of lands owned by the Government

6. The decision of Ramakrishnan, J. in W. P. 45 of 1961 (Mad), *Murugesan v Collector of Madras* throws some light on this aspect of the case. It related to proceedings taken by the Government under the Land Encroachment Act to evict dwellers of huts mainly occupied by employees in the Harbour in the locality called Kannappa Nagar colony, in pursuance of a scheme to provide for an alternative space for their occupation, as the Government land was required for the purpose of the Port Trust to extend the harbour. The hut dwellers of Kannappa Nagar colony relied on the acts of the Corporation and the Government as showing that their occupation of the huts was authorised and claimed the benefit of the provisions contained in the City Tenants Protection Act. The fact that when the proviso to Section 1 (3) of the Act was added in 1960 no attempt was made to give any similar protection to Government land, was relied on to show that the City Tenants Protection Act could not be invoked in respect of Government lands. The learned Judge has observed that the reason for the amendment was to extend the benefit which the Crown enjoyed not only by virtue of the common law principle of saving Crown lands from the operation of the statute, but also by reason of the specific provisions of the Govt. Grants Act 1895, to the lands of the Corporation and certain other authorities. It is true that in so far as this decision relies on AIR 1961 SC 1355, the authority has been shaken by the subsequent decisions referred to above. But the interpretation of Sections 2 and 3 of the Government Grants Act, 1895 given in that case supports the contention of the learned Government Pleader.

7. The decision in these petitions depends on a proper construction of Section 3 of the Government Grants Act. If the terms of the grant by the Government by way of leases of their lands through the Corporation are to take effect according to their tenor by virtue of Section 3 of the Government Grants Act, notwithstanding any law, statute, or enactment to the contrary, the City Tenants Protection Act cannot be invoked by the tenants for the fixation of fair rent. The preamble of the Government Grants Act gives an indication as to the scope and purview of the Act and it can be looked into to

correctly understand the provisions of the Act. The Government Grants Act was passed not only to settle the doubts which had arisen as to the effect of the Transfer of Property Act, 1882, but also to remove any doubts with regard to the power of the Government to impose limitations and restrictions upon grants and other transfers of lands made by it, or under its authority. Section 2 of the Government Grants Act deals with exemptions as regards the Crown Grants from the provisions of the Transfer of Property Act, 1882, and thus it gives effect to the first object mentioned in the preamble. Section 3 of the Act provides that Crown Grants should take effect according to their tenor, notwithstanding any law to the contrary. There is no need for any such provisions if the law referred to in Section 3 is only the Transfer of Property Act. In *Secretary of State for India v. Raja Parthasarathi Appa Rao*, ILR 49 Mad 349 at pp 379 and 380 = (AIR 1926 Mad 706 at p. 717) it is observed that "looking at the preamble and considering the purpose of the Act it cannot be doubted that the Act was rather declaratory in its nature than enabling or enacting", that it has to be enacted so says the preamble, because doubts had arisen as to the extent and operation of the Transfer of Property Act, 1882, and that "taking the terms of the Crown Grants Act, the inference seems to be irresistible that prior to the Transfer of Property Act there was no doubt whatever as to the power of the Crown to make a transfer of property in any terms, or under any of the conditions whatsoever."

8. *Haji Mohammad Nasaruddin Khan Bahadur v. Egambara Mudaly*, (1907) 2 Mad LT 53 relates to a case where the Crown made a grant of a village for the maintenance of a tomb. It was held in that decision that having regard to Section 3 of the Crown Grants Act, the validity of the grant could not be questioned on the ground that it created an estate not recognised by the Muhammadan law. In *Moosa Kutti v. Secretary of State*, ILR 43 Mad 65 = (AIR 1920 Mad 413) a Bench of this Court has held that under Sections 2 and 3 of the Crown Grants Act, the Government has power to impose restrictions in a lease made by it a power which is not affected by the provisions of the Malabar Compensation for Tenants Improvements Act. In *Ullattuthodi Choyi v. Secretary of State for India*, 41 Mad LJ 494 = (AIR 1921 Mad 409) the above decision has been followed and it has been held that "where under the terms of a lease granted by the Crown the lessee agrees to surrender the demised property on six months' notice, he cannot resist a suit in ejectment by the Crown after the requisite notice, on the ground that he must be paid the value of his improve-

ments under the Malabar Compensation for Tenants Improvements Act” In *Murugesu Gramini v. Province of Madras*, 1946-2 Mad LJ 171 = (AIR 1947 Mad 74) it has been held that the Crown Grants Act prevails over the City Tenants Protection Act and that being so, the terms of the grant of lease given by the Government to the appellant in that case have to be enforced.

9. There are decisions of other High Courts also with regard to the interpretation of Section 3 of the Government Grants Act to the same effect. In *Gaya-prasad v. Secretary of State*, AIR 1939 All 263 it has been held that in respect of a Crown grant the Crown is not bound by any of the sections of the Tenancy Act or the Transfer of Property Act or the Contract Act and that regard must be had by the courts to the terms of the grant. This decision throws light on the construction of Section 3 of the Crown Grants Act. The appellant in that case had purchased the property originally owned by the Government from the grantee and contrary to the terms of the grant made by the Government, he put up a construction after obtaining a licence from the municipality. It was urged that the Municipality acted as the agent of the Government and that the Government was bound by the act of the Municipality and reliance was placed on Section 188 of the Contract Act. It was held that the section of the Contract Act on which the appellant relied had no binding effect on the Government for the simple reason that it could not override Section 3 of the Crown Grants Act. In *State of Andhra v. Abhishekam*, AIR 1964 Andh Pra 450 it has been held that the effect of Section 3 of the Government Grants Act is that when a grant has been made by the Government, it is not, with reference to that grant, bound by any of the sections of either the Tenancy Act or the Transfer of Property Act or the Contract Act, or any other law for the time being in force and it, therefore, follows that any grant made has to be construed in accordance with the tenor of the grant and the grant will certainly be regulated in accordance with such tenor.

10. We shall proceed to consider whether the decision of the Judicial Committee in *Jagannath Baksh Singh v. United Provinces*, (1946) 2 Mad LJ 29 = (AIR 1946 PC 127) which has been referred to with approval in *Collector of Bombay v. Nusserwanji*, AIR 1955 SC 298 has taken away the authority of the above decisions. The relevant passage in the decision of the Privy Council at page 34 (of Mad LJ) = (at p. 131 of AIR) is as follows—

“Their Lordships ought to refer in passing to the Crown Grants Act 1895 of which Section 3 was relied on by the appellant. That section runs: ‘All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid (i.e., one made by the Crown) shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding.’”

“These general words cannot be read in their apparent generality. The whole Act was intended to settle doubts which had arisen as to the effect of the Transfer of Property Act 1882 and must be read with reference to the general context and could not be construed to extend to the relations between a Sanad-holder and his tenants. Still less could they be construed to limit the statutory competence of the Provincial Legislature under the Constitution Act.”

It is clear from the above passage that their Lordships of the Privy Council in passing referred to Section 3 of the Crown Grants Act. Their observations should be read in the light of the decision in that case. The appellant in that case put forward a claim that the U. P. Tenancy Act 1939 is ultra vires of the Provincial Legislature. He claimed that the Act created rights and interests in land in favour of persons other than the grantee contrary to the Sanad granted by the Crown in favour of his predecessor-in-title and thus derogated from the terms of the Crown grants because it modified or curtailed the rights conferred by the Crown. Thus the real question involved in that case was about the competence of the Legislature to enact laws which would affect a Crown grant. In *A. Subhan v. Union of India*, AIR 1966 Cal 570 it has been held that Section 3 of the Crown Grants Act has no overriding effect on Section 3 of the West Bengal Estates Acquisition Act and that a competent Legislature can legislate so as to vary the effect of a Crown grant and that Section 3 of the Crown Grants Act cannot limit the statutory competence of a State Legislature to legislate on a subject assigned to it by the Constitution. The principle is illustrated by the *Zamindari Abolition Act* and similar legislation.

11. The Privy Council referred to the first part of the preamble that it was intended to settle doubts which had arisen as to the effect of the Transfer of Property Act and stated that the general words of S. 3 could not be read in their apparent generality and must be read with reference to the general context and could not be construed to extend to the relation between a sanad holder and his tenants. Thus as between the Government and the grantee, the terms of the grant would prevail notwithstanding any other law to

the contrary. It is true, as pointed out in the said Privy Council decision and the Calcutta decision just referred to that Section 3 of the Government Grants Act cannot be construed as to limit the statutory competence of the Provincial Legislature under the Constitution Act. Thus a legislature can by express words, or by necessary implication, take away the effect of Section 3 of the Government Grants Act while enacting a particular legislation. But for Section 3 of the Government Grants Act, the Madras City Tenants Protection Act would apply to tenancies in respect of Government lands. The express provision contained in Section 3 of the Government Grants Act, taken along with the absence of any provision in the Madras City Tenants Protection Act extending the Act to Government lands, either expressly or by necessary implication, can only lead to one inference, namely, that the provisions of the Madras City Tenants Protection Act cannot be invoked contrary to the terms of the Government grants.

12. It is true in the decision in AIR 1955 SC 298, the relevant passage of the Privy Council decision construing Section 3 has been quoted with approval. But we have already explained the scope of the decision in the Privy Council case. The respondent in the above Supreme Court case claimed immunity from assessment by virtue of a transfer made by the Government in favour of his predecessor-in-title. The lands were originally acquired by the Government for the purpose of the B. B. C. I. railway under the provisions of the Land Acquisition Act and as they were no longer required for the purpose of the railway, they were sold by the Governor General to the predecessor-in-title of the respondent. The contention in that case was that as the grant is of a freehold estate without any reservation, it must, to take effect according to its tenor, be construed as granting exemption from assessment to revenue. It is held in that decision that S. 3 of the Crown Grants Act must be construed in the light of the preamble and so construed, it cannot have any bearing on the rights of the parties. It is further pointed out in that case that the section only enacts that "all provisions, restrictions, conditions and limitations over" in any grant or transfer shall be valid and take effect according to their tenor and that what is relied on is not any "provision, restriction, condition or limitation over" in the relevant document Ex. A-1 which according to its tenor entitles the respondents to hold the lands rent-free, but the absolute character of the interest conveyed under Ex. A and therefore, Section 3 does not in terms apply. The deed in that case conveyed the lands to the purchasers absolutely "with all rights, easements and appurtenances

whatsoever" to be held 'for ever' as in the case of conveyance of land in fee simple. It did not however, recite that they are to be held revenue-free. Thus the observation of the Privy Council in 1946-2 Mad LJ 29 = (AIR 1946 PC 127) cited with approval in the Supreme Court decision, cannot be taken as throwing any doubt on the correctness of the decision of this Court; and the other Courts as regards the scope of Section 3 of the Government Grants Act.

13. The terms of Section 3 of the Government Grants Act can certainly be relied on as specifically exempting Government Grants from the operation of Madras City Tenants Protection Act in the absence of any provision, either express or implied, extending the Act to Government grants. We are inclined to agree with the view of Ramkrishnan, J. in W. P. No 45 of 1961 (Mad) that in view of Section 3 of the Government Grants Act, the local legislature did not deem it necessary to include Government grants while amending the Act by introducing the proviso to Section 1 (3) of the Act giving exemption to lands of the Corporation and certain other public bodies.

14. The learned Government Pleader brought to our notice the unreported decision of Natesan, J. in S. A. No. 482 of 1964 (Mad), Nallanna Gounder v. Muthuswami Gounder, where a different view of Section 3 of the Government Grants Act was taken in deciding whether the State can claim immunity and exemption from the provisions of the Madras Cultivating Tenants Protection Act in respect of agricultural lands of the Government by virtue of Section 3 of the Government Grants Act. In the case before the learned Judge, a lessee of agricultural land from Government sought to rely upon the provisions of the Madras Cultivating Tenants Protection Act and the State met it by putting forward a claim to immunity and exemption from the provisions of that Act, by reason of the Government Grants Act. The learned Judge held, firstly, that the plaintiff in the suit would be a cultivating tenant within the meaning of the Madras Cultivating Tenants Protection Act and that if the Act should apply, he could not be evicted from his holding. The State was undoubtedly the landlord and but for the claim to immunity by reason of the Government Grants Act, Section 3 of the Madras Cultivating Tenants Protection Act would afford protection to the tenant against eviction. The learned Judge examined the provisions of the Government Grants Act. He referred to the decisions already cited by us earlier in this judgment. He cited the observation of the Privy Council in 1946-2 Mad LJ 29 = (AIR 1946 PC 127) that the words in Section 3 of the Government Grants Act 'cannot be read in

their apparent generality' and the observations of the Supreme Court in AIR 1955 SC 298. The learned Judge construed the observation that the general words in Section 3 cannot be read in their apparent generality to mean that the scope of Section 3 of that Act was limited.

It seems to us that the observations both of the Privy Council and the Supreme Court cannot be divorced from the context in which they were made. In the Privy Council decision, the validity of the United Provinces Tenancy Act, as enacted by the Provincial Legislature was questioned in so far as it affected the rights conferred upon a grantee under a sanad. The contention then was that since under the terms of the grant it was open to the sanad-holder to deal with the land and the tenancy as he liked, the impugned legislation, in so far as it interfered with his right to deal with his tenants in any way was contrary to the terms of the grant. The Judicial Committee pointed out that the legislative power could not be attacked and the statute regulating the relations between the landlord and the tenant, though it might affect or diminish the rights which the landlord possessed earlier, did not in any way run contrary to Section 3 of the Government Grants Act. By making a grant of that description, the legislature did not deprive itself of any power to legislate within the scope of its authority, and the contention that by reason of the sanad, the pre-existing relations between the sanad-holder and his tenants could not be interfered with by legislation of this kind was repelled, and it is in that context that the Judicial Committee observed that the words of Section 3 of the Government Grants Act should be read with reference to the context. Nor do the observations of the Supreme Court in the next case referred to above lead to a different conclusion. After quoting the passage from the Supreme Court decision, Natesan, J. proceeded to say that "the Government Grants Act thus being unavailable, the State ought to stand on the archaic prerogative and immunity of the Crown from the operation of the statute," and proceeded to consider whether under the general law the Crown was not bound by any statute, unless the statute expressly or by clear implication so bound it.

We are unable to subscribe to the view taken by our learned brother that the Government Grants Act became 'unavailable' solely by reason of the observations of the Privy Council and the Supreme Court. We have already pointed out that under the law as it stands at present, the State is bound by any legislation, unless it is expressly or by necessary implication excluded from the operation of that

statute. Undoubtedly, there is such a piece of legislation, that is, the Government Grants Act, which does expressly exclude the Government from the operation of statutes in relation to certain matters covered by that piece of legislation. In effect, the view of Natesan, J. would appear to be that the two decisions, that of the Privy Council and of the Supreme Court have virtually destroyed the basis of the Government Grants Act, and that in so far as transactions dealt with by that Act are concerned, the Government by reason of the provisions contained in that Act cannot claim immunity from the operation of any other statute. We are unable to agree in the view taken by our learned brother that the earlier decisions of this Court in 1946-2 Mad LJ 171 = (AIR 1947 Mad 74) and 41 Mad LJ 494 = (AIR 1921 Mad 409) and ILR 43 Mad 65 = (AIR 1920 Mad 413) may not be good law after the decisions of the Judicial Committee and the Supreme Court cited above. Neither expressly nor by necessary implication does the Government Grants Act either stand repealed or has fallen into obsolescence.

We hold that it is open to the State to put forward successfully the contention that the express stipulation found in the terms of the grant, such as that the lessee should surrender possession after the expiry of the term of demise etc. can take effect, notwithstanding the provisions of the Madras Cultivating Tenants Protection Act. It is also our view that it is not necessary for the Madras City Tenants Protection Act to contain any provision excluding the State from the operation for such an exclusion from the operation of any particular enactment may be found in a different enactment covering the same field. In so far as the Madras City Tenants Protection Act provides for the control over the eviction of cultivating tenants, though the relevant section excluding its operation in the case of lands belonging to certain specified bodies are concerned does not expressly refer to the exclusion of lands belonging to the State, the Government Grants Act confers that exclusion.

15. We therefore, find that Section 3 of the Govt. Grants Act prevails in the instant cases and the State is therefore, not bound by the provisions of the City Tenants Protection Act. It should follow that the fair rent petitions filed by the respondents in C. R. P. 1565 and 1799 of 1963 and the petitioners in C. R. P. 962 of 1965 and 1297 of 1966 in the City Civil Court are not maintainable against the landlord, the State. They are accordingly, dismissed, but in the circumstances, there will be no order as to costs.

Order accordingly.

AIR 1970 MADRAS 34 (V 57 C 12)

K. VEERASWAMI OFFG. C. J. AND
T. RAMAPRASADA RAO J.Thiruvengadam, Appellant v Muthu
Chettiar and another, Respondents.W A. No. 150 of 1968. D/-30-7-1968
against order of Kailasam J., in W. P. No.
898 of 1968, D/-8-3-1968(A) Rice Milling Industry (Regulation)
Act (1958), S. 5 (4) — Order under, is
administrative and not quasi-judicial —
Power when can be said to be quasi-judi-
cial.An order under sub-section (4) of Sec-
tion 5 of the Rice Milling Industry (Re-
gulation) Act is in its effect administrative
in character (Para 3)Where there is authority the exercise
of which affects parties, it cannot be taken
as a rule that an order made in exercise
of such power is necessarily quasi-judi-
cial in character. The nature of the order
will further depend upon the scheme and
intendment of the provisions of the Act
which confers the power and which may
throw light on the question. (Para 2)A power can be said to be quasi-judi-
cial in character, if it confers authority to
decide rights or liabilities which affect
parties, and the statute which confers the
power also indicates that there is a duty
in exercising the power to act quasi-judi-
cially (Para 2)So far as an order made under Sec. 5
of the Rice Milling Industry (Regulation)
Act is concerned, having regard to the
provisions of that section and of the Act
as a whole, it is administrative in char-
acter. It is true that in the course of ex-
ercising the power to grant a permit, the
authority vested with the power is en-
joined to have regard to the specified
matters and for that purpose, an investi-
gation ought to be directed. But beyond
that the power to grant permit is not one
to decide rights as such. The general con-
sideration that refusal of permit may af-
fect fundamental rights does not alter the
true character of the power under Sec-
tion 5 (4). It is a regulatory power which
is justified by its being reasonable and
intended to serve public interest. AIR
1962 SC 1110 & AIR 1966 SC 91. Foll.

(Para 3)

(B) Constitution of India, Art. 226 —
Certiorari — Administrative orders —
Power of High Court to interfere.The power under the Article is not con-
fined to judicial or quasi-judicial orders,
but it is within its ambit to review even
administrative orders, if only to see that
they conform to the rule of law and are
within the limits of the grant of the re-
levant powers. The relevancy of the
character of the order as quasi-judicial is
that in the case of such orders they arebound to set out the reasons therefor.
That is, however, not to imply that admi-
nistrative orders, as a rule are not requir-
ed to set out reasons. There may be cases
in which the circumstances may call for
setting out reasons. But, in case of
failure to do so it may not follow that
the orders are necessarily bad. It will be
open to the Court to examine the records
and satisfy itself whether the authority
exercising the power in deciding a matter
has reasonably applied its mind to the ap-
propriate statutory provisions and the
facts. (Para 5)(C) Rice Milling Industry (Regulation)
Act (1958), Ss. 12, 6, 5 (4) — Grant of
licence under S. 5 to run a rice mill near
temple — Complaint by worshipper that
running of mill may affect temple build-
ing — Held, whether it was so or not, was
not a consequence directly connected with
grant of Rice Mill licence — Worshipper
could not be said to be person aggrieved
— (Words and Phrases — "Aggrieved per-
son" — Meaning of).A trustee or worshipper of the temple
is not a person aggrieved in the matter of
grant of licence to some other person
under Section 5 of the Rice Milling Indus-
try (Regulation) Act, merely because the
running of a rice mill 65 feet away from
temple may cause inconvenience to the
worshipping public and also may affect
the temple building. Whether it is so or
not, that is not a consequence which is
directly connected with or flows from the
rice mill licence. The complaint of
nuisance, if at all is directed against the
running of the rice mill and not the
permit itself. The remedy of the appel-
lant, in such a case if it is available, is
not in respect of the licence and has to
be sought in separate proceedings.

(Para 7)

A person can be said to be aggrieved, if
apart from the general interest such a
person, as a member of the public, may
have, he has a particular or special in-
terest in the subject-matter supposed to
be wrongly decided. (Para 7)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 91 (V 53) —

1966-1 SCJ 215 = 1964-1 SCR

243 = (1965) Mad LJ (Cri) 153,

Sadhu Singh v. Delhi Adminis-

tration 2

(1966) W. P. Nos. 2132 and 2298

of 1966 (Mad) 1

(1964) ILR (1964) 1 Mad 151 —

(1963) 2 Mad LJ 320. P. L. L.

Ramanathan Chettiar v. Board

of Revenue, Madras 2

(1964) ILR (1964) 2 Mad 869 —

1965-1 Mad LJ 119, Lakshmi

Ammal v. Commr. of Civil Sup-

plies 2

(1964) Writ Appeal No. 195 of 1962

and Writ Petn. No. 43 of 1964

(Mad) 2

- (1964) 1964 AC 40 = 1963-2 All
ER 66 = 1963-2 WLR 935, Ridge
v. Baldwin 2
- (1962) AIR 1962 SC 1110 (V 49) =
1963-2 SCJ 509, Board of High
School and Intermediate Educa-
tion U. P. Allahabad v. Ghanshyam
Das 2
- (1961) AIR 1961 Mad 180 (V 48) =
1961-2 Mad LJ 127 = ILR (1961)
Mad 110 (FB), S. M. Transport
(Private) Ltd v. Raman and
Raman (Private) Ltd. 7
- (1921) 1921-1 KB 248 = 90 LJKB
413, Rex v. Richmond Confirming
Authority; Ex parte, Howitt 7
- (1901) 1901-2 KB 157 = 70 LJKB
636, Rex v. Groom; Ex parte
Cobbold 7

G. Ramaswamy, for Appellant; Govern-
ment Pleader and R. G. Rajan, for Res-
pondents.

VEERASWAMI OFFG. C. J.: This Ap-
peal arises from an order of Kailasam, J.,
dismissing in limine the petition under
Art. 226 of the Constitution to quash an
order of the State Government, dated 16th
November, 1967 granting to the first res-
pondent a permit under Section 5 of the
Rice Milling Industry (Regulation) Act,
1958, read with the Government of India
Notification G. S. R. 512, dated 22nd April,
1959 for establishing a new rice mill at
Enadhi Village, Pattukottai Taluk. The
first respondent applied for a permit on
8th November, 1966, the site was approved
on 10th January, 1967 and it would ap-
pear that the Panchayat Union Council
gave its permission for granting of a
licence on 13th March, 1967. The permit
issued to the first respondent prescribed
a period within which he should establish
the rice mill.

It is stated that since then the first res-
pondent has put up the construction and
installed a mill thereby incurring a heavy
expenditure. The appellant representing
a local temple which is 65 feet removed
from the site on which the rice mill is
located, raised certain objections which
are also supported by some of the vil-
lagers who were worshippers. The ob-
jections were that the establishment of
the rice mill so near the temple would
cause inconvenience to the worshippers
particularly at the time of the festival.
Further, if decortication were to be per-
mitted, the vibration emanating would af-
fect the temple building. The impugned
order of the Government granting the
permit is silent about the objections. But
the preamble to the order shows that the
District Revenue Officer's report dated
31st July, 1967 had been referred before
the decision to grant the permit was
arrived at. Kailasam, J., in dismissing the
writ petition in limine stated that he did
so in view of the decision of this Court in

W. P. Nos. 2132 and 2298 of 1966 (Mad).
Those cases related to rice mill permits,
as in the present appeal. The learned
Judge took the view that an order grant-
ing permit was an administrative order
and that the petitioners in those cases
could not, in any case, be regarded as
aggrieved.

2. Mr. G. Ramaswamy for the appel-
lant contends that an order under Sec-
tion 5 of the Rice Milling Industry (Re-
gulation) Act, is having regard to the
nature of the power, a quasi-judicial order
and that the appellant being an objector
is also a person aggrieved. He says that
inasmuch as the impugned order of the
Government does not ex facie show that
the objection had been dealt with and
does not give reasons for rejecting them,
it is as a quasi-judicial order, vitiated,
which, for the reason, can be removed by
this Court by certiorari. In support of
his contention as to the nature of the
power of jurisdiction of the Government
under Section 5, he has invited our atten-
tion to certain decided cases to show whe-
ther the power or jurisdiction is quasi-
judicial in character will depend upon its
nature, the manner of its exercise and how
it affects the rights of parties. The pro-
position formulated in that broad manner
is unexceptionable. A power can be said
to be quasi-judicial in character, if it con-
fers authority to decide rights or liabi-
lities which affect parties, and the statute
which confers the power also indicates
that there is a duty in exercising the
power to act quasi-judicially. Board of
High School and Intermediate Education
U. P. Allahabad v Ghanshyam Das, (1963)
2 SCJ 509 = AIR 1962 SC 1110 observes:

"The inference whether the authority
acting under a statute where it is silent
has the duty to act judicially will depend
on the express provisions of the statute
read along with the nature of the rights
affected, the manner of the disposal pro-
vided, the objective criterion if any to be
adopted, the effect of the decision on the
person affected and other indicia afforded
by the statute. A duty to act judicially
may arise in widely different circum-
stances which it will be impossible and
indeed inadvisable to attempt to define ex-
haustively."

In Ridge v. Baldwin, ((1963) 2 WLR 935
= (1963) 2 All ER 66 = (1964) AC 40),
the second requirement of duty to act
judicially was considered to be unneces-
sary in relation to a question whether the
principles of natural justice had not to be
followed in making an order under Sec-
tion 191 (4) of the English Police Act.
That sub-section specified the grounds on
which a constable could be dismissed from
service, and, the particular ground on
which the dismissal was made, having not
been made known to the officer concern-

ed and his explanation asked for, the House of Lords was of the view that on account of failure to observe the principles of natural justice, the order was vitiated. Referring to (1963) 2 WLR 935 = (1963) 2 All ER 66 = (1954) AC 40, the Supreme Court in *Sadhu Singh v. Delhi Administration*, (1966) 1 SCJ 215 = (1966) Mad LJ (Cri) 153 = (1954) 1 SCR 243 = AIR 1966 SC 91, pointed out that the English case did not support the broad proposition that no order of public authority which affected the rights of a person might be made without giving that person an opportunity of making a representation against the proposed order. It seems to us that even where there is authority the exercise of which affects parties, it cannot be taken as a rule that an order made in exercise of such power is necessarily quasi-judicial in character. The nature of the order will further depend upon the scheme and intentment of the provisions of the Act which confers the power and which may throw light on the question.

3. So far as an order made under Section 5 of the Rice Milling Industry (Regulation) Act is concerned, we are of the view that having regard to the provisions of that section and of the Act as a whole, it is administrative in character. The Act is intended to regulate the rice milling industry in the interest of the general public. The Act is essentially a regulatory measure. Sub-section (3) of Section 5 says that grant of a permit under sub-section (4) is related to the necessity for ensuring adequate supply of rice and sub-section (4) prescribes the procedure for grant of a permit. It specifies a number of matters which ought to be taken into account in granting a permit, and, for that purpose, the Government should cause a full and complete investigation to be made in the prescribed manner. The other provisions of the Act bear on restriction on rice mills, power of inspection returns, penalties, certain offences and delegation of powers.

We may particularly notice that Section 12 which provides for appeals, does not give a right of appeal against an order under Section 5. That by itself is not conclusive but on a consideration of these provisions we are clearly of opinion that an order under sub-section (4) of Section 5 is in its effect but administrative in character. It is true that in the course of exercising the power to grant a permit, the authority vested with the power is enjoined to have regard to the specified matters and for that purpose, an investigation ought to be directed. But beyond that the power to grant permit is not one to decide rights as such. It is contended by Mr. Ramaswamy that refusal of a permit may affect fundamental rights, but, in our view, that

general consideration does not alter the true character of the power under Section 5 (4). It is a regulatory power which is justified by its being reasonable and intended to serve public interest.

4. A few cases which this Court had occasion to decide under the Rice Milling Industry (Regulation) Act have been brought to our notice on that aspect of the question, but on the view we have taken, it does not appear to us to be necessary to refer to them in detail. The view we have expressed is, however, in conformity with *P. L. L. Ramanathan Chettiar v. Board of Revenue, Madras*, ILR (1954) 1 Mad 151 = (1963) 2 Mad LJ 320, and the orders in *Writ Appeal No. 195 of 1962* and *W. P. No. 43 of 1964 (Mad)* *Lakshmi Ammal v. Commissioner of Civil Supplies*, ILR (1964) 2 Mad 869 = (1965) 1 Mad LJ 119, left the question open.

5. The question whether an order is quasi-judicial or administrative in character arises not with reference to the scope of the power of this Court under Art. 226 of the Constitution. The power under the Article is not confined to judicial or quasi-judicial orders, but it is within its ambit to review even administrative orders, if only to see that they conform to the rule of law and are within the limits of the grant of the relevant powers. The relevancy of the character of the order as quasi-judicial is that in the case of such orders they are bound to set out the reasons therefor. That is, however, not to imply that administrative orders, as a rule, are not required to set out reasons. There may be cases in which the circumstances may call for setting out reasons. But in case of failure to do so it may not follow that the orders are necessarily bad. It will be open to the Court to examine the records and satisfy itself whether the authority exercising the power in deciding a matter has reasonably applied its mind to the appropriate statutory provisions and the facts.

6. In the instant case, on a reference to the record, we are satisfied that the licensing authority, in making the impugned order under Section 5 has applied its mind to all the relevant matters enjoined by the statutory provision to be taken into account and to the facts relating to them, though of course this does not appear *ex facie* the order. As we said, the order does refer to the report from the District Revenue Officer. We have looked into that report which has considered the objections from the worshippers and the appellant in relation to the temple and suggested that they might be overruled. When this report was referred to in the impugned order there is no reason in the circumstances to think that the Government did so mechanically. What is, however, stated for the

appellant is that the District Supply Officer, who actually carried out the investigation contemplated by Section 5 (4) and made a report made it appear to the appellant that there was substance in the objections on behalf of the temple, and that, the fact that the report was surprisingly against the temple was brought to the notice of the Government and there is nothing in the impugned order dealing with that aspect. But, the substance of the matter is whether the Government applied its mind to the objections on behalf of the temple and rejected them. That, we are satisfied, they did.

7. Learned Government Pleader contended that the appellant, in any case, cannot be regarded as an aggrieved person. Though, on the view which we have already expressed, this question does not require to be considered, nevertheless we may briefly express our view. A person can be said to be aggrieved, if apart from the general interest such a person, as a member of the public, may have, he has a particular or special interest in the subject-matter supposed to be wrongly decided. In *S. M. Transport (Private) Ltd. v. Raman and Raman (Private) Ltd.*, (1961) 2 Mad LJ 127 : ILR (1961) Mad 110 = AIR 1961 Mad 180 (FB), which arose under the provisions of the Madras Motor Vehicles Act, this Court after referring to the observations of Earl of Reading, C. J., in *Rex v. Richmond Confirming Authority*, Ex parte Howitt, (1921) 1 KB 248 and also *Rex v. Groom*; Ex parte, Cobbold, (1901) 2 KB 157, laid down the true principle in these words:

"The true principle is to determine whether the applicant has an interest distinct from the general inconvenience which may be suffered by the law being wrongly administered."

We do not see how, in that sense, the appellant can be said to be aggrieved in the matter of grant or refusal of licence to the first respondent under Section 5. He purports to be a trustee or worshipper of the temple. He is not a rival applicant for a rice mill permit nor is he the owner of a rice mill, nor as far as we are able to see, is he interested in the matters specified in S. 5 (4) of the Act. It is true the averment is that the running of a rice mill 65 feet away from the temple may cause inconvenience to the worshipping public and also may affect the temple building. Whether it is so or not, that is not a consequence which is directly connected with or flows from the rice mill licence. The complaint of nuisance, if at all is directed against the running of the rice mill and not the permit itself. The remedy of the appellant, in such a case if it is available, is not in respect of the licence and has to be sought in separate proceedings. In our view, the appellant is not a person aggrieved.

8. The appeal is dismissed with costs. Counsel's Fee Rs. 100.

Appeal dismissed.

AIR 1970 MADRAS 37 (V 57 C 13)

VEERASWAMI AND
ALAGIRISWAMI JJ.

Bank of India Ltd., Madras, Appellants
v. Messrs. Sarathy Brothers and another,
Respondents.

Second Appeals Nos. 575 to 577 of 1966 and C. M. P. No. 13985 of 1967, D/-10-9-1968 against decrees of City Civil Court (First Addl. J.) Madras, D/-30-11-1965.

(A) Civil P. C. (1908), Ss. 100, 101 — Question of law — Question whether disputed passage forms part of tenancy granted to a tenant, subject to right of other tenants or occupants of the premises — Question is one of law and open to review in second appeal — Transfer of Property Act (1882), S. 105 (Para 4)

(B) Easements Act (1882), S. 13 — Easement of necessity — Passage not part of lease — Lessees will have no better rights than lessors — Alternative access held obviated the necessity — Transfer of Property Act (1882), S. 108 (c).

Where real property is severed by the grant of a portion of it, there can be no implied reservation in favour of the property retained of an easement of convenience but only of an easement of necessity. If the disputed passage is not part of the lease in the sense that it formed the very subject-matter of the lease as the portions leased out and in the occupation of the lessees, the lessees would be entitled to no better rights than the lessor itself. If there is no other access to the portion retained by the owner of premises, as easement of necessity the retained portion will be entitled to an access to the disputed passage. Where, however an alternative access has been provided for the tenanted premises through another street, that will obviate the necessity which will form the foundation for an easement in the nature of passage through portion severed and conveyed to the person in whose favour it is severed. AIR 1956 Mad 584, Applied. (Para 5)

Cases Referred: Chronological Paras
(1956) AIR 1956 Mad 584 (V 43) =

69 Mad LW 435, Mariyayi v. Arunachala Ammal 5
(1895) 72 LT 533 = 11 TLR 310,
Allports v. The Securities Corporation 3

C. N. S. Chengalvarayan, for Appellants; T. T. Srinivasan, A. N. Rangaswami and A. R. Krishnaswami, for Respondents.

VEERASWAMI J.:— These are connected Second appeals by the second

defendant, Bank of India Ltd., from a common judgment of the First Additional Judge, City Civil Court, Madras, who disagreed with the trial Court and decreed the suits as prayed for. They were instituted each by a tenant of portions of 'Lecotts Buildings', 26 Errabalu Chetti St. G. T. Madras, for an injunction restraining the defendants from causing any obstruction to the use and enjoyment of the passage leading to Errabalu Chetty Street from the portion in the occupation of each of the plaintiffs. Two of the plaintiffs became tenants prior to 26th June 1961 and the other after that date. The entire premises originally belonged to the Chrome Leather Co (P) Ltd (first defendant) On 26th June 1961, the first defendant sold the front portion of the premises inclusive of its entire frontage on Errabalu Chetti Street for a handsome price. The second defendant decided to demolish portions of the premises purchased by them and construct anew at an estimated cost of some lakhs of rupees.

The proposal involved demolition and closure of the main entrance of the premises from Errabalu Chetti Street which not only gave access to the portion of the premises purchased by the second defendant, but also to the portions under the tenancy of each of the plaintiffs. The plaintiff in O. S. 1921 of 1962 occupied the ground floor. The plaintiff in O. S. 1941 of 1963 was a tenant of a portion of the ground floor and of the first floor and the plaintiff in the last suit was in occupation of a portion of the first floor. The sale deed in favour of the second defendant made no reservation in respect of the part conveyed thereunder. The plaintiffs objected to the closure of the main entrance and obstruction of access through it to the portions in their respective occupation. They took up the stand that the use of the main gate abutting Errabalu Chetti Street and the passage giving access to the tenanted portion formed part of the demise under the tenancies and also constituted an essential element of the contract of tenancy between them because of the commercial importance of the locality, and, therefore, of the access through Errabalu Chetti Street. On that basis they sought for the relief of injunction.

2. The suits were resisted on the ground that the main gate and the passage did not form part of the demise and the plaintiffs had no right to insist upon the retention of the original passage opening into Errabalu Chetti street and all that they could insist was to an alternative access. The defendants maintained that the only right of the tenants lay in securing a convenient access to the portions of the premises in their occupation, and that the first defendant had provided an alternative entrance from Vanniar

street, which secured to the plaintiffs continued enjoyment of the tenancy.

3. The trial Court dismissed the suits. But the lower appellate Court has found, though the observations in different parts of the judgment in relation to this matter are not uniform, that the main gate and passage formed part of the demise and this being the case, the plaintiffs were entitled to protection of their quiet enjoyment thereof by a restrictive injunction. At one place in its judgment the lower appellate Court said that the disputed entrance should be regarded as part of the demised premises; later it observed that it was satisfied that the use of the disputed passage was part of the demised premises subject only to the right of other tenants or occupants of the premises using the same passage for ingress and egress from or to Errabalu Chetti Street. There was a further observation that the disputed passage was intended to be a passage for the enjoyment of the tenancy by the plaintiffs. But we are prepared to take in that in the opinion of the lower appellate Court the disputed passage was part of the tenancy granted to the plaintiffs, subject to the right of the other tenants or occupants of the premises to use the same. If that finding is maintained, it would follow that the plaintiffs would be entitled to the injunction they asked for. *Aliparis v. The Securities Co Ltd, (1895) 72 LT 533* does support that view.

4. Before me, the learned counsel for the second defendant appellant contends that the finding of the lower appellate Court cannot be supported on the undisputed facts in this case. We think that the contention is well founded. We are inclined to think that the question is not purely a factual one, but is one relating to the propriety of the legal conclusion that could be arrived at on the basis of proved facts. That is a question of law which is open to review in second appeal. The finding of the lower appellate Court has not been based on mere appreciation of evidence, but depends on the effect to be given to certain facts in existence. These facts emerge from the correspondence between the parties and also certain other documents, relating to business advertisements made by the plaintiffs. These records show that the plaintiffs uniformly have during their tenancies given their address as 26 Errabalu Chetti street. They have also in their business advertisements given that address. We may also take it for granted that by reputation also their address was 26 Errabalu Chetti street. At the time the tenancies started, at least in two of the cases the alternative access through Vanier Street to the tenanted premises was not very much in use or in existence.

In our view, the legal effect of these facts, either taken one by one or together,

is not with the entrance by the main gate from Errabalu Chetti street formed part of the tenancy, in the sense that it was the subject-matter of the lease, like the portions actually occupied by each of the plaintiffs. The lower appellate Court thought it was justified in making an inference that because at the time the tenancy started that was the only passage that was in use, therefore, it followed that it was part of the tenancy. We are unable to agree. As a matter of fact, in one of the tenancies, the formation of which appears from the relative correspondence, the property demised was set out which did not include the passage. Apart from that, there were more than one tenant in the premises, and it would be quite inconsistent to infer that the passage itself formed the subject-matter of the lease in any one of these cases. The passage was, as a matter of fact, used in common by the owner for the time being as also the tenants in the premises to reach their relative portions.

When the property was not sub-divided in the Corporation records, obviously the mention by each of the plaintiffs in the correspondence or in the commercial advertisements of their address as 26 Errabalu Chetti Street is not of much significance and would not support an inference that the passage was part of the tenancies. The effect, to our minds, of the facts stated would only be this that the plaintiffs would be entitled to access to the respective portions under their occupation through the passage in dispute, not as part of or constituting the subject-matter of the lease itself, but because the tenanted portion must have an access. The lower appellate Court has been weighed by the fact that Errabalu Chetti street is in a locality in George Town which is commercially important, and that a passage opening into that road should have played an essential role in the plaintiffs taking out the portions in 26 Errabalu Chetti street under tenancies. We do not think that this aspect has any relevance to the question at issue. We are of the view, therefore, that the finding of the lower appellate Court on the basis of which it granted the relief of injunction, cannot be sustained.

5. We are inclined to think that the true principle on which these cases should be decided is that where real property is severed by the grant of a portion of it, there can be no implied reservation in favour of the property retained of an easement of convenience but only of an easement of necessity. Woodfall's Law of Landlord and Tenant, 1960 Edition, refers to this principle which has also received judicial recognition and application. For instance, reference may be made to Mariyayi v. Arunachala Ammal, AIR

1956 Mad 884. If the passage is not part of the lease in the sense that it formed the very subject-matter of the lease as the portions leased out and in the occupation of the plaintiffs, we do not see how the plaintiffs would be entitled to better rights than the lessor itself. We mentioned earlier the sale deed in favour of the second defendant did not make any reservation of the passage.

In fact it expressly permitted the second defendant to raise structures in the portion of the property conveyed without let or hindrance by the first defendant. If there is no other access to the portion retained by the first defendant, it would obviously follow that as an easement of necessity, the retained portion would be entitled to an access through the disputed passage. But that implication does not apply in the present case because alternative access has been provided for to the tenanted premises through Vanniar Street. That would obviate the necessity which would form the foundation for an easement in the nature of a passage through the portion severed and conveyed to the second defendant. It would appear that a great deal of argument had been addressed to the lower appellate Court that the alternative passage is not as convenient or advantageous as the entrance through the Errabalu Chetti street. That would only be a question of degree but does not make the passage through Errabalu Chetti street a necessity to have access to the portions under the plaintiffs' tenancies.

6. We are, therefore, satisfied that the plaintiffs are not entitled to the Injunction they asked for. The second appeals are allowed with costs. Counsel's fee Rs. 250. one set to be equally borne by the plaintiffs. C. M. P. No. 13985 of 1967 dismissed.

Appeals allowed.

AIR 1970 MADRAS 39 (V 57 C 14)

ALAGIRISWAMI J.

V. Syed Hanifa, Petitioner v. Muhammad Khalifulla, Respondent.

Civil Revn. Petn. No. 460 of 1968, D/- 18-6-1968. from order of Rent Controller, Tiruchirapalli in O. P. 101 of 1966.

Civil P. C. (1908), S. 115 — Rent Controller not being Civil Court subordinate to appellate jurisdiction of High Court, his decision is not open to revision: AIR 1950 EP 181 (FB), Rel. on; AIR 1956 SC 153. Ref. (Para 3)

Cases Referred: Chronological Paras (1962) AIR 1962 Punj 555 (V 49) = 1962 (2) Cri LJ 784, Tara-chand v. State

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LL/BM/F849/68/MBR/B

(1956) AIR 1956 SC 153 (V 43) —
 1956 Cri LJ 326, Virindar Kumar
 v. State of Punjab 3
 (1950) AIR 1950 EP 181 (V 37) —
 52 Pun LR 1 (FB), Pitman's
 Shorthand Academy v. Lila Ram
 and Sons 3

K. Ramaswami, for Petitioner; K.
 Sarvabhauman, for Respondent.

ORDER:— This is a petition to revise the order of the Rent Controller, Tiruchirappalli holding that he was competent to act under Section 476, Cr. P. C. and lay a complaint against the petitioner for offences under Ss. 465 and 471, I. P. C.

2. It should be made clear that the Rent Controller was only deciding the question of his competency to lay a complaint and he had not decided whether it was necessary in the interests of justice to lay such a complaint. That question still remains open.

3. On behalf of the petitioner it is contended that the Rent Controller is not a civil, criminal or revenue Court, which under Section 476, Cr. P. C. is competent to lay a complaint in respect of any offences referred to in Section 195 (i) (b) or (c), Criminal P. C. The criteria for deciding what is 'a Court' has been succinctly set forth in the decision of the Supreme Court in Virindar Kumar v. State of Punjab, AIR 1956 SC 153 in para 6:—

".....It may be stated broadly that what distinguishes a Court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definite judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it.

And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question therefore, arises as to whether an authority created by an Act is a Court as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a Court." Applying these principles there is no doubt that the Rent Controller would be a 'Court'. He decides disputes in a judicial manner and declares rights of parties in a definitive judgment. Parties are entitled as a matter of right to be heard in respect of their claim and adduce evidence in proof of it. He has to decide the matter on a consideration of the evidence adduced and in accordance with law. In all matters before the Rent Controller there is a 'lis' in which persons with opposing claims are entitled to have their rights adjudicated in a judicial manner.

The enquiry is not entrusted to an ad hoc tribunal. Applying all these tests it would appear that the Rent Controller is a 'Court'. But it may still be argued that the Rent Controller is not a civil, criminal or revenue Court.

A learned single Judge of the East Punjab High Court in Tarachand v. State, AIR 1962 Punj 555 held that neither the Rent Controller nor the appellate authority under the East Punjab Urban Rent Restriction Act is a Court and therefore, they cannot be held to be civil Courts within the meaning of Section 476, Criminal P. C. For this purpose the learned Judge relied upon the decision of the Supreme Court referred to earlier. The learned Judge mentions that the Supreme Court placed reliance principally on a decision of a Full Bench of the East Punjab High Court in Pitman's Shorthand Academy v. Lila Ram and Sons, AIR 1950 EP 181 (FB). But in the Supreme Court decision there is no reference to this decision of the Full Bench of the East Punjab High Court. The decision of the Full Bench of the East Punjab High Court in AIR 1950 EP 181 (FB) held that the Rent Controller and appellate authority appointed under the East Punjab Rent Restriction Act of 1947 do not constitute Civil Courts subordinate to the appellate jurisdiction of the High Court and therefore, their orders are not subject to revision by the High Court under Section 115, Civil P. C. While there may be room for argument, as to whether the Rent Controller is or is not a Court there can be no doubt that the Rent Controller is not a Civil Court, subordinate to the appellate jurisdiction of the High Court. The Full Bench of the East Punjab High Court did not decide the question whether the Rent Controller was a Court; it only held that he was not a Civil Court. With respect, that decision is undoubtedly correct. In this case the decision of the Rent Controller is not subject to revision by this Court under Section 115, Civil P. C. as the Rent Controller is not a Civil Court. This is enough to dispose of this revision petition. It has got to be simply dismissed on the ground that the decision of the Rent Controller not being one by a Civil Court is not open to revision under Section 115, Civil P. C. by this Court. The C. R. F. is accordingly dismissed.

4. The dismissal of the revision petition does not of course dispose of the question which the Magistrate might have to decide i.e., whether the offences complained of before him are offences in relation to a Court as required under Section 476, Criminal P. C.

Petition dismissed.

AIR 1970 MADRAS 41 (V 57 C 15)

RAMAKRISHNAN J.

Anamalais Bus Transports (P.) Ltd., Pollachi, Petitioner v. Regional Transport Authority, Coimbatore, by its Secretary and another, Respondents.

Writ Petn. No. 3295 of 1968, D/- 6-11-1968.

Motor Vehicles Act (1939), Ss. 62 Proviso, 47, 46 — Application by B for renewal of temporary permit — Application by A for grant of permanent permit pending — Grant of temporary permit to B by slightly varying the route is not justified.

Where in order to circumvent the observation of a High Court decision against grant of fresh temporary permit to B during pendency of A's application for grant of permanent permit, the grant of temporary permit to B by Regional Transport Authority for route from place C to M (via) U was made by varying the route slightly in the context of B's application for renewing permit only for route from C to U but not from C to M (via) U, in absence of any representation from public or that of necessity in public interest such an exercise of power by Regional Transport Authority was not justified by the statute that granted the power to him and with a view to circumvent it. 1915 AC 372, Applied. (Para 6)

Cases Referred: Chronological Paras
(1915) 1915 AC 372 = 84 LJPC 86, 6
Vatcher v. Paull

N. G. Krishna Aiyangar, for Petitioner;
J. Kanakaraj for Govt. Pleader and G. Ramaswami, for Respondents.

ORDER:— The petitioner Anamalais Bus Transports Ltd., Pollachi has filed this writ petition under Art. 226 of the Constitution, to quash the order dated 5-9-1968 made by the 1st respondent, Regional Transport Authority, Coimbatore, granting a temporary permit to the 2nd respondent for the route Coimbatore to Madathukulam (via) Udamalpet. The prior facts necessary for a consideration of the points raised for decision in this petition are briefly the following. The route Coimbatore to Udamalpet is 52 miles and 6 furlongs long. Respondent 2, K. K. Palaniswami, was granted on 19-2-1968 by the Regional Transport Authority, Coimbatore, a temporary permit for this route valid for four months under the provisions of Section 62 of the Motor Vehicles Act. The petitioner had applied subsequent to the notification for the grant of the temporary permit for the above route for a permanent permit for the same route. Aggrieved against the order granting a temporary permit to respondent 2, the petitioner filed W. P. 894 of

1968, which was dismissed by this Court on 19-3-1968.

One of the grounds which the petitioner then put forward before this Court was that the grant of temporary permit in the context of his application for a permanent permit for the same route would attract the first proviso to Section 62 of the Motor Vehicles Act, rendering the grant of the temporary permit illegal. But I held against this contention on the principal ground that the application for the permanent permit was filed by the petitioner after the proceedings for the grant of a temporary permit had been initiated and in such a case the first proviso will not apply. Aggrieved against that decision, the petitioner filed an appeal, W. A. 151 of 1968. That appeal was dismissed by a Bench of this Court on 16-4-1968, and it was observed—"that if there was going to be any fresh temporary permit granted thereafter, it would definitely be during the pendency of the application of the writ petitioner and the first proviso would be attracted to such a context and would bar the grant of a temporary permit".

2. These observations have been followed by me subsequently in other cases (vide W. P. 2289 and 2293 of 1968). It is alleged in the affidavit of the petitioner that on 18-7-1968, the 2nd respondent applied for a temporary permit for the same route Coimbatore to Udamalpet for a further period from 20-7-1968 to 19-11-1968, that is four months after the expiry of the first permit granted earlier on 19-2-1968. The affidavit of the petitioner goes on to say—

"I understand and believe the same to be true that when this file was put up before the Regional Transport Authority, realising that the decision of this Honorable Court in W. A. 151 of 1968 would operate as a bar to the issue of a temporary permit, for the second time, during the pendency of the application suo motu made by the petitioner under Section 46 of the Act, he is understood to have expressed an opinion that all that could be done was to vary the route a little bit and give a fresh temporary permit. On that opinion, an office note would appear to have been put up before the Regional Transport Authority as to whether the route Coimbatore to Udamalpet for which a temporary permit was applied for by the 2nd respondent could be varied slightly as Coimbatore to Madathukulam (via) Udamalpet and a fresh temporary permit issued for four months in favour of the same grantee, viz. the 2nd respondent herein. The Regional Transport Authority is understood to have agreed with this view. After this opinion of the Regional Transport Authority expressed in the file concerned, the 2nd respondent, presumably getting scent of this endorsement of the Regional Transport Authority, made

an application on 26-8-1968, for the issue of a fresh temporary permit for the route Madathukulam to Coimbatore (via) Udamalpet, which is practically the former route Udamalpet to Coimbatore plus a short distance of eight miles beyond Udamalpet to Madathukulam. In other words, the temporary permit applied for by the 2nd respondent was practically for the route Coimbatore to Udamalpet plus an additional distance of eight miles beyond Udamalpet to Madathukulam".

After making the above allegations, the petitioner contended that this action of the Regional Transport Authority cannot be said to be "bona fide and commendable". Further the affidavit also alleged that there was no evidence at all before the Regional Transport Authority for holding that there was necessity in the public interest to extend the route of the permit from Udamalpet to Madathukulam. There was no representation from the public or from the local authority for such an extension.

3. In view of the above statements in the affidavit of the petitioner, I called for the concerned file of the Regional Transport Authority to verify if the allegations are substantiated. I gave also an opportunity through the Government Pleader to the Regional Transport Authority to file a counter-affidavit. The file has been produced, but no counter-affidavit has been filed before me. The file shows that respondent 2 applied for renewal of temporary permit for a further spell of four months from Coimbatore to Udamalpet. The office note put up by the Secretary to the Regional Transport Authority brought to the notice of the Regional Transport Authority the observations of the High Court in the writ appeal filed by the A. B. T. Ltd. (petitioner) (W A 151 of 1963) namely, that during the pendency of the application for the grant of new permit, a temporary permit cannot be issued. There is a reference in the office note to the matter being re-litigated before the High Court and that further orders of the High Court might be expected.

The file was allowed to lie over for some time. The Regional Transport Authority thereafter remarked on 10-8-1968 that "when the matter is pending before the Court, we cannot help. All we can do is to 'vary the route a little bit' (italics here in ' ') mine) and give fresh temporary permit." Then the Secretary to the Regional Transport Authority asked for instructions stating that the route for which the temporary permit was issued is Coimbatore to Udamalpet and asking whether that route may be varied slightly as Coimbatore to Madathukulam (via) Udamalpet and a fresh temporary permit issued for four months in favour of the same grantee, Thiru K. K. Palaniswami, respon-

dent 2. This proposal was approved by the Regional Transport Authority on 21-8-1968. The file also shows that only subsequently was an application received from Thiru K. K. Palaniswami for the grant of a temporary permit for the route Madathukulam to Coimbatore (via) Udamalpet.

4. These proceedings in the file clearly bear out the allegation expressed in the affidavit of the petitioner that it was to circumvent the observations of the High Court in the decision in W. A. No 151 of 1963 against the grant of fresh temporary permit during the pendency of an application for the grant of permanent permit, that the present grant of temporary permit for the route Coimbatore to Madathukulam (via) Udamalpet was made by varying the route slightly in the context of an application by respondent 2 for renewing the permit only from Coimbatore to Udamalpet and without any application from him at that time for the route slightly varied as above. The file also does not show that there was any representation by the public or by the local authority or any other interested person, that there was no need to supplement the existing transport facilities from Udamalpet to Madathukulam by grant of a temporary permit to cover that extra distance, an additional length of eight miles.

5. The above would show that both the grounds on which the petitioner has attacked the grant of permit are substantiated. They are firstly, that the authority, Regional Transport Authority in this case, in granting a temporary permit from Coimbatore to Madathukulam (via) Udamalpet, was really circumventing the difficulty about granting it which arose as a consequence of the decision of the High Court, by making a slight extra addition to the route for which the second respondent had applied for temporary permit, to make it appear as if it was a temporary permit for a new route, when what was intended in fact and substance, was only the grant of temporary permit for the route Coimbatore to Udamalpet at a time when the decision of the High Court debarred the Regional Transport Authority from granting such a second temporary permit.

Secondly, there was no apparent necessity in the public interest, for granting such a variation. It has been laid down that even in respect of temporary permits the main principles of Section 47 of the Motor Vehicles Act namely, the interest of the public generally and the advantages to the public of the service to be provided, should also be borne in mind. There is nothing to show that they were borne in mind in this case. No doubt, the order of the Regional Transport Authority

granting the temporary permit has made a reference to an urgent and real need for the permit. But the particulars in the file do not afford any data to support such a conclusion about an urgent and real need having arisen.

6. On the other hand, the file clearly shows that this is a case where the authority—very regrettably it must be stated, was trying to do indirectly what he was prohibited from doing directly. Learned counsel for the second respondent Sri Ramaswami referred me to several decisions upon the question of fraud on power as well as mala fides, but it is not necessary to refer to all those decisions, for, the facts of this case set out above make it crystal clear that the authority was trying to do indirectly what he could not do directly. One thing however, could be mentioned with reference to the general law on the subject of fraud on power, in the context of the aforesaid facts in this case. As pointed out by the Privy Council in the case *Vatcher v. Paull*, 1915 AC 372 at page 378—

"The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointer amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power".

In the present case, the instrument creating the power of granting temporary permit to the appointer, namely, the Regional Transport Authority, is the statute as clarified by the decision of the Bench of this Court in W. A. No. 151 of 1968 debarring the authority from granting a second temporary permit in the context of an application for a permanent permit. But what the Regional Transport Authority has done is to exercise that power in a manner which was not justified by the Statute that granted the power to him and with a view to circumvent it. It is to be hoped that a recurrence of such a state of affairs would not take place as it reflects little credit on the Regional Transport Authority concerned.

7. The writ petition is allowed and the order of the Regional Transport Authority granting the impugned permit to the second respondent is quashed by a writ of certiorari. No order as to costs.

Petition allowed.

AIR 1970 MADRAS 43 (V 57 C 16)

K. VEERASWAMI AND RAMA-
PRASADA RAO JJ.

Commissioner of Expenditure Tax Madras, Applicant v. T. S. Krishna C/o. M/s. T. V. S. and Sons (P.) Ltd., Madurai, Respondent.

Tax Case No. 20 of 1965 (Reference No. 10 of 1965), D/-6-8-1968.

(A) Expenditure Tax Act (1957) (as amended by Act 12 of 1959), Ss. 2 (g) (i), 4 (i) and (ii) — Expression "dependent" in S. 2 (g) (i) — Meaning of — Assessee as individual — His wife and minor son owning separate property — Inclusion of expenditure incurred by them in his assessment is illegal. ILR (1968) Andh Pra 279, Dissented from.

Where the wife and the minor son of the assessee own separate properties in her or his name and derive income therefrom, they cannot be considered as dependents of the assessee within meaning of Section 2 (g) (i). Hence neither Cl. (i) or (ii) of Section 4 is applicable to the assessment of the assessee. (Paras 3 and 4)

In Section 2 (g) (i), the expression "dependent" means in the case of an assessee who is an individual his or her spouse or child wholly or mainly dependent on the assessee for support and maintenance. The expression "dependent" has been expanded (by Finance Act 12 of 1959) to include, apart from spouse or minor child, any person who factually is a dependent on the individual for support and maintenance. A spouse or minor child factually independent cannot come within the ambit of dependent. If that were not so, one will have to impute to the legislature an unjustifiable discrimination in the matter of addition of expenditure between a spouse or minor child of an individual and a spouse or minor child of a coparcener in a Hindu undivided family. ILR (1968) Andh Pra 279, Dissented from; AIR 1968 Madh Pra 107, Rel. on. (Para 2)

(B) Expenditure Tax Act (1957) (as amended by Act 12 of 1959), Ss. 2 (g) (i) and 4 (ii) — Assessee, an individual — Inclusion of dependent's expenditure — Whether conditional on its being incurred from and out of income or property transferred by such individual. AIR 1968 Madh Pra 107, Dissented from.

Where an assessee is an individual, the inclusion of the dependent's expenditure is not conditioned by the same having been incurred from and out of any income or property transferred directly or indirectly to such dependent by such individual. The expression 'any expenditure incurred by any dependent from or out of income or property transferred directly or indirectly to the dependent by the as-

sessee' occurring in Section 4 (ii) applies only when the assessee is a Hindu undivided family and not when the assessee is an individual. AIR 1968 Madh Pra 107, Dissented from. (Para 2)

Sub-clause (ii) of Section 4 has not been happily phrased, but the effect is the same as if it had read, "where an individual is the assessee, any expenditure incurred by any dependent of such assessee". The definition of 'dependent' has been framed first with reference to an assessee, who is an individual, and secondly, an assessee which is a Hindu undivided family. It is this scheme that is carried into Section 4 (ii). (Para 2)

Cases Referred: Chronological Paras
(1968) AIR 1968 Madh Pra 107

(V 55) = 1967 Jab LJ 878, Rajkumarsinghji v. Commr. of Expenditure Tax, Madhya Pradesh (1967) W. A. Nos. 67 & 69 of 1964, D/-14-4-1967 = ILR (1968) Andh Pra 279, Prince Azam Jah v. Expenditure Tax Officer

V. Balasubramanian and J. Jayaraman, for Applicant; S. Swaminathan and K. Ramagopal, for Respondent.

VEERASWAMI J.:— This reference involves assessment years 1960-61 and 1961-62, and arises under Section 25 (1) of the Expenditure Tax Act, 1957. The assessee, who is an individual, was charged to tax on his expenditure for the periods ended March 31, 1960 and 1961, which included the expenditure incurred by his wife and minor son during the years. For the first year, the expenditure of the wife was Rs. 10,324 and of the minor son Rs. 3,944 and for the next year it was Rs. 2002 for the wife and Rs. 29,439 for the minor son. It is common ground that the wife and the minor each had during the year her or his own properties and derived income therefrom. The Expenditure Tax Officer considered that both of them were dependents of the assessee within the meaning of Section 2 (g) (i) and that as such, Sec. 4 (i) would apply. On appeals, the view taken was that neither Section 4 (i) nor Section 4 (ii) would be applicable, and that being the case, the question whether they were dependents within the meaning of S. 2 (g) (i) need not be considered. The Tribunal substantially concurred and the reference comes before us at the instance of the Commissioner of Expenditure Tax. The question for consideration is:

"Whether on the facts and in the circumstances of the case, the inclusion of the expenditure incurred by the assessee's wife and minor son with that of the assessee was justified under Section 4 (ii) of the Expenditure Tax Act?"

Though the frame of the question is rested on Section 4 (ii), eventually, the answer will have to depend on the view

taken as to the scope of Section 2 (g) (i). Our first impression on a consideration of Section 2 (g) (i) in the context of the other relevant provisions is that the Tribunal's view is correct. But there has been an elaborate argument before us which does show that the question is not entirely free from difficulty. Eventually, we have, however, decided to stick to our first impression.

2. The Expenditure Tax Act provides for levy of tax on expenditure. Nothing seems to turn on the history of this Act and no reference need be made to it. The charge is in respect of the expenditure incurred by any individual or Hindu undivided family in the previous year. Although the charge is in respect of the expenditure incurred by the assessee, expenditure has been defined to include any amount which under the provisions of the Act is required to be included in the taxable expenditure. The last phraseology, viz., 'taxable expenditure' means for the purpose of the Act 'total expenditure of the assessee liable to tax under the Act'. We are not on the broader question whether the charge will properly lie on the expenditure not incurred by the assessee, but required to be included in the taxable expenditure. The charging section itself is subject to the other provisions contained in the Act. Section 4 requires, in the contingencies mentioned, inclusion of certain taxable expenditure in the expenditure of the assessee. Sections 5 and 6 provide for exemptions and deductions. The only two kinds of assessee comprehended by the Act are the individual and the Hindu undivided family. But, in each of these cases, a dependent plays a part, and for purposes of assessment to expenditure tax, the individual or the Hindu undivided family, along with the dependent concerned, is taken as a unit in giving effect to the principle of aggregation.

A dependent in the case of an individual was originally defined to mean his or her spouse or child wholly or mainly dependent on the assessee for support and maintenance. Act 12 of 1959 amended this provision by inserting the words 'and includes any person' between 'child' and 'wholly' and prefixing the word 'minor' to the word 'child', which is punctuated at the end by a comma. The second part of Section 2 (g) has two limbs, both of which relate to a Hindu undivided family. In that case, a dependent means every coparcener other than the Kartha, and also any other member of the family, who under any law or order or decree of a Court is entitled to maintenance from the joint family property. This was left intact by Act 12 of 1959. Section 4, which is subject to the other provisions of the Act, stated, as it stood originally, that in the expenditure of an assessee liable to tax under the Act shall be included (i)

any expenditure incurred, whether directly or indirectly, by any person other than the assessee in respect of any obligation or personal requirement of the assessee or any of his dependents, which, but for the expenditure having been incurred by that other person, would have been incurred by the assessee, to the extent to which the amount of all such expenditure in the aggregate exceeds Rs. 5,000 in a year; and (ii) any expenditure incurred by any dependent of the assessee for the benefit of the assessee or of any of his dependents out of any gift, donation or settlement on trust or out of any other source made or created by the assessee, whether directly or indirectly.

The explanation cleared a doubt and stated that any expenditure incurred by any person other than the assessee for and on his behalf by way of customary hospitality, or which was of a trivial or inconsequential nature, was not required to be included in the assessee's expenditure. Act 12 of 1959 deleted from the first limb the words "which, but for the expenditure having been incurred by that other person, would have been incurred by the assessee", and recast the second limb to read, "where the assessee is an individual, any expenditure incurred by any dependent of the assessee, and where the assessee is a Hindu undivided family, any expenditure incurred by any dependent, from or out of any income or property transferred directly or indirectly to the dependent by the assessee". The Appellate Assistant Commissioner rightly thought that Section 4 (i) was inapplicable and this question does not survive before us. But, he also thought that the second limb, as amended, having regard to its frame, would not apply. This is on the view that even the first part of the second limb of Section 4 would be qualified by the requirement that the expenditure incurred by a dependent should be from or out of any income or property transferred directly or indirectly to the dependent by the assessee. *Rajkumar-singhji v. Commissioner of Expenditure Tax*, AIR 1968 Madh Pra 107 does lend support to him. In that case, the learned Judges were of opinion:

"The expression 'any expenditure incurred by any dependent from or out of income or property transferred directly or indirectly to the dependent by the assessee' occurring in Section 4 (ii) applies not only when the assessee is a Hindu undivided family but also when the assessee is an individual."

With respect we are not able to share that view and do not think that the word 'assessee' at the end of Section 4 (ii) qualifies a dependent of the individual. The first part of Section 4 (ii) speaks of a dependent of the assessee and there the assessee is clearly an individual and

likewise the assessee in the second part of Section 4 (ii) has reference to the Hindu undivided family. This sub-clause has not been happily phrased, but the effect is the same as if it had read, "where an individual is the assessee, any expenditure incurred by any dependent of such assessee." We do not see why we should read the second limb of Section 4 (ii) in a different manner. This construction looks to us all the more proper by reference to the definition of an assessee and of a dependent. An assessee means only an individual or Hindu undivided family, and we have already set out the definition of a dependent. This definition has been framed first with reference to an assessee, who is an individual, and secondly, an assessee which is a Hindu undivided family. It is this scheme that is carried into Section 4 (ii). It seems to us, therefore, that where an assessee is an individual, the inclusion of the dependent's expenditure will not be conditioned by the same having been incurred from and out of any income or property transferred directly or indirectly to such dependent by such individual.

3. That, however, does not conclude the matter. The answer to the question under reference, as we said at the outset, would really depend upon what a dependent means for purposes of the first part of Section 4 (ii). For the Revenue, it has been heavily stressed that in interpreting the provision, we must bear in mind the scheme of the Act, particularly, the fact that the family of an individual is treated as a unit, though the individual is taken for the purposes of the assessment and the application of the principle of aggregation, as for instance, attempted by Section 16 (3) of the Income-tax Act, with a view to check evasion or avoidance of tax liability. Mr. Balasubramanyam contends that by a comparison of S. 2 (g) (i) before and after its amendment, the intention is clear from Act 12 of 1959 that even an independent spouse or a minor child is a dependent of the individual. Learned Counsel in addition to the language of S. 2 (g) (i) as amended in 1959, invited our attention to the Objects and Reasons for amending the Act and stated that although the Objects and Reasons may not be conclusive, it is relevant to take them into account, and in the context of them also, it should be held that Section 2 (g) (i) does not take the actuality into account but by a statutory fiat defines a dependent to mean the spouse or a minor child who in fact does not depend upon the individual for support and maintenance. We have given careful thought to this contention but find ourselves unable to accept it.

In our view AIR 1968 Madh Pra 107 if we may say so with respect, rightly de-

limits the scope and effect of S. 2 (g) (i) as amended, and we are in complete agreement with the reasoning in that case. We do not, therefore, think it necessary to cover or reiterate the identical ground. The word 'dependent' is not a term of art in taxation and should bear its natural meaning, which may not include one who is independent and who does not require and get the assistance of another for support and maintenance. There is nothing in the language of Section 2 (g) (i) which compels us to take a different view. As it originally stood, the expression meant in the case of an assessee who is an individual "his or her spouse or child wholly or mainly dependent on the assessee for support and maintenance." Even after the amendment, that substantially remains to be the position in the case of spouse or child except that the child should be a minor and that the expression "dependent" has been expanded to include, apart from spouse or minor child, any person who factually is a dependent of the individual for support and maintenance. The utmost that can be said in favour of the Revenue's construction is that if the dependent is defined in terms of any person who is factually a dependent, it would have been unnecessary to employ the surplusage "his or her spouse or minor child". But we are inclined to think that beyond the peculiarity of the draftsmanship, it has no further significance. The amendment took the particular form because of the then existing structure and the Legislature apparently wanted to retain that structure as much as possible while at the same time it expanded its scope. The word 'includes' would indicate that but for it, the definition may not take in the category of person included. But that to our minds does not necessarily mean or imply that a spouse or minor child factually independent would come within the ambit of dependent. That a dependent also means an independent but includes a dependent looks odd indeed.

It has been strenuously argued by Mr. Balasubramanyam that the very object of the amendment in 1959 was to provide that the husband, wife and minor child should be regarded as one unit for the exemption limit of Rs. 30,000/- in the matter of non-taxable expenditure and not as a separate assessee, if they have income in their own individual rights. We do not think that if that was the object, the amendment, phrased as it was, has carried out the object. As we already mentioned, the individual is always the assessee or the Hindu undivided family, as the case may be. But, in the case of the individual or Hindu undivided family, the dependent's expenditure is in certain circumstances required to be included, and in that sense, the individual with the

dependent or the Hindu undivided family with the dependent is taken as a unit. That scheme existed even before the amendment in 1959. The effect of the amended Sec. 2 (g) (i) is only to include or add to the category of dependents with reference to an individual and treat them all as a unit for the purposes of assessment in the sense that the expenditure of such a dependent in computing the taxable expenditure of the individual is liable to be included therein.

4. We also fail to see why the Legislature, if checking evasion was the object, made a distinction between the spouse or the minor child of an individual on the one hand and the spouse or minor child of a coparcener in a Hindu undivided family on the other. In the latter case, the expenditure of a wife or a minor child who would be a member or coparcener as the case may be, can be included in the taxable expenditure of the Hindu undivided family only if they are entitled to maintenance from the joint family property under any law or order or decree of a court. There is no reason why from the standpoint of checking evasion, that qualification is to be ignored in the case of a spouse or minor child of an individual. Section 4 (ii) further lends support to the view we have taken. As we indicated earlier, this provision as amended provides for the addition of the expenditure of a dependent of an individual and a dependent of a Hindu undivided family; but, in the latter case, as a requisite for the inclusion, the dependent should have incurred expenditure from the income or property transferred directly or indirectly to him or her by the assessee. In the case of a dependent of an individual, this requisite is not made applicable, because, as we think, the spouse or minor child, as defined by the first part of Section 2 (g) (i) is one who depends on the individual for support or maintenance. If that were not so, one will have to impute to the Legislature an unjustifiable discrimination in the matter of addition of expenditure between a spouse or minor child of an individual and a spouse or minor child of a coparcener in a Hindu undivided family. It seems to us that such a discrimination could not have been intended.

5. Our attention has been invited to a majority decision of the Andhra Pradesh High Court in W. A. No. 67 to 69 of 1964 (AP), which takes a contrary view as to the scope of Sec. 2 (g) (i). In our opinion, the objects and reasons as given in the Legislature for the amendment cannot be taken as the controlling factor in determining the scope and effect of the amendment. Quite apart from that consideration, punctuation, which is no part of an enactment, has a limited part to play when

the language employed by the Legislature is clear. We are, therefore, with due respect, unable to agree with the view of the Andhra Pradesh High Court.

6. We answer the question referred to us against the Revenue with costs. Counsel's fee Rs. 250/-.

Reference answered accordingly.

AIR 1970 MADRAS 47 (V 57 C 17)

VEERASWAMI J.

Parasmal Chordia, Petitioner v. Rajalakshmi Ammal and another, Respondents.

Civil Revn. Petn. No. 2348 of 1967. D/- 7-11-1968 from order of Sub J., Cuddalore in I. A. No. 803 of 1967.

(A) Civil P. C. (1908), O. 8-A, R. 1 (Madras) — Scope and applicability — Third party notice procedure applies even to suits on negotiable instruments. AIR 1956 Mad 155, Dissent. from. AIR 1962 Mad 202, Ref. (Para 2)

(B) Civil P. C. (1908), O. 8-A, R. 1 (Madras) — Scope and object — Policy of rule is that defendant need not be driven to fresh suit to put indemnity into operation — Applicability of rule is not limited to claim of indemnity arising out of same transaction or simultaneous transaction. (Paras 3, 6)

(C) Civil P. C. (1908), O. 8-A, Rr. 1 and 3 (Madras) — Scope and applicability — Rule 3 does not limit scope of R. 1 so as to make it applicable only to cases where suit claim is admitted. (Para 4)

Cases Referred: Chronological Paras (1962) AIR 1962 Mad 202 (V 49) = (1962) 1 Mad LJ 246, P. S. Pattabiraman v. Ganapathi Kamappamudali 5

(1956) AIR 1956 Mad 155 (V 43) = 68 Mad LW 810, Uthaman Chettiar v. Thiagaraja Pillai 1, 5

K. Gopalachari for G. Krishnan and K. Sampath, for Petitioner; N. R. Raghavachari and N. C. Raghavachari, for Respondents.

ORDER:— This petition is directed against an order of the Subordinate Judge of Cuddalore dismissing an application of the petitioner made under O. 8-A, R. 1, Civil P. C. The suit was laid on a promissory note said to have been executed by the defendant who is the petitioner, on 21-6-1964. He resisted the suit on the ground that the promissory note was not supported by consideration, and also maintained that the plaintiff's son had executed an agreement or varthamanam of 4-7-1964, admitting that the promissory note was not supported by consideration and that, in case, it was successfully enforced, he would indemnify the defendant. Evidently, on the basis of the last averment, the defendant took out the application

under Order 8-A for third party notice to the son of the plaintiff. The application was dismissed by the Subordinate Judge, by placing reliance on Uthaman Chettiar v. Thiagaraja Pillai, 68 Mad LW 810 = (AIR 1956 Mad 155) Panchapakasa Ayyar, J. was of the view, in that case, that the third party notice procedure should not be applied to suits on negotiable instruments.

2. With due respect to the learned Judge the limitation placed by him does not appear to be justified by the language of Rule 1 of Order 8-A. The order relates to third party procedure and the first rule says that where a defendant claims to be entitled to contribution from or indemnity against any person, not already a party to the suit, he may, by leave of the Court, issue a notice, called a third party notice, to that effect. That simply means that where in a suit the defendant, in case the plaintiff succeeds, is entitled to indemnity from a third party, who has not been already brought on record, he is entitled to ask for a third party notice. There is nothing in the rule suggesting that it has no application to suits on negotiable instruments.

3. It is urged that the rule is applicable only to a claim of indemnity arising out of the same transaction or a transaction entered into simultaneously with the transaction sought to be enforced in the suit. The answer is Rule 1 itself contains no such limitation. Nor does the reason of the rule demands such a limitation. The rule is conceived for the benefit of a defendant who, if defeated in respect of a claim against him, is entitled to reimbursement by way of indemnity. In such a case the policy of the rule is that the defendant need not be driven to a fresh suit to put indemnity into operation. That, in my view, should be the approach to the procedure for third party notice.

4. The further contention for one of the respondents is that Order 8-A itself will be attracted only in cases where a defendant admits liability on the main transaction sued upon. Support is sought to be derived, for this contention, from Rule 3 of O. 8-A. This rule only states that if the third party desires to defend himself he may do so; but, if he does not enter appearance, he shall be deemed to admit the validity of the decree against the defendant and his own liability to indemnity to the extent claimed in the third party notice. This does not mean that Rule 3 limits the scope of Rule 1 so as to make it applicable only to cases where the suit claim is admitted.

5. Learned counsel for the petitioner urged that suits on negotiable instruments being of a simple character, by admitting third party procedure it should not be

complicated and from this standpoint, the view of 68 Mad LW 810 = (AIR 1956 Mad 155), is the correct one. As it seems to me, it is the same or similar point as the one I have already adverted to earlier. Ramachandra Iyer, J., as he then was, in *P. S. Pattabiraman v. Ganapathi*, AIR 1963 Mad 202 referred to 68 Mad LW 810 = (AIR 1956 Mad 155) and interpreted it in such a way as to practically emasculate its effect. What seems to me is that Ramachandra Iyer, J. in the context, did not feel inclined to accept the view of Panchapakesa Aiyar, J. in 68 Mad LW 810 = (AIR 1956 Mad 155). This is clear from the observations of Ramachandra Iyer, J. himself in that judgment, to wit, there is nothing in the language of Rule 1 of Order 8-A to forge any such limitation to its scope.

6. Concealed, as it is, for the benefit of the defendant, as I had already stated, all that is necessary for the application of third party procedure is whether if the plaintiff claim is allowed the defendant has a claim, in that event, for indemnity by reason of such claim being allowed, from a third party. If that requisite is satisfied, the Court will not be justified, on any extraneous ground, from refusing third party procedure. Counsel for the proposed third party urged that on the terms of the Varthamanam if the suit promissory note was found to be without consideration it would be dismissed, and in that case, no question of indemnity would arise. But, counsel fails to take note of the fact that if the suit is decreed and the Varthamanam is found to be true and the claim for indemnity can be based on that, the defendant would be entitled to a decree for indemnity as against the third party.

7. The petition is allowed with costs. One set,

Petition allowed.

AIR 1970 MADRAS 48 (V 57 C 18)

M. ANANTANARAYANAN C. J. AND
M. NATESAN J.

Trustees of the Port of Madras, Appellant v. Home Insurance Co. Ltd., Respondent.

O. S. A. Nos. 28 and 37 of 1961, D/- 20-9-1967.

(A) Madras Port Trust Act (2 of 1905), Ss. 39 and 40 — Contract Act (1872), Ss. 151, 152 and 161 — Board taking charge of goods under Ss. 39 and 40 — Its responsibility for the goods is that of a bailee under Ss. 151, 152 and 161, Contract Act — Damage to goods, prima facie evidence of bailee's negligence — Bailee to disprove it. (Contract Act (1872), Ss. 151,

152 and 161) — (Evidence Act (1872), Section 102).

Where the goods in question were transhipped to another vessel for carriage to Madras where they arrived and were unloaded, and were taken charge of by the Port Trust Board under Section 39 of the Madras Port Trust Act, the responsibility of the Board for the loss, destruction or deterioration of the goods of which it has taken charge under Section 40 of the Act would be that of a bailee under Sections 151, 152 and 161 of the Contract Act. The Board as a bailee is bound to take as much care of the goods bailed to it as a man of ordinary prudence under similar circumstances would take care of his own goods. In Sections 151 and 152 of the Contract Act the loss or damage of the goods entrusted to the bailee is prima facie evidence of his negligence. The burden of proof is therefore, on the bailee to disprove negligence when damage or loss is established. Judgment in ILR (1961) Mad 877 by Ganapathla Pillai, J. Affirmed. (Para 15)

(B) Contract Act (1872), Ss. 151, 152 & 161 — On facts, held, Madras Port Trust Board as bailee had been negligent. (Madras Port Trust Act (2 of 1905), Sections 39 and 40).

A number of high density American cotton bales were unloaded from the ship between 20-4-1952 and 4-5-1952. The bales were stacked in the open in the Harbour premises uncovered by tarpaulin and continued to remain so. Rain occurred first on the night of the 18th May. On the 19th, the consignor's agents wrote to the Board giving notice of the claim for damages caused to the cotton bales by rain. The evidence further disclosed that even on the 16th of May itself the weather conditions began to show indications of the coming summer storm, which was not unusual in Madras. Even after the rains on the 18th and the notice from the agents on the 19th, the Board had not taken steps to prevent further damage to the goods. No attempt was made to requisition and cover the bales with tarpaulin to avoid further soaking by rain. The Board had, in addition, been receiving weather reports from the Meteorological office and had been hoisting cautionary signals.

Held, that the Board did not take care of the goods in the manner expected of a bailee and it continued to be negligent even after the 18th of May when rain had fallen. (1895) AC 632 at 640, Rel. on. (Para 16)

(C) Madras Port Trust Act (2 of 1905), Ss. 110, 6, 39, 41, 41-A and 104 — Negligence of Board in respect of goods taken charge of under S. 39 — Board can claim protection under S. 110 — Plea that Board was not a 'person' under S. 110 overruled. (Madras General Clauses Act

THE

All India Reporter

1970

Manipur J. C.'s Court

AIR 1970 MANIPUR 1 (V 57 C 1)

C. JAGANNADHACHARYULU, J. C.

State Bank of India at Imphal, Plaintiff, Petitioner v. Yumnam Gouramani Singh, Defendant-Respondent.

Civil Revn. Case No. 9 of 1967 D/- 26-11-1968 against judgment and order of Second Sub-J., Manipur, D/- 26-12-1966.

Civil P. C. (1908), O. 6, R. 17 — Object — Amendment of pleadings — Principles — Amendment of written statement introducing a plea that the plaint is defective for omission to sign it properly cannot be allowed.

The object of O. 6, R. 17 is that the Courts should get at and try the merits of the cases which come up before them and should consequently allow all amendments, which may be necessary for the purpose of determining the real question in controversy between the parties, provided that it can be done without causing injustice to the other side. The settled rule, with regard to amendment of pleadings is that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid multiplicity of suits, provided that there has been no undue delay, that no new or inconsistent cause of action is introduced that no vested interest or accrued legal right is affected, that the application is not mala fide and that no injustice is done to the other side. AIR 1941 Pat 276 & AIR 1948 Mad 332 & AIR 1951 Cal 262 & AIR 1952 Pat 380 & AIR 1953 Hyd 212 & AIR 1954 Nag 200 & AIR 1955 Trav-Co 201 & AIR 1955 Hyd 1 (FB) & AIR 1956 Cal 630 & AIR 1957 Kerala 140 & AIR 1958 Ail 36 & AIR 1959 Andh-Pra 448 & AIR 1965 Andh-Pra 98 & AIR 1966 SC 997, Rel. on. AIR

Commentary on Civil P. C. 7th Ed. P. 2211 Note 1 Cited. (Para 11)

The amendment of pleadings is in the discretion of the court, though Order 6, Rule 17, Civil P. C. confers a very wide discretion on the Courts. The powers are to be liberally exercised. But, the discretion must be exercised according to judicial principles and not in an arbitrary, vague or fanciful manner, so as to cause injustice to the other side. The main considerations to be borne in mind in exercising the discretion are that the rules of procedure have no other aim than to facilitate the task of administering justice, that multiplicity of suits should be avoided and that the interests of substantial justice should be advanced even if a fresh suit on the amended claim is barred by limitations. An amendment merely clarifying the position put forward in the plaint or a written-statement can be allowed. Further the falsity of the case in the amendment cannot be considered at this stage without allowing the amendment and framing an issue thereon and allowing both sides to adduce evidence. AIR 1957 SC 357 & AIR 1957 SC 363 & AIR 1961 J & K 6 & AIR 1965 Mani 53 & AIR 1967 AP 155 & AIR 1967 Pat 326 & AIR 1967 SC 96 & 1967 Mani LJ 371 & AIR 1949 Mad 433 & AIR 1949 Mad 467 & AIR 1950 Cal 379 & AIR 1953 Hyd 212 & AIR 1955 Mys 141, Rel. on; AIR Commentary on Civil P. C. 7th Ed. p. 2213 Note 2 Cited. (Paras 11, 12)

So far as the amendment of the written statement is concerned, an amendment setting up a case which is totally inconsistent with the original case set up will not be allowed, if it is unjust to the opposite side to allow it. Similarly, where the proposed amendment of the written-statement will have the effect of displacing plaintiff's suit, a Court will refuse the application to amend the written statement. A defendant, who has deli-

berately and under no mistake or misapprehension admitted a material fact in his written statement, cannot be allowed at a later stage to change his front and make out a new case by denying that fact. There is no provision in the Civil P. C. to enable the court to permit the substitution of one written statement in toto for another already filed. (1885) 16 QBD 178 & (1886) 16 QBD 556 & (1886) 33 Ch D 603 & 1952 (2) All ER 823n & AIR 1957 SC 363 & AIR 1967 Mani 28 & AIR 1955 Mys 141 & AIR 1959 Andh-Pra 448 & AIR 1961 Bom 136, Rel. on, AIR Commentary on Civil P. C. 7th Ed Pp. 2224 to 2226 Note 4 (2) Cited. (Para 13)

An omission to sign a plaint properly under Order 6, Rule 14 C. P. C. is a mere irregularity which is a curable one. The amendment is sought for not to determine the real question in controversy between the parties but to drag on the proceedings and relates to mere technicalities and cannot be allowed. (Para 15)

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and Sons Ltd v. Damodar Valley
Corporation 11
- (1967) AIR 1967 Andh-Pra 155 (V 54)=
1967 Cri LJ 691, C. Subba Rao
v. K. Brahmananda Reddy 11
- (1967) AIR 1967 Mani 28 (V 54),
Elangbam Manga Singh v.
Ngangbam Tombi Singh 13
- (1967) Civil Revn. Case No. 22 of
1966=1967 Mani LJ 371, Thompson
& Mathews v. Kshetrimayum
Tomba Singh 11
- (1967) AIR 1967 Pat 326 (V 54)=
Mahabir Prasad v. Narmadeshwar
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- (1966) AIR 1966 SC 997 (V 53)=
(1966) 1 SC WR 199, Nichhalbhai
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- (1965) AIR 1965 Andh-Pra 98 (V 52)=
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P. Mangarao v. C. Kishan Rao 11
- (1965) AIR 1965 Mani 53 (V 52),
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Sarma 11
- (1961) AIR 1961 Bom 136 (V 48)=
62 Bom LR 336, Shriram Sardar-
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Firm Ghulam Mohi-udain v.
State of J & K 11
- (1959) AIR 1959 Andh-Pra 448
(V 46)= (1959) 1 Andh WR 239,
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- (1958) AIR 1958 All 36 (V 45),
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- (1937) AIR 1937 SC 357 (V 44)=
1937 SCR 438, L. J. Leach and Co.
Ltd. v. Jardine Skinner and Co. 11

- (1957) AIR 1957 SC 363 (V 44)=
1957 SCR 595, Pargonda
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- (1957) AIR 1957 Ker 140 (V 44)=
1957 Ker LT 511, Mahamood
v. Ayissu 11
- (1956) AIR 1956 Cal 630 (V 43)=
60 Cal WN 840, M. B. Sirkar
and Sons v. Powell & Co. 11
- (1955) AIR 1955 Hyd 1 (V 42)=
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- (1955) AIR 1955 Mys 141 (V 42)=
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- (1955) AIR 1955 Trav-Co 201 (V 42)=
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- (1954) AIR 1954 Nag 200 (V 41)=
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- (1953) AIR 1953 Hyd 212 (V 40)=
ILR (1953) Hyd 366, Goverdhan
Bang v. Govt. of the Union of
India 11, 12
- (1952) AIR 1952 Pat 380 (V 39),
Kailash Singh v. Sheopujan
Singh 11
- (1952) 1952-2 All ER 823n=1952 WN
481, Loutfi v. Czarnikow Ltd. 13
- (1951) AIR 1951 Cal 262 (V 38)=
85 Cal LJ 213, Ahmed Hossein
v. Mt. Chembelli 11
- (1950) AIR 1950 Cal 379 (V 37)=
54 Cal WN 445, Abdul Rahim
v. Abdul Jabbar 12
- (1949) AIR 1949 Mad 433 (V 36)=
1949-1 Mad LJ 64, Krishna Rao
v. Gangadeswarar Temple 12
- (1949) AIR 1949 Mad 467 (V 36)=
1948-2 Mad LJ 644, Dharmalinga
Chetti v. Krishnaswami Chetty 12
- (1948) AIR 1948 Mad 332 (V 35)=
1948-1 Mad LJ 337, Pancha-
ksharam Pillai v. Rangaswami
Pillai 11
- (1941) AIR 1941 Pat 276 (V 28)=
7 BR 924, Tika Sao v. Hari Lal 11
- (1886) 33 Ch D 603=56 LJ Ch 126,
Moss v. Malining 13
- (1886) 16 QBD 556=55 LJ QB 157,
Stewart v. North Metropolitan
Tramways Co. 13
- (1885) 16 QBD 178, Steward v.
North Metropolitan Tramways
Co. 13

N. Ibotombi Singh, for Petitioner; A. Nilamani Singh, for Respondent.

ORDER:— This is a revision petition filed under Section 115, C. P. C. against the order of the Second Subordinate Judge, Manipur dated 26-12-1966 in Misc. Case No. 75/1965/73 of 1966 in Money Suit No. 3/1960/62/1962 on his file allow-

ing the respondent to amend his written statement.

2. The brief facts of the case leading to the institution of the present revision petition are thus: The respondent mortgaged the plaint "A" schedule properties on 16-3-1964 for securing a loan of Rs. 15,000/- from the Manipur State Bank Ltd. which was a company incorporated under the Indian Companies Act (Act VII of 1913) with its registered Office in Imphal. On 17-3-1954 the respondent applied for and obtained the loan of Rs. 15,000/- after executing a promissory note and a letter of continuity. He agreed to repay the amount in 3 quarterly instalments on or before 1-1-1965 and further agreed that, in default of payment of any instalment, the mortgage bond would be enforceable forthwith. Again on 19-9-1965 the respondent obtained from the Manipur State Bank Ltd. a second loan of Rs. 10,000/- by executing a promissory note, letter of continuity and creating a mortgage of his properties described in the plaint schedule B(a) and (b) agreeing to repay the debt within 6 months, i.e. before 19-3-1956. On 21-12-1956, the respondent executed a third mortgage bond mortgaging the plaint "C" schedule properties in favour of the said Bank to secure the debit balance as on 20-12-1956 in his current account. He executed a promissory note and a letter of continuity on 22-12-1956 and agreed to discharge the mortgage debt within six months, i.e. before 21-6-1957.

3. In exercise of powers conferred under Section 35(2) of the State Bank of India Act, 1955, the Central Government sanctioned the scheme relating to the acquisition by the State Bank of India the business of the Manipur State Bank Ltd. In pursuance of the said scheme, the Manipur State Bank Ltd. transferred to the State Bank of India at Imphal all the mortgage debts due to it on 24-1-59 along with the securities as per schedule annexed to the deed of transfer.

4. On 22-9-1960 the State Bank of India at Imphal filed Money Suit No. 3/1960/62/1962 against the respondent for recovery of Rs. 44,852.34 p. due under the three accounts. The respondent filed his written-statement on 9-1-1961. His written-statement was very vague. He stated in para 1 that the suit is liable to be dismissed for want of cause of action. In para 2, he alleged that the suit is not maintainable in the "present form". In para 3, he stated that the suit is bad for multifariousness and wrong joinder of parties. In paras 4 to 6 he set up the usual defence that the interest is exorbitant and that the suit is barred by limitation, estoppel etc. But, in para 7, he stated that he did not borrow the amount personally from the State Bank

of India (petitioner) but that he had an account with Manipur State Bank Limited on behalf of partners for carrying on contract works, that credits and debits were made from time to time, that no mutual account was struck and that the patta lands were kept as "security" but not by way of "mortgage". Then, in para 8 of his written-statement he purported to mention the real state of affairs, namely, (a) that he had no direct transaction with the petitioner, who was bound to prove that the mortgage bonds were legally acquired by it, (b) that Section 67-A of the Transfer of Property Act does not apply to the said transaction, (c) that there was no agreement for paying any compound interest, (d) that a sum of Rs. 10,500/- had been paid already, and (e) that the suit was premature as the petitioner filed the suit before the agreed time for payment of the dues.

5. On 28-1-1961, the learned Subordinate Judge passed an order that the written-statement was very vague and that the respondent should clarify his defence. On 4-7-1961, the respondent filed a statement of clarification dated 19-6-1961 clarifying paragraphs 3, 6 and 8 of his written statement. The respondent clarified, firstly, that he did not borrow any amount from Manipur State Bank Limited for his personal purpose but that he borrowed the amounts for the benefits of Engineering Corporation Ltd. Secondly, he stated that "he had intimated one Shri Chatterjee, D. O., State Bank of India, while taking over Manipur State Bank Ltd., that the amount in respect of account No. 1 would be cleared in 1959, that the amount in respect of account No. 2 would be cleared in 1960, that the amount due in respect of account No. 3 would be cleared in 1961 and that he paid Rs. 10,500/- accordingly in respect of account No. 1 in time.

6. On 9-4-1963, the Lower Court commenced trial of the suit. On 15-5-1963, the petitioner closed its case. The Sub-Judge passed an order on that date that, as no evidence was adduced by the respondent, the arguments would be heard on 18-5-1963.

7. The respondent filed Civil Revision Case No. 17 of 1963 on the file of this Court against the order mentioned above. This Court allowed the revision petition on 30-8-1963 and remanded the suit for hearing directing the lower Court to give an opportunity to the respondent to examine his witnesses.

8. Then, the respondent filed Judicial Misc. Case No. 11 of 1964 under Order 11, Rules 14 and 15, C. P. C. requesting the Court to call upon the petitioner to produce a list of debts including bad debts of the State Bank of Manipur Ltd. The lower Court rejected the peti-

tion on 24-2-1964 on the opposition of the petitioner and posted the suit to 4-4-1964 for examining witnesses of the respondent. The respondent filed another Revision Petition — Civil Revision Petition No. 8 of 1964, in this Court against the order dismissing the Judicial Misc. Case No. 11 of 1964. This Court held on 16-4-1965 that the respondent admitted in his pleadings that the debts due from him were taken over by the petitioner and that it was not necessary for the Court to order the petitioner to produce a list of debtors and of bad debts. This Court, therefore, dismissed the petition with costs.

9. The lower Court adjourned the suit again to enable the respondent to adduce evidence. But, on 16-9-1965 the respondent filed Judicial Misc. Case No. 75/65/73/66 under Order 6, Rule 16, C. P. C. to amend his written statement. The lower Court allowed the petition on 26-12-1966 subject to payment of costs of Rs. 20/- to the petitioner. The petitioner did not take the costs. By virtue of the order of the lower Court, the respondent filed amended written statement on 5-1-1967. Hence, the present Civil Revision Petition.

10. The amendments which were sought to be introduced in the written statement by the respondent are, firstly, that para 2 of the written statement is to be amended to show that "the plaint was not signed and verified by the petitioner according to law, that the plaint does not bear the common seal or any other official seal in accordance with the State Bank of India Act and Regulation 80 of the State Bank of India General Regulation, 1955". The second amendment is to introduce para 2A that "the petitioner has no locus standi to file the suit, inasmuch as, bad debts amounting to Rs. 1,67,636.72 nP. including the suit debts were not taken over by the petitioner and that the legal entity of the Manipur State Bank Ltd. still exists". The third amendment is an amendment to sub-para (a) of para 8 that "the State Bank of India did not acquire the bad debts".

The 4th amendment relates to sub-para (d) of para 8 that "assuming that the petitioner had acquired the bad debts of the Manipur State Bank Limited, the part payment of Rs. 11,300/- made by the petitioner was made under due influence resulting in a constructive trust in favour of the respondent under the provisions of Chapter IX of the Indian Trusts Act, 1882 and that the petitioner must hold the said amount for the benefit of the respondent". The 5th amendment is an amendment to sub-para (e) of para 8 that "even assuming but not admitting that the petitioner acquired bad debts of the Manipur State Bank Limited, including the suit debts" the petitioner is not entitled to

costs. The last amendment sought for is addition of sub-para (f) to para 8 that "the petitioner did not take over the entire accounts, business, assets or liabilities of the Manipur State Bank Limited as for instance certain shares of the Manipur State Bank Limited including those Nos. 28041-28060 issued to Shri M. Radhamohan Singh, retired First Subordinate Judge of Manipur & subsequently transferred by him to the respondent".

11. Under Order 6, Rule 17, C. P. C. the Court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. The object of the rule is that the Courts should get at and try the merits of the cases which come up before them and should consequently allow all amendments, which may be necessary for the purpose of determining the real question in controversy between the parties, provided that it can be done without causing injustice to the other side. The settled rule, with regard to amendment of pleadings, is that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid multiplicity of suits, provided that there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected, that the application is not mala fide and that no injustice is done to the other side. Vide Note 1 at pages 2211 and 2212 of AIR Commentaries on C. P. C. Vol. II, 7th edition. Vide also the various rulings relied on by the respondent's learned counsel viz., *Tika Sao v. Hari Lal*, AIR 1941 Pat 276. *Panchaksharam Pillai v. Rangaswami Pillai*, AIR 1948 Mad 332. *Ahmed Hossein v. Mt. Chembelli*, AIR 1951 Cal 262; *Kailash Singh v. Sheopuian Singh*, AIR 1952 Pat 380. *Goverdhan Bang v. Government of the Union of India*, AIR 1953 Hyd 212. *Amolakchand Mohanlal v. Firm of Sadhuram Tularam*, AIR 1954 Nag 200. *Chattanatha Karayalar v. Central Bank of India Ltd., Alleppey*, AIR 1955 Trav-Co 201. *Maruti v. Rangnath*, AIR 1955 Hyd 1 (FB). *M. B. Sirkar and Sons v. Powell & Co.*, AIR 1956 Cal 630. *Mahamood v. Ayissu*, AIR 1957 Ker 140. *Har Prasad v. Lala Sita Ram*, AIR 1958 All 36. *Jaidu Anantha Raghurama Arya v. Jaidu Bapanna Rao*, AIR 1959 Andh Pra 448. *Pangoti Mangarao v. Chinnadi Kishan Rao*, AIR 1965 Andh Pra 98. and *Nichhalbhai Vallabhai v. Jaswantlal Zinabhai*, AIR 1966 SC 997.

It is also evident that the amendment of pleadings is in the discretion of the Court, though Order 6, Rule 17, C. P. C. confers a very wide discretion on the

Courts. The powers are to be liberally exercised. But, the discretion must be exercised according to judicial principles and not in an arbitrary, vague or fanciful manner, so to cause injustice to the other side. The main considerations to be borne in mind in exercising the discretion are that the rules of procedure have no other aim than to facilitate the task of administering justice, that multiplicity of suits should be avoided and that the interests of substantial justice should be advanced even if a fresh suit on the amended claim is barred by limitations. An amendment merely clarifying the position put forward in the plaint or a written statement can be allowed. Vide Note 2 at pages 2213, 2214 and 2215 of AIR Commentaries, Vol II, 7th edition. Vide also the decisions relied on by the counsel for the respondent in this regard viz., *L. J. Leach and Co. Ltd. v. Jardine Skinner and Co.*, AIR 1957 SC 357, *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil*, AIR 1957 SC 363, *Firm Ghulam Mohi-uddin v. State of Jammu and Kashmir*, AIR 1961 J & K 6, *Nangsitombi Devi v. S. Nimai Sarma*, AIR 1965 Mani 53, *C. Subba Rao v. K. Brahmananda Reddy*, AIR 1967 Andh Pra 155, *Mahabir Prasad Singh v. Narmadeshwar Prasad Singh*, AIR 1967 Pat 326, *A. K. Gupta & Sons Ltd. v. Damodar Valley Corporation*, AIR 1967 SC 96, and my judgment in *Ballardie, Thompson & Mathews v. Kshetrimayum Tomba Singh*, in Civil Revn. Case No. 22 of 1966 (1967 Mani LJ 371).

12. It is also equally well settled that the falsity of the case in the amendment cannot be considered at this stage without allowing the amendment and framing an issue thereon and allowing both sides to adduce evidence. Vide Note 2 at page 2216 of AIR Commentaries on C. P. C. Vol. II, 7th edition. Vide also the decisions relied on by the respondent's counsel *Krishna Rao v. Gangadeswarar Temple*, AIR 1949 Mad 433, *Dharmalinga Chetti v. A. M. Krishnaswami Chetty*, AIR 1949 Mad 467, *Abdul Rahim v. Abdul Jabbar*, AIR 1950 Cal 379, AIR 1953 Hyd 212, and *Damodara Sastry v. Sanjiviah*, AIR 1955 Mys 141.

13. So far as the amendment of the written statement is concerned, an amendment setting up a case which is totally inconsistent with the original case set up will not be allowed, if it is unjust to the opposite side to allow it. Similarly, where the proposed amendment of the written statement will have the effect of displacing plaintiff's suit, a Court will refuse the application to amend the written statement. A defendant, who has deliberately and under no mistake or misapprehension admitted a material fact in his written statement, cannot be allowed at a later stage to change his front and make out a new case by denying that fact.

There is no provision in the C. P. C. to enable the Court to permit the substitution of one written statement in toto for another already filed. Vide note 4 at pages 2224, 2225 and 2226 of AIR Commentaries on C. P. C., Vol. II, 7th Edition and sub-note (2) of note 4 at page 729 of Mulla's C. P. C. Vol. I, 13th edition, *Steward v. North Metropolitan Tramways Co.* (1885) 16 QBD 178, *Steward v. North Metropolitan Tramways Co.* (1886) 16 QBD 556, *Moss v. Malings*, (1886) 33 Ch D 603, *Loutfi v. Czarnikow Ltd.*; 1952(2) All ER 823n, AIR 1957 SC 363 and my judgment in *Elangbam Mangi Singh v. Ngangbam Tombi Singh*, AIR 1967 Mani 28. Vide also AIR 1955 Mys 141, AIR 1959 Andh Pra 448 and *Shriram Sardarmal v. Gourishankar*, AIR 1961 Bom 136, referred to by the respondent's counsel.

14. Thus, the principles, which can be gathered from the above rulings and which are being followed by the Courts when leave to amend should be refused, can be summed up succinctly as stated in Note 4 at page 728 of Mulla's C. P. C., Vol. I, 13th edition:

"(1) Where the amendment is not necessary for the purpose of determining the real questions in controversy between the parties, as where it is

(i) merely technical; or

(ii) useless and of no substance;

(2) Where the plaintiff's suit would be wholly displaced by the proposed amendment,

(3) Where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time,

(4) Where the amendment would introduce a totally different, new and inconsistent case, and the application is made at a late stage of the proceedings, and

(5) Where the application for amendment is not made in good faith.

15. The amendments sought for will have to be judged bearing the above principles in mind. The first amendment sought for relates to para 2 of the written statement, wherein the respondent wants to set out certain facts to show that the plaint was not properly signed or verified, that it does not bear the common seal of the State Bank of India or any other official seal and that, therefore the plaint is not valid. Para 2 of the written statement is very vague. Issue 1 raised the question that "the suit is not maintainable due to multifariousness" and not due to any other reason. The petitioner had ample time from 1961 to 1965 when he could discover all these technical objections. But, he did not discover them due to alleged ignorance of law on his part, which is no excuse. He did not take up any such plea even in his clarification fil-

ed in the lower Court on 4-7-1961. An omission to sign a plaint properly under Order 6, Rule 14, C. P. C. is a mere irregularity which is a curable one. The amendment is sought for not to determine the real question in controversy between the parties but to drag on the proceedings and relates to mere technicalities and within the meaning of (d) of para 14(1) supra. This is a belated amendment, which will seriously prejudice the petitioner and may even displace the plaint. So, leave to amend para 2 of the written statement must be refused.

16. The next amendment relates to the allegation of the respondent that the petitioner did not take over bad debts amounting to Rs 1,67,636 72 nP. as on 24-1-1959. The respondent wants to introduce this plea in paragraph 2(A), latter portion of sub-para (a) of para 8 of the written statement, earlier portion of sub-para (d) of para 8 and the earlier portion of sub-para (e) of para 8. Issue No. 2 already framed by the lower Court raises the question of the petitioner's locus standi to file the suit. The respondent filed a letter received by him from the State Bank of India, Calcutta Office dated 12th June, 1964. It was stated therein that one Shri R. K. Sanahal Singh, Taxation Officer, Manipur Administration, Imphal, was appointed as the Manager of the Manipur State Bank Ltd. for the purpose of winding up its affairs and distributing its assets (except those assets transferred to the State Bank of India).

It was also mentioned in the letter that the State Bank of India acquired the entire business of the Manipur State Bank Limited against payment of compensation in accordance with the scheme sanctioned by the Central Government. So, this amendment constitutes an additional approach to the plea of the respondent that *the petitioner has no locus standi to file the suit against him*. The nature of the defence is not thereby altered. The petitioner is not prejudiced, inasmuch as, the issue No. 2 throwing the burden on him to show that he has locus standi to file a suit was already framed on the basis of the original pleadings. So, this amendment will have to be allowed.

17. The next amendment relates to the latter portion of sub-para (d) of para 8 of the written statement. The respondent wants to allege that the part payment of Rs. 11,300/- made to the petitioner was made under undue influence exercised by the petitioner's Bank resulting in constructive trust in favour of the respondent under the provisions of Chapter IX of the Indian Trusts Act, 1882 and that, therefore, the petitioner must hold the said sum for the benefit of the respondent. It is seen that this is a totally different plea of the respondent altogether. He

wants to make out a different case. In para B of his clarification dated 19-6-1961, he admitted that when Manipur State Bank was taken over by the petitioner, the respondent intimated Mr. Chatterjee, D. O., State Bank of India, that he would clear the amount due under Account No. 1 in 1959, the amount under Account No. 2 in 1960, the amount under Account No. 3 in 1961 and that accordingly he paid Rs 10,500/- towards account No. 1 in time. This Court considered this aspect of the case in Civil Revision Case No 8 of 1964 and held that the respondent admitted that the debts due from him were taken over by the petitioner.

In view of the allegations in para (B) of the clarified written statement dated 19-6-1961, that he made the payment of Rs 10,500/- in respect of Account No. 1 before the agreed date, the respondent cannot now be permitted to set up a new case that he made the payment under undue influence and that there is a resulting trust in his favour. This is not only a new case but it is also inconsistent with the earlier written statement filed by the respondent. The learned counsel for the respondent, argued that in case the petitioner is found to be not entitled to recover the suit amount, then he will have to work out his remedy to recover Rs. 10,500/- by way of a separate suit and that to avoid multiplicity of proceedings this amendment should be allowed. But, this is not correct. The amount of Rs 10,500/- (if really paid) would go in discharge of Account No. 1, and the persons really entitled to the balance will recover the balance only. The respondent cannot be permitted to change his front by allowing him to introduce a totally different, new and inconsistent case at the late stage of the proceedings. The application so far as this is concerned was not made in good faith and has to be rejected.

18. The last amendment prayed for is addition of sub-para (f) in para 8 of the written statement that the petitioner did not take over the shares No. 28041-28060 issued to Shri M. Radhamohan Singh, retired First Subordinate Judge of Manipur, said to have been transferred by him to the respondent. This is quite irrelevant for the purpose of the suit. If the shares of somebody else were not taken over by the petitioner, it is for him or his alleged assignee, namely, respondent to work out separately his alleged rights regarding the alleged shares. This has no bearing on the claim made by the petitioner or the defence of the respondent regarding the suit-debts.

19. The Subordinate Judge did not discuss the law bearing on the amendments prayed for. He disposed of the petition in a laconic manner.

20. In the result, the revision petition is allowed in part and amendment sought for regarding para 2, the last portion of sub-para (d) of para 8 beginning from "that the part repayment of Rs. 11,300 ... prejudiced" and sub-para (f) of para 8 are disallowed and the order of the lower Court is modified accordingly. I direct the parties to bear their respective costs in this revision petition.

Petition partly allowed.

AIR 1970 MANIPUR 7 (V 57 C 2)

R. S. BINDRA, J. C.

Nurmahamed and others, Petitioners v. Md. Abdul Karim, Respondent.

Civil Revn. Case No. 3 of 1969 D/- 4-8-1969 against order and judgment of Dist. J.; Manipur D/- 19-11-1968.

(A) Evidence Act (1872), Ss. 65, 63 — Secondary evidence — Copy of original letter addressed by Government to Commissioner prepared privately by the party at time of inspection of relevant file is not secondary evidence of the original letter — Document is inadmissible in evidence and no reliance can be placed on it — If party is unable to procure in Court the original letter, it can only be proved by producing certified copy.

(Para 5)

(B) Evidence Act (1872), S. 35 — Manipur Land Revenue and Land Reforms Rules (1961), Rr. 66, 67, 56 — Dag chithas prepared under R. 66 — They are documents in nature of revenue records — Cannot be declared inadmissible on ground of non-publication for purpose of attestation.

Dag chithas prepared under Rule 66 of the Manipur Land Revenue and Land Reforms Rules 1961, constitute an important basic step in the preparation of the 'record-of-rights', which expression, according to Rule 56, consists of Jamabandi and tenants khatian. The Dag Chithas without dispute do not form part of record-of-rights. But equally indisputably the Dag Chithas are documents in the nature of revenue records and they are prepared by public servants in discharge of their statutory functions and as such they are relevant under Section 35 of the Evidence Act. They cannot be declared inadmissible because of their non-publication for purpose of attestation.

(Para 8)

(C) Civil P. C. (1908), S. 115(c) — Lower Courts wrongly taking into consideration inadmissible document and rejecting unjustifiably relevant and admis-

sible document — Courts, held, committed illegality and material irregularity in exercise of their jurisdiction — Revision petition, held, maintainable. Case law discussed. (Para 9)

(D) Civil P. C. (1908), O. 39, R. 1 — Suit for permanent injunction restraining defendant from interfering with plaintiff's possession over certain land — Temporary injunction — Neither title of plaintiff to land nor its possession over land proved — According to allegations of plaintiff it had entered into possession of land only 23 days before institution of suit — Defendant's contention that they had been in possession for a period of 4 to 5 years substantiated by entries in copies of Dag Chithas produced by them — Held, no case for issuing temporary injunction was made out.

(Paras 10, 11)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 153 (V 53)=	
(1966) 1 SCR 102, Pandurang	
Dhondi v. Maruti Hari	9
(1964) AIR 1964 All 302 (V 51),	
Hira Lal v. Hari Narain	9
(1963) AIR 1963 Punj 104 (V 50)=	
ILR (1962) 2 Punj 597, Union of	
India v. Bakshi Amrik Singh	9
T. Bhubon Singh, for Petitioners; A.	
Nilamani Singh, for Respondent.	

ORDER:— One Abdul Karim filed a suit against Nurmahamed and 11 others seeking a decree for permanent injunction restraining the latter from interfering with his possession over certain land described in the plaint. The suit was instituted by Abdul Karim in his capacity as Chairman of Usoipokpi Pisciculture Co-operative Society Ltd., hereinafter called the Society. Simultaneously with the institution of the suit, Abdul Karim moved an application under Rules 1 and 2 of Order 39 and Section 151 of the Civil Procedure Code for securing temporary injunction restraining the defendants from interfering with the possession of the Society over the land until the disposal of the suit. That application was granted by Shri M. C. Ray, Subordinate Judge, Manipur, by his order dated 5th August, 1968. Aggrieved by that order the defendants filed an appeal in the Court of the District Judge who happened to reject the same on 21-11-1968. In the present revision petition filed by the defendants, they challenge the correctness of the orders made by the trial Court and the appellate Court.

2. The facts of the case as set out in the plaint are that the Fishery No. 231 at Usoipokpi had been leased out by the Government to Longjam Tombi Singh for the period 15-9-1965 to 31-3-1968. Abdul Karim, the plaintiff, worked as an Agent of that Tombi Singh for manag-

ing the Fishery. Some 20 persons living in the vicinage of the Fishery threatened to enter into possession of some land forming part of the Fishery and to overcome that threat Tombi Singh aforementioned and Abdul Karim instituted Title Suit No. 3 of 1966 claiming permanent injunction against the said persons. The plaintiffs also sought temporary injunction during the pendency of the suit and the Court granted that prayer. Subsequently, on 26-4-1967, the Government addressed a communication to the Deputy Commissioner and the Settlement Officer approving that the Fishery be settled with the Society for a period of 5 years with effect from 1-4-1968, that 50 paris of land covered by the Fishery be de-reserved, and that 30 paris out of those 50 paris should be allotted to the Society. It was pleaded further that the Society paid the Fishery revenue and assumed possession over the Fishery as also 30 paris of land with effect from 1-4-1968. On 20th of April 1968, and on the succeeding dates, the defendants of the instant suit No. 23 of 1968 tried to disturb the possession of the Society over 30 paris of land aforementioned. It is to meet that development that Abdul Karim was forced to file the suit out of which this revision has arisen.

3. The defendants contested the suit and traversed the pleadings of the plaintiff Abdul Karim. Their defence was that they had been in occupation of the land for a period of 4 to 5 years and so the prayer for temporary injunction made by the plaintiffs had no meaning in the context of their possession over the land. It was denied that the Government had settled any part of the land out of the Fishery area with the Society. The defendants also placed on record some copies of the Dag Chithas to support their assertion that they had been in possession of the land for a long time.

4. The trial Court and the first appellate Court held the Dag Chithas to be inadmissible in evidence. At the same time they admitted the document marked Ext. A/3 filed by the plaintiff and on the basis thereof reached the conclusion that the Government had settled 30 paris of land with the Society.

5. After analysing the arguments addressed at the bar I have reached the conclusion that the Courts below were not justified in either placing reliance on document Ext. A/3 or in rejecting the copies of the Dag Chithas. It was conceded by Shri A. Nilamani Singh, representing the plaintiff Abdul Karim, that Ext. A/3 is not a certified copy of the original letter alleged to have been addressed by the Government to the Deputy Commissioner. In reply to a Court question Shri A. Nilamani Singh stated that the document Ext. A/3 is a copy

prepared privately from the original at the time of inspection of the relevant file by someone on behalf of Abdul Karim. If this is the true nature of the document, it is obviously not admissible. Firstly, there is no guarantee that it is a correct copy of the original. In the second instance, the only legal way of proving the letter would be to produce a certified copy thereof if the plaintiff, for some reason or another, is unable to procure in Court the original letter. As at present, the document has no value in the eye of law and so the Courts below were altogether unjustified in placing reliance on it.

6. A perusal of the document reveals that the Government had reached the tentative decision that the Fishery be leased out to the Society for a period of 5 years with effect from 1-4-1968, that 50 paris of land out of the Fishery area should be de-reserved, and that 30 paris out of that land be allotted to the Society. In the penultimate para of the letter, the Secretary, who signed the letter, made a request to the Deputy Commissioner to take steps to implement the decision reached by the Government. We have no evidence that that decision has been implemented and the Society placed into possession of 30 paris of land. In this back ground the Courts below, it is evident, were wrong in assuming that the Fishery has been leased out to the Society and 30 paris of land allotted to it.

7. The Dag Chithas were not taken into consideration by the trial Court for the reason that they are not admissible in evidence since they had not been duly published for the purposes of attestation and as such the presumption of correctness attaching to record of rights cannot be claimed for them, while they were ruled out by the learned District Judge on the footing that the entries in them did not establish that they pertain to the land in dispute. A perusal of the trial Court's order would reveal that it was not represented before it that the Dag Chithas do not relate to the land in dispute. In this Court such an objection was raised by Shri A. Nilamani Singh, but when Shri T. Bhupon Singh, representing the defendants petitioners, examined the documents in Court Shri A. Nilamani Singh found it difficult to sustain his objection. Therefore, the appellate Court's rejection of the documents for the reason stated by it cannot be justified.

8. The trial Court was also wrong in not taking the documents into consideration on the score that they were inadmissible because of their non-publication for the purpose of attestation. The Dag Chithas are prepared under Rule 66 of the Manipur Land Revenue and Land Reforms Rules 1961, hereinafter called the Rules. Sub-rule (1) of that Rule

provides that the Survey and Settlement Officer shall get prepared Dag Chitha in Form 7 through the Revenue Officer. The latter Officer, it is stated further shall prepare the Dag Chitha after consulting the previous records and also after making local investigation. If there is any dispute, the fact shall be noted in the remarks column and that dispute shall be referred to the Survey and Settlement Officer. Sub-rule (2) of the Rule requires that the entries in the Dag Chitha shall be explained to the persons concerned by the Survey and Settlement Officer, and that the latter shall enquire into the disputes referred to in sub-rule (1) as also into such other disputes relating to entries in the Dag Chitha as may be raised at the spot during the course of local investigation. This inquiry, sub-r. (2) enjoins, shall be in the summary manner and the disputes shall, as far as possible, be decided on the basis of actual possession. Rule 67(1) provides that after the Dag Chitha has been prepared but before the record attestation begins the Survey and Settlement Officer shall cause a draft Jamabandi to be drawn up. "The fields which have been found in the possession of each land-holder and the classification of each field as entered in the Dag Chitha, the sub-rule states further, "shall be written but at that stage there shall be no entry under the head 'revenue' in the draft jamabandi." Draft tenants' khatiana shall also be prepared, the sub-rule prescribes, from the Dag Chitha.

It is thus apparent from these Rules 66 and 67 that draft Jamabandi and Khatian have for their foundations the entries in the Dag Chithas. Therefore, Dag Chithas constitute an important basic step in the preparation of the 'record-of-rights', which expression, according to Rule 56, consists of Jamabandi and tenants khatian. The Dag Chithas without dispute do not form part of record-of-rights. But equally indisputably the Dag Chithas are documents in the nature of revenue records and they are prepared by public servants in discharge of their statutory functions and as such they are relevant under Section 35 of the Evidence Act. That section enacts that an entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact. It would, therefore, follow that the trial Court had gone wrong in declaring the Dag Chithas as inadmissible in evidence.

9. In wrongly admitting Ext. A/3 and unjustifiably rejecting the Dag Chithas, the Courts below committed serious irregularity and material illegality in exercise

of their jurisdiction, and as such this Court can certainly interfere in exercise of its power under Section 115 C. P. C. In this connection I invite reference to the case of Hira Lal v. Hari Narain, AIR 1964 All 302, wherein it was held that, when in dismissing an application of the auction-purchaser under Order 21, Rule 97, of the Civil Procedure Code, the Court below did not properly approach the case and in arriving at the result in favour of the objector omitted to take into consideration several pieces of evidence placed on the record by the auction-purchaser and took into consideration materials which it could not legally do, the Court shall be taken to have acted with material illegality and irregularity vitiating the result and justifying interference in revision by the High Court. Shri A. Nilamani Singh, appearing for Abdul Karim, cited the case of Pandurang Dhondi v. Maruti Hari, AIR 1966 SC 153, to support the contention that the present revision petition is not maintainable for none out of the three conditions mentioned in Section 115 C. P. C. is proved. However, on going through the report I find that nothing observed by the Supreme Court stands in the way of instant revision petition. I think our case clearly falls within the purview of clause (c) of Section 115 because the Courts below have committed an illegality and have acted with material irregularity in the exercise of their jurisdiction by ignoring relevant and admissible Dag Chithas and by taking into consideration the document Ext. A/3 which was clearly not admissible. It was held in the case of Union of India v. Bakshi Amrik Singh, AIR 1963 Punj 104, that unproved copies, in which category Ext. A/3 falls, are not admissible even for the purpose of granting temporary injunction. Hence, I hold that the revision petition filed by the defendants is maintainable under Section 115 of the Civil Procedure Code.

10. On merits, the revision petition must succeed. Neither the title of the Society to the land nor its possession over the land is proved on the record. If the Government had allotted the land to the Society, as alleged in the plaint, it would not have been difficult for the Society to place on record a copy of the order of allotment. The suit was instituted on 23-4-1968 and the Society is said to have entered into possession of the land earlier on 1-4-1968. If for more than 15 months, that the suit has now been pending the Society could not produce in Court the order of alleged allotment, it is safe to assume that no such allotment has so far been made. It is the contention of the defendants-petitioners that they had been in possession for a period of 4 to 5 years by the date they were summoned in the trial Court. This claim to possession is

substantiated by the entries in the copies of Dag Chithas produced by them. Further, it will be noted that according to the allegations of the Society it had entered into possession of the land only 23 days before the suit was instituted. It is not the case of the Society that the Government had placed it into possession of the land. The previous possession over the land, according to the Society, was that of Tombi Singh. It is correct that Abdul Karim is said to have been managing the land attached to the Fishery on behalf of Tombi Singh. However, the suit has been instituted not by Abdul Karim in his personal capacity but in his capacity as the Chairman of the Society. There being no data to satisfy this Court that either Tombi Singh or his Agent had delivered possession of the land to the Society, I do not feel safe in holding that possession over the land at present is that of Society and not of the defendants petitioners. If the Society was not in possession of the land on the date of the institution of the suit, as prima facie appears to be the situation, no case for issuing temporary injunction is made out.

11. As a result, I allow the petition and on setting aside the orders of the trial Court and of the appellate Court I reject the prayer for temporary injunction made by the Society. The petitioners shall get costs in this Court as also in the two Courts below. Advocate's fee Rs. 25/-.

Petition allowed

AIR 1970 MANIPUR 10 (V 57 C 3)

R. S. BINDRA, J. C.

Bansidhar Agrawala and others, Petitioners v. Purnananda Sharma and others, Respondents.

Civil Revn. Case No 29 of 1966 D/- 11-7-1969 against order of Dist., J., Manipur D/- 8-8-1966.

(A) Civil P. C. (1908), O. 9, Rr. 9, 13, O. 17, Rr. 2, 3, S. 115—Suit of P dismissed in default on 19-5-1961 under O. 17 R. 3—In appeal by P, appellate Court declared in its orders dated 11-2-1963 that suit should be considered to have been dismissed under O. 17, R. 2 and not under O. 17, R. 3 and directed that P should be given opportunity to file application for setting aside that order—P filed application under O. 9 R. 9 on 6-3-1963 before trial Court—Application was rejected as barred by limitation—Appeal before District Judge was however allowed—On revision held that P's suit stood restored by order dated 11-2-1963 and must be decided on merits—There remained no

necessity for P to approach trial court with application under O. 9, R. 9 but limitation however commenced from 19-5-1961 and not from 11-2-1963 only—Interference in revision is to be made for advancing and not for defeating ends of justice AIR 1930 Lah 417 (2) Foll.

(Paras 3, 4, 5, 6)

(B) Limitation Act (1908), S. 5, Art. 165—S. 5 does not apply to applications mentioned in Art. 165.

(Para 3)

Cases Referred: Chronological Paras (1930) AIR 1930 Lah 417 (2) (V 17)=

127 Ind Cas 215, Hazara Singh v.

Dittaram Luta Ram

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R K. Manisana Singh for Petitioners; A. Nilamani Singh, for Respondent No. 1.

ORDER:—This revision petition by Bansidhar Agrawala and 11 others is directed against the order dated 8-7-1966 of the District Judge, Manipur, by which he allowed the appeal filed against the order of the Munsiff by which the latter had rejected the application of the present respondent Purnananda Sharma made under Order 9, Rule 9 of the Code of Civil Procedure, hereinafter called the Code, for restoration of his suit dismissed on 19-5-1961.

2. The facts bearing on this revision petition are that the suit of Purnananda Sharma was dismissed in default on 19-5-1961 under Rule 3 of Order 17 of the Code. Purnananda Sharma filed an appeal against the decree of dismissal and it was heard by the Additional District Judge Shri O. Thambal Singh. The appellate Court declared in its order dated 11-2-1963 that the suit should be considered to have been dismissed not under Rule 3 but under Rule 2 of Order 17 of the Code. It, therefore, set aside the decree dismissing the suit and simultaneously directed that the plaintiff should be given an opportunity to move an application for setting aside the order dismissing the suit in default. Pursuant to that direction Purnananda Sharma filed an application on 6-3-1963 in the Court of the Munsiff under Order 9, Rule 9 of the Code. That application was rejected on the score that it was time barred under Article 163 of the Indian Limitation Act of 1908.

In the opinion of the learned Munsiff, it was obligatory on Purnananda Sharma to move the application for setting aside the dismissal of the suit in default within 30 days and that the direction given by the appellate Court in its order dated 11-2-1963 that the plaintiff should be given an opportunity to make an application for restoration of the suit could not extend the period of limitation. Purnananda Sharma challenged the verdict of the Munsiff by taking an appeal to the Court of the District Judge. The District Judge accepted the appeal, set aside the order dated 19-5-1961, and restored the

suit to the file of the Munsiff. The District Judge held, while allowing the appeal, that the order of dismissal dated 19-5-1961 was merged in the order dated 11-2-1963, by which the Additional District Judge had set aside the order dated 19-5-1961, and so the period of 30 days for making the application under Order 9, Rule 9 of the Code had commenced to run from 11-2-1963 and not 19-5-1961. In the present revision petition the validity of this order of the District Judge is assailed.

3. There is no contest between the parties' counsel on the points that the Munsiff had gone wrong in dismissing the suit on 19-5-1961 under Rule 3 of Order 17 of the Code and that in the eye of law that dismissal was under Rule 2 of that Order. Shri Manisana Singh, representing the petitioners, urges in this Court, as had been done in the Courts below, that the application made by Purnananda Sharma under Order 9, Rule 9 before the Munsiff was barred by limitation since it was presented more than 30 days after the dismissal of the suit on 19-5-1961. He submits further that the direction given by the Additional District Judge in his order dated 11-2-1963 that Purnananda Sharma should be given an opportunity to make an application for restoration of the suit could not have extended the period of limitation. I agree that the period of limitation prescribed in Article 163 by the legislature could not have been extended by an order, implied or express, of the Additional District Judge despite the fullness of heart to relieve Purnananda of the injustice occasioned to him by the erroneous order of dismissal dated 19-5-1961.

Shri Nilamani Singh, the counsel for Purnananda Sharma, has not been able to convince me that the finding of the District Judge that the dismissal order dated 19-5-1961 had merged into the appellate order dated 11-2-1963 of the Additional District Judge and as such the period of limitation for an application under Order 9, Rule 9 should be counted from the latter date is sound in law or principle. Article 163 of the Limitation Act prescribes that the period for an application to set aside an order of dismissal in default shall begin from "The date of the dismissal". No authority has been cited before me to support the proposition that the period of limitation mentioned in column 2 of Article 163 can be extended by any order made in appeal filed against the dismissal of the suit in default. It may be appropriately mentioned that Section 5 of Limitation Act does not apply to applications mentioned in Article 163 of the Act. Therefore, I am unable to agree with the District Judge that the period of limitation for the application made by Purnananda under Order 9,

Rule 9 of the Code had commenced from 11-2-1963 and not from 19-5-1961.

4. Nevertheless, the present revision petition, in my opinion, merits dismissal for I feel satisfied that the suit of Purnananda stood restored by the order dated 11-2-1963 of the Additional District Judge and hence has to be decided on merits. It is for the reason that the decree of dismissal dated 19-5-1961 was specifically quashed by the appellate order dated 11-2-1963 and so there remained no necessity for Purnananda to approach the trial Court with an application under Order 9, Rule 9 for setting aside the dismissal in default. The only order of the trial Court which operated against Purnananda was the one dated 19-5-1961 and since the decree drawn on the basis thereof had been set aside on 11-2-1963, there was no hurdle in the way of Purnananda in calling upon the trial Court to proceed to try the case on merits or in the way of the Court to adopt that course.

The direction given in the appellate order that Purnananda should get an opportunity to make an application for vacating the dismissal in default was a mere surplusage in the context that the decree of dismissal had been specifically set aside, and as such Purnananda could have ignored that direction and that too with impunity. Therefore, I agree with the learned District Judge, though for different reasons, that the learned Munsiff was not justified in reaching the conclusion, while dismissing the application under Order 9, Rule 9, that the order dated 19-5-1961 dismissing the suit was still operative.

5. The matter in controversy can be looked at from another standpoint as well. It is well settled that interference in revision is discretionary with the Court unlike in appeal. It is equally well settled that interference in revision is to be made only for advancing and not defeating the ends of justice. In dismissing the suit on 19-5-1961 under Rule 3 of Order 17, the trial Court had perpetrated a great injustice to Purnananda. The appellate Court tried to undo that injustice by its order dated 11-2-1963 by quashing the decree dated 19-5-1961, but at the same time it condemned Purnananda, without justification, to the task of moving an application under Order 9, Rule 9, of the Code. It should have been clear to the appellate Court that Section 5 of the Limitation Act did not apply to applications made under Order 9, Rule 9 and that by 11-2-1963, the date of the appellate order, the period of limitation prescribed by Article 163 of the Limitation Act for making such an application had run out. Therefore, the course suggested by the appellate Court was clearly unavailing to Purnananda.

While dismissing the application made by Purnananda under Order 9, Rule 9, the trial Court recorded the finding that he (Purnananda) was seriously ill on 18th and 19th of May, 1961, and so there was justification for his non-appearance in Court on 19th. This finding of the trial Court was not challenged before the District Judge, and Shri Manisana Singh has been very fair in conceding that, that finding has to be accepted by this Court, being a finding of fact. In the background of the circumstances just reproduced, it would be perpetrating injustice to Purnananda if I were to interfere with the order of the District Judge. And sitting in revision, I am most reluctant to adopt that course.

6. I may usefully invite attention to the observations of the High Court of Lahore in the case of Hazara Singh v. Dittaram, AIR 1930 Lal 417(2), in support of the conclusion recorded above. The facts of that case were that a creditor made a petition under Section 9 of the Provincial Insolvency Act, hereinafter called the Act, which appeared to be barred by time. The District Judge admitted the petition by extending the period of limitation under Section 5 of the Limitation Act read with Section 78 of the Act. The latter section gives power to the Court to grant extension of time in respect of "appeals and applications" and so in terms it did not apply to a petition made under Section 9 of the Act. Despite that legal hurdle, the High Court refused to interfere with the order of the District Judge extending time in favour of the creditor on the score that it was not a fit case for interference in revision.

The High Court observed that interference in revision is discretionary and that in face of the circumstances established in the case "interference is likely to work not in the interests of justice, but rather against it." The facts of this Lahore case obviously bear a close parallel to those of the case in hand. Here, too, the application under Order 9, Rule 9 was barred by time and the District Judge had extended that time on the basis already mentioned above. I am, therefore, not inclined to interfere with the discretion exercised by the learned District Judge because the interference by this Court would thwart rather than advance the ends of justice.

7. For the reasons given above, the revision petition fails and so I reject the same. However, since the petitioners had a good case to argue in this Court, I have decided to leave the parties to bear their own costs and order accordingly. Advocate's fee Rs. 25/-.

8. Announced.

Petition rejected.

AIR 1970 MANIPUR 12 (V 57 C 4)

R. S. BINDRA, J. C.

Thokchom Nimai Singh and another, Petitioners v. Thangba Kom and another, Respondents.

Criminal Ref. Case No. 12 of 1969, D/- 5-8-1969 from order of Addl. S. J.; Manipur in Cri. Revn. Case No. 46 of 1966.

(A) Criminal P. C. (1898), S. 145(5) — Cancellation of preliminary order — Satisfaction of Magistrate that dispute does not exist and did not exist.

The proceedings initiated under Section 145 can be dropped only in terms of sub-section (5) thereof. That sub-section provides that nothing in the section shall preclude any party required to attend the Magistrate's Court, or any other person interested, from showing that no dispute exists or has existed. In such a case, the Magistrate shall cancel his preliminary order, and all further proceedings thereon shall be stayed. But the preliminary order can be cancelled only if the Magistrate feels satisfied that no dispute concerning the land involved exists at present or had existed before. Mere representation of a party is not enough. It is the finding of the Magistrate that the dispute does not exist at present or had not existed before which alone can provide him the legal sanction for cancellation of the preliminary order. (Para 5)

(B) Criminal P. C. (1898), S. 145 (5), (6) and (4) — Proceedings dropped — One party prohibited to interfere with possession of other — Order of Magistrate is illegal.

The apprehension of breach of the peace being the basis of the jurisdiction of the Magistrate to proceed under Section 145, he cannot make an order of the nature mentioned in sub-sections (4) and (6) if he is satisfied that there is no such likelihood and as a consequence he drops the proceedings under sub-section (5). With the cancellation of the preliminary order, the Magistrate becomes *functus officio* except, to pass orders necessary to wind up the proceedings, and so he ceases to have jurisdiction to pass an order that one of the two contestants should not interfere with the possession of the other over the property in dispute. In other words, the Magistrate cannot simultaneously act both under sub-section (5) and under sub-sections (4) and (6). Once the Magistrate cancels the preliminary order, it befits him to ensure that none out of the parties arrayed before him gets an advantage at the expense of another. The ideal step to take on cancellation of preliminary

order under sub-section (5) would be to restore the parties to the status quo ante. (Para 6)

Petitioners in Person; Respondent No. 1 in Person; N. Ibotombi Singh Public Prosecutor, for Respondent No. 2.

ORDER:— In this reference under section 438 of the Criminal Procedure Code, hereinafter called the Code, the learned Additional Sessions Judge recommends that the order dated 16-6-1966 by which the sub-divisional Magistrate, Bishenpur, dropped the proceedings under Section 145 of the Code and lifted the attachment in favour of the first party with the direction that the opposite party should not interfere with the possession of the first party over the land in dispute should be quashed.

2. The facts of the case may first be briefly summarised. On 22-11-1965 the Officer-in-charge of the Police Station, Bishenpur, reported to the sub-divisional Magistrate that there was serious probability of "clash and blood-shed" between the two parties respecting their right to harvest the crop standing on some patta land in the village. The Magistrate after studying the report and examining the Officer-in-charge of the Police Station directed that proceedings under Section 145 be drawn up and he simultaneously attached the land in dispute. The two parties involved in the conflict were summoned and in course of time they put in their written statements. On 16-6-1966 only the first party was present before the Magistrate and that party prayed that the proceedings be dropped inasmuch as the second party had failed to put in appearance on no less than four hearings. The learned Magistrate was of the opinion that, the repeated absence of the second party was indicative of the fact that they had "no more interest in the disputed land". He, therefore, dropped the proceedings and lifted the attachment "in favour of the first party" and gave the direction that the second party shall not interfere with the peaceful possession of the first party over the land in dispute. The second party having felt aggrieved with the Magistrate's order dated 16-6-66 took the matter in revision before the Sessions Court.

3. The revision petition came up for hearing before Shri P. N. Roy, the Additional Sessions Judge. He reached the conclusions, as gathered from his reference made to this Court, that the Magistrate had no jurisdiction to drop the proceedings without first recording the finding that he felt satisfied that, there was no apprehension of breach of the peace, that such a finding was never recorded by the Magistrate, and that the Magistrate had acted illegally in lifting the attachment and directing the second

party not to interfere with the possession of the first party over the land. In view of these legal infirmities in the order of the Magistrate, the Additional Sessions Judge was of the opinion that it could not be sustained and so he recommended that it should be set aside.

4. Unfortunately, the counsel for none of the parties to the dispute has turned up in this Court today. Only Shri N. Ibotombi Singh, the Government Advocate, has put in appearance on behalf of the Union Territory. Shri Ibotombi Singh supports the recommendation made by the learned Additional Sessions Judge in its entirety.

5. The proceedings initiated under Section 145 can be dropped only in terms of sub-section (5) thereof. That sub-section provides that nothing in the section shall preclude any party required to attend the Magistrate's Court or any other person interested, from showing that no dispute exists or has existed. In such a case, the section states further, the Magistrate shall cancel his preliminary order, and all further proceedings thereon shall be stayed. It is apparent that the preliminary order can be cancelled only if the Magistrate feels satisfied that no dispute concerning the land involved exists at present or had existed before. Mere representation of one party to the case that dispute does not exist or had never existed cannot constitute justification for cancellation of the order. It is therefore, the finding of the Magistrate that the dispute does not exist at present or had not existed before which alone can provide him the legal sanction for cancellation of the preliminary order. In the instant case the Magistrate did not record the finding that the dispute between the parties had either never existed or had ceased to exist. Hence, it is not possible to uphold the validity of the cancellation of the preliminary order.

6. The Additional Sessions Judge was very right in his observation that the part of the impugned order by which the attachment was lifted in favour of the first party and direction was issued to the second party not to interfere with the peaceful possession of the first party over the land in dispute is open to more serious objection. This part of the order apparently partakes the nature of a final order passed under sub-sections (4) and (6) of Section 145 after conclusion of the enquiry. However, if the Magistrate, had dropped the proceedings under Section 145 on the basis that the dispute between the two parties had come to an end, he had no jurisdiction to make an order of the nature which is normally passed under sub-sections (4) and (6) of Section 145. The apprehension of breach of the peace being the basis of the jurisdiction of the Magistrate to proceed under Sec-

tion 145, he cannot make an order of the nature mentioned in sub-sections (4) and (6) if he is satisfied that there is no such likelihood and as a consequence he drops the proceedings under sub-section (5). With the cancellation of the preliminary order, the Magistrate becomes *functus officio* except, of course, to pass orders necessary to wind up the proceedings, and so he ceases to have jurisdiction to pass an order that one of the two contestants should not interfere with the possession of the other over the property in dispute. In other words, the Magistrate cannot simultaneously act both under sub-section (5) and under sub-sections (4) and (6). Once the Magistrate cancels the preliminary order, it befits him to ensure that none out of the parties arrayed before him gets an advantage at the expense of another. The ideal step to take on cancellation of the preliminary order under sub-section (5) would be to restore the parties to the status quo ante. Since, however, the sub-divisional Magistrate in the present case had directed the second party not to interfere with the possession of the first party over the land in dispute after he had made up his mind to drop the proceedings and cancel the preliminary order, that direction cannot be sustained in law.

7. A perusal of the record reveals that the finding of the Police, while reporting the case to the Magistrate, was that both the parties had been in possession of the land for about 4 to 5 years and that the dispute arose between them at the time of harvesting of the standing crops in November 1965. In such a situation the direction of the Magistrate after dropping the proceedings, that the second party should not interfere with the possession of the first party was highly unjust to the former. The proper course to follow was to proceed with the case to its logical conclusion and then either to hold that one of the parties was in possession of the land if such a conclusion could be arrived at on the basis of the material placed before the Magistrate, or to refer the dispute to the Civil Court under Section 146(1) of the Code. None of these two courses legally open to the Magistrate having been followed, and he having instead cancelled the preliminary order without first recording the finding that the dispute had never existed between the parties or had ceased to exist, I have no option but to accept the recommendation made by the learned Additional Sessions Judge. Consequently I quash the order dated 16th of June 1966 and remit the case to the Magistrate for deciding it in accordance with the provisions of law. I may observe in passing that if the second party had exhibited contumacy in the matter of appearing before the Magistrate, the latter could have proceed-

ed to pass final order in the case despite that party's absence on the basis of material available on the record.

8. Announced.

Reference accepted.

AIR 1970 MANIPUR 14 (V 57 C 5)

R. S. BINDRA, J. C.

Maibam Gokulchand Singh, Petitioner v. Hidam Ningol Maibam, Ongbi Tonsana Devi, Respondent.

Civil Revn. Case No. 13 of 1968, D/-1-7-1969.

(A) Civil P. C. (1908), O. 21, R. 29 — Expression "suit" — Means only suit and not appeal — AIR 1928 Cal 222, Diss. (Words and Phrases — "Suit").

The expression 'suit' in the expression 'pending suit has been decided' in R. 29 means the suit and not the appeal or appeals arising therefrom. AIR 1928 Cal 222, Diss. Case law discussed. (Para 3)

The right given to a plaintiff by Rule 29 is of very exceptional nature, and if the claim made by him in the suit had been found, after a fair trial, to be without substance he is not entitled to any further indulgence in case he happens to file an appeal against trial Courts' judgment and decree. (Para 3)

(B) Civil P. C. (1908), S. 151 — If a statutory remedy is available for a particular relief, recourse cannot be had to the provisions of S. 151. (Para 4)

(C) Civil P. C. (1908), O. 21, R. 29 — Power to stay execution is only discretionary.

The power to stay execution under the rule is purely discretionary. The discretion has to be exercised on sound judicial principles and not capriciously.

(Para 5)

Cases Referred: Chronological Paras-

(1944) AIR 1944 Mad 73 (V 31) =

1943-2 Mad LJ 452, Ramanathan

v. Kasi Chettiar

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(1932) AIR 1932 Cal 19 (V 19) =

ILR 58 Cal 1113, Radha Ballav

v. Peary Lall

3

(1928) AIR 1928 Cal 222 (V 15) =

ILR 55 Cal 512, Mahesh

Chandra v. Jogendralal

3

(1910) 82 Pun Re 1910 = 7 Ind Cas

1017, Bhagwan Kaur v. Harnam

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T. N. Bhattacharjee, for Petitioner; N. Kerani Singh, for Respondent.

ORDER:— The facts bearing on this civil revision petition filed by Maibam Gokul Chand Singh are not in dispute and can be summarised in a few words. The respondent Hidam Ningol Maibam

HM/HM/D569/69/MVJ/D

Ongbi Tonsana Devi, a widow, instituted Title Suit No. 8 of 1961 against the present petitioner Maibam Gokul Chand Singh and it was decreed on 1-5-1964. Tonsana Devi, the decree-holder, then sued out execution of the decree. In the mean time Gokul Chand Singh filed Title Suit No. 95 of 1964 challenging the validity of that decree. He (Gokul Chand Singh) also filed an application under Order 21, Rule 29, of the Civil Procedure Code (hereinafter referred to as the Code) on 9-11-1964, in that suit praying that the execution of the decree dated 1-5-1964 be stayed. The execution application filed by Tonsana Devi was dismissed in default on 5-12-1964, while the application filed by Gokul Chand Singh under Order 21, Rule 29 suffered the same fate on 20th of July 1965. Tonsana Devi instituted the second execution application in the year 1965. Gokul Chand Singh, not to be beaten, filed an application under Sections 47 and 151 of the Code on 30-11-1966 seeking the relief that until the disposal of his Title Suit No. 95 of 1964 the execution of the decree dated 1-5-1964 should be stayed. This application was rejected by the Trial Court on the short ground that stay could be directed only on the basis of an application made under Order 21, Rule 29 of the Code and the present application had not been filed under that provision of law. Aggrieved by that order of the trial Court Gokul Chand Singh has come up in revision to this Court, under Sections 115 and 151 of the Code. Another fact which requires mention at this stage is that suit No. 95 of 1964 instituted by Gokul Chand Singh has been dismissed by the Trial Court and an appeal against the decree of dismissal is pending decision in the Court of District Judge.

2. Shri Bhattacharjee, the learned counsel for the petitioner, made the submission, anticipating objection by the opposite counsel, that the provisions of Rule 29 can be availed of not only during the pendency of the suit but also during the pendency of the appeal arising out of the suit. To shore up this submission, the counsel urged that appeal is in fact a continuation of the suit and so there can possibly be no difficulty in interpreting Rule 29 in the manner canvassed by him. Shri N. Kerani Singh, representing Tonsana Devi, submitted on the other hand that the plain words of Rule 29 are not susceptible of the interpretation solicited by Shri Bhattacharjee, and emphasised in addition that at present no application by Gokul Chand Singh under Rule 29 is pending in the Court. He therefore prayed that the revision petition should be thrown out. I think the submissions made by Shri N. Kerani Singh are weighty and so must prevail.

3. Rule 29 of Order 21 of the Code is in the following terms:

"Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree 'until the pending suit has been decided'."

The underlined words (here in ' ') apparently do not lend support to the contention raised by Shri Bhattacharjee. He, however, placed reliance on the case of Mahesh Chandra v. Jogendra Lal, AIR 1928 Cal. 222, to support the view that the word 'suit' in the expression "pending suit has been decided" includes an appeal arising out of the suit in question. But this interpretation of Rule 29 was dissented from in a later case of the Calcutta High Court reported in AIR 1932 Cal 19, Radha Ballav v. Peary Lal, wherein it was held that a stay order made under Rule 29 will operate only until the disposal of the suit and not until the exhaustion of all rights of appeal arising out of that suit. This latter view of the Calcutta High Court was adopted by the Madras High Court in the case of Ramanathan v. Kasu Chettiar, AIR 1944 Mad 73. According to Madras High Court, the expression "suit" in Rule 29 means the suit and not the appeal or appeals arising therefrom. In the case of Radha Ballav, AIR 1932 Cal 19, (supra), the Calcutta High Court had relied upon the case, Bhagwan Kaur v. Harman Kaur of the Punjab Chief Court, reported in (1910) 82 Pun Re 1910=7 Ind Cas 1017. Therefore, the proposition canvassed by Shri Bhattacharjee has to be rejected because it gathers no support from the judicial pronouncements. The interpretation placed by Calcutta and Madras High Courts on Rule 29 is indeed rational. The right given to a plaintiff by that Rule is of a very exceptional nature, and if the claim made by him in the suit had been found, after a fair trial, to be without substance he is not entitled to any further indulgence in case he happens to file an appeal against trial Court's judgment and decree.

4. It was not denied by Shri Bhattacharjee that as at present no application under Rule 29 is pending in the trial Court. Such an application made by Gokul Chand Singh in the year 1964 was dismissed in default on 28th of July 1965. He took no steps for the restoration of that application, nor made any fresh application under Rule 29. The present revision petition is directed against the order dismissing an application made under Sections 47 and 151 of the Code. Section 151 will not apply because there is a specific provision enacted in Rule 29 under which Gokul Chand Singh could

have moved the Court for staying the execution of the decree dated 1-5-1964. It is well settled that if a statutory remedy is available for a particular relief, recourse cannot be had to the provisions of Section 151 of the Code. An application under Section 47 can be moved in the executing court and not in the Court where the suit instituted by Gokul Chand Singh is now pending. It is not the contention of Shri Bhattacharjee that the application under Section 47 was moved in the executing court. Therefore, the trial court was perfectly justified in holding that the application under Sections 47 and 151 of the Code was not maintainable in connection with Suit No. 95 of 1964.

5. This revision petition merits rejection on another ground as well. The trial Court has held that the plaintiff can claim stay of execution of the decree only if he can show at least a prima facie case and not on the mere plea that he has filed a suit against his own decree-holder. The trial Court states further that Gokul Chand Singh had failed to convince him that the claim made by him in the suit was genuine. It cannot be denied that the power to stay execution under the rule is purely discretionary. The phraseology of the rule, especially the words "The Court may . . . stay execution of the decree", admits of no doubt on that point. The discretion vesting in the Court is evident has to be exercised on sound judicial principles and not capriciously. Shri Bhattacharjee, however, failed to convince me that the trial Court's verdict is arbitrary, infirm, or faulty. Hence, there looks to be no scope for interference with the impugned order.

6. As a result the revision petition fails and it is dismissed with costs. Advocate's fee Rs. 20/-.

7. Announced.

Revision dismissed.

AIR 1970 MANIPUR 16 (V 57 C 6)

C. JAGANNADHACHARYULU, J. C.

Ayekpam Angahal Singh and another, Petitioners v. The Union of India and others, Respondents.

Civil Writ Appln. Case No. 19 of 1963, D/- 3-3-1969

(A) Constitution of India, Arts. 226 and 227 — Error apparent on face of record — Construction of terms of contract — Contract for fishery rights in Government property — Two views possible — There is no error apparent which can be corrected by the High Court — Findings of fact cannot be interfered with. AIR 1955 SC 233 and AIR 1960 SC 137 and AIR

1958 SC 398 and AIR 1960 SC 1168, Rel. on. (Para 16)

(B) Contract Act (1872), Section 22 — Voidable Contract — Contract for fishery rights — Unilateral mistake on part of one of the parties only — Contract cannot be avoided. (1885) ILR 9 Bom 358 and (1892) ILR 16 Bom 561 and AIR 1929 Cal 670 and AIR 1958 Andh Pra 533, Rel. on. (Para 17)

(C) Fisheries Act (1897), S. 6 — Fishery Rules of Manipur, Rule 39 — Offer of ripeos into a contract only when bid is accepted by Chief Commissioner — Once bid is accepted the offer cannot be withdrawn. AIR 1923 Mad 582 and AIR 1947 Mad 366 and AIR 1953 Punj 274 and AIR 1963 Andh. Pra. 110, Ref. (Para 18)

(D) Constitution of India, Arts. 226 and 227 — Other remedy open — Controversy as to terms of a contract — Contract as to fishery rights — Proper remedy is Civil Suit. AIR 1952 SC 192 and AIR 1959 SC 490 and AIR 1962 Manipur 47 and AIR 1963 SC 507 and AIR 1964 SC 685 and AIR 1969 Manipur 41, Referred. (Para 20)

(E) Constitution of India, Arts. 226 and 227 — Hardship to a litigant is no ground to refuse relief. AIR 1957 Mad 419, Rel. on. (Para 22)

(F) Constitution of India, Arts. 226 and 227 — Joint petition — Maintainability — Person not participating in proceedings which are being impugned cannot join as petitioner. (Para 23)

Cases Referred: Chronological Paras

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| (1969) AIR 1969 Mani 41 (V 56) = Civil Writ Petn. No. 21 of 1968 Imphal Sporting Club v. All Manipur Sports Association, Imphal | 20 |
| (1964) AIR 1964 SC 685 (V 51) = (1964) 1 SCWR 186, State of Orissa v. Ram Chandra | 20 |
| (1963) AIR 1963 SC 507 (V 50) = (1962) 2 SCR 711, State of Punjab v. Suraj Parkash Kapur | 20 |
| (1963) AIR 1963 Andh Pra 110 (V 50) = 1962-1 Andh LT 535, Raghunandhan Reddy v. State of Hyderabad | 18 |
| (1962) AIR 1962 Manipur 47 (V 49) = Nameirakpam Pishak Sing v. Forest Officer, Manipur Forest Dept | 20 |
| (1961) AIR 1961 SC 1669 (V 48) = (1962) 2 SCR 339, Harinagar Sugar Mills Ltd. v. Shyam Sundar | 19 |
| (1960) AIR 1960 SC 137 (V 47) = 1960-1 SCR 890, Satyanarayan Laxminarayan Hegde v. Mallikarjan Bhavanappa Tirumala | 16 |
| (1960) AIR 1960 SC 1168 (V 47), Kaushalya Devi v. Bachittar Singh | 16 |
| (1959) AIR 1959 SC 490 (V 46) = (1959) Supp (1) SCR 787, C. K. Achutan v. State of Kerala | 20 |

THE
All India Reporter
1970
Mysore High Court

AIR 1970 MYSORE 1 (V 57 C 1)

A. NARAYANA PAI AND M. SANTHOSH, JJ.

D. G. Venkataramu and others, Petitioners
v. Managing Director, Pandavapura Sahakara
Sakkare Karkhane Ltd., Pandavapura and
another, Respondents. .

Writ Petn. No. 1460 of 1966, D/- 8-1-1969.

Factories Act (1948), Ss. 79 and 80 —
Scope of S. 79 — Retrenchment of em-
ployees held unlawful — Employees, under
award, reinstated and paid back wages and
bonus for period of enforced non-employ-
ment — Employees claiming wages for
earned leave — Leave applied for and
having been refused by employer not
proved — Employees entitled to earned
leave for that period — Proper course is
to direct employer to credit such leave to
employees.

Where employees, whose retrenchment
is held unlawful, are reinstated under an
award and paid back wages and bonus for
the period of enforced non-employment
and those employees, claiming wages for
earned leave, do not prove that leave ap-
plied for had been refused by the em-
ployer, they are entitled to earned leave for
that period. The proper course in such
a case is to direct the employer to credit
such leave to those employees

(Paras 8 and 10)

A worker who becomes entitled to leave
with wages for a specified number of days
should not be deprived of that right by
any wrongful act of the employer which
has the effect of preventing the employee
from enjoying the benefit of that leave.
If he cannot be given the benefit in its
original form, he should be compensated
therefor by payment in lieu of it.

(Para 7)

Where employees are directed by an
award to be reinstated with back wages,
the entire period of non-employment was

the result of the wrongful act of the em-
ployer. The employees in such a case
must be regarded to have been in service
throughout as if the retrenchment had not
taken place at all and to give them all
the benefits flowing therefrom. When two
of the benefits, wages and bonus, have
been paid to them, the further benefit is
that they have earned leave for that
period. More accurately the position will
be that the period of enforced non-employ-
ment must be equated to the period spent on
duty and therefore the basis of calculating
earned leave is available to those em-
ployees. (Para 8)

When those employees ask for pay-
ment in cash, the "wages for leave", they
must prove the further position that hav-
ing asked for leave to which they were
entitled the employer had refused it to
them. When no such proof is given and
the claim itself is for wages for earned
leave and not for leave subsequently
refused, the proper thing in such circum-
stances will be to direct the employer to
calculate under S. 79 the leave earned by
the employees in respect of the period of
enforced non-employment and credit the
same to the leave account of those em-
ployees. (Para 10)

S. K. V. Chalapathy and S. Krishnaiah,
for Petitioners; V. L. Narasimha Murthy,
for Respondent No. 1.

ORDER:— 29 Petitioners and 9 others
who were all workers of the first respon-
dent Pandavapura Sahakara Sakkare Kar-
khane were retrenched by the first res-
pondent without full compliance with all
the terms of Section 25-F of the Indus-
trial Disputes Act, 1947. On their ap-
proaching the Labour Court, that Court
made an award on March 22, 1965 setting
aside the orders of retrenchment and
directing the management of the Khar-
khane to reinstate all of them in their
former posts and pay them back wages

from the date of retrenchment to the date of reinstatement.

2. The employer obeyed the award, reinstated them and paid their back wages. Further dispute was raised by the employee that the award had not been fully implemented, that reinstatement with back wages pursuant to the award amounted to saying that all the employees had throughout remained in the service of the employer as if there had never been any retrenchment, that therefore all consequence flowing from the said legal position should be made available to them. On that footing they claimed payment of bonus in respect of the period of enforced non employment as well as what they called wages for earned leave.

3. The said matter was once again placed before the Labour Court by the present 29 petitioners by means of an application under Section 33-C (2) of the Industrial Disputes Act. The Labour Court upheld their first contention regarding bonus. In doing so, it stated the legal position to be that the employees in question should be deemed to have been in service throughout the period of enforced non employment. The bonus so calculated, we are told, has been paid to the petitioners.

4. In regard to the claim for wages for earned leave, the court rejected the case of the petitioners. While pointing out that legal position was as stated above, it considered the facts of this case to be 'rather peculiar' in regard to the matter of leave and thought that it was equally possible to presume or proceed upon the assumption that the petitioners were actually on duty for a period of 11 months and on leave with wages for one month, and no further payment was called for, because for the entire period they had been paid back wages.

5. The contention pressed on behalf of the petitioners by their learned counsel Mr. Krishniah is that the modified proposition stated by the Labour Court with reference to their claim regarding leave is not only inconsistent with the general propositions made while dealing with bonus, but quite illogical and opposed to the provisions of not only the Industrial Disputes Act but also Section 79 of the Factories Act.

6. Section 79 of the Factories Act is the section which entitles workmen to certain number of days of leave with wages in respect of or in relation to period during which they had been working in the factory. According to sub-section (1) every worker who has worked for a period of 240 days or more in a factory during a calendar year shall be allowed during the subsequent calendar year, a specified number of days leave with wages. Sub-section (3) provides that if a worker is

discharged or dismissed from service during the course of the year, he would be entitled to leave with wages as laid down in sub section (1) even if he has not worked for the entire period entitling him to earned leave.

Sub section (11) provides that if the employment of a worker who is entitled to leave is terminated before he has taken the entire leave to which he was entitled to or if having applied for leave, the same is refused and the worker quits the employment before he takes leave, the employer is bound to pay him an amount calculated under Section 80 of the Act in respect of the leave not taken.

7. The general effect of the scheme for leave under Section 79 of the Factories Act, therefore, appears to be that if a worker has put in a certain period of work, he becomes entitled to be granted a specified number of days of leave with wages and that he should not be deprived of the said right earned by him by any wrongful act on the part of the employer, which has the effect of preventing him from enjoying the benefit of the leave earned by him, and that if the position is such that he cannot be given the benefit in its original form, he should be compensated therefor by payment in lieu of it.

8. Now in this case by virtue of the previous award it has to be held that the entire period of non employment of the petitioners from the date of unlawful termination till the date of reinstatement, was the result of wrongful act on the part of the employer.

The normal principle of law is that a person should not be permitted to take advantage of his own wrongful act, but that the person who is prejudicially affected by the said wrongful act should be compensated for or protected against the consequences of such wrong. The way of dealing with the situation is what the Labour Court has done while dealing with bonus, viz., to regard the petitioners to have been in service throughout as if the retrenchment had not taken place at all and to give them all the benefits flowing therefrom; two of the benefits — wages and bonus — have already been paid. The further benefit is that they have earned leave for the said period. More accurately the position would be that the period of enforced non employment must be equated to period spent on duty, and, therefore the basis of calculating leave earned by and available to the petitioners.

9. To take the next step and ask for payment in cash described as "wages for leave" the petitioners must prove the further position, namely, that having asked for leave to which they were entitled the employer has refused them leave. There is no such case. The claim itself was for

wages for earned leave and not for leave which was subsequently refused.

10. Hence, in the circumstances of the case, the proper thing to do would be to direct the first respondent employer to calculate by applying the provisions of Section 79 of the Factories Act, leave earned by each one of the petitioners in respect of the period of enforced non-employment i.e., from the date of retrenchment till the date of reinstatement and credit the same to the leave account of each one of them. We make a direction in those terms.

11. No costs.

Petition allowed.

AIR 1970 MYSORE 3 (V 57 C 2)

**A. R. SOMNATH IYER AND
AHMED ALI KHAN, JJ.**

M/s. K. O. Krishnaswamy represented by its Proprietor, K. O. Krishnaswamy, Bangalore and others, Petitioners v. Director, Enforcement Directorate, Ministry of Finance, Dept. of Revenue, Govt. of India, New Delhi and another, Respondents.

Writ Petns. Nos. 441 and 443 of 1966, D/- 4-6-1969.

(A) Foreign Exchange Regulation Act (1947), Section 12 (1) (2) (b) — Contravention of — Value of goods exported inflated by petitioner — Foreign buyer repatriating only true value of goods — No contravention of provisions and petitioners, held could not be penalised.

While the delay in the sale of goods is prohibited by clause (a) of sub-section (2) of Section 12, the act or omission which results in the failure of the payment of the full amount payable by the foreign buyer is what constitutes disobedience to clause (b) of that sub-section. Section 12(2)(b) prohibits an act or omission the consequence of which is the non-payment of the full amount payable by the foreign buyer on a bona fide sale of the exported goods for a proper price. So, there would be a contravention of that part of clause (b) only when the foreign buyer was under an obligation to pay a certain sum of money which represented the true market value of the exported goods purchased by him and there was non-payment of that entire sum of money in consequence of something done or omitted to be done by the exporter.

(Paras 7 and 13)

Therefore, where the petitioners inflated the value of the goods which they exported, but the foreign buyer repatriated only the true value of the goods exported, as he was not bound to repatriate the entire value as declared by the petitioner, there

would not be any contravention of clause (b) of Section 12(2) for which the petitioners would be liable to be penalised.

(Para 13)

There is contrariety between the language of sub-section (1) and that of clause (b) of sub-section (2). While sub-section (1) speaks of the "full export value of the goods", clause (b) of sub-section (2) refers to the "full amount payable by the foreign buyer". Thus, the amount to which clause (b) of sub-section (2) refers is distinct from the declared export value of the goods to which sub-section (1) refers.

(Paras 14, 15)

(B) Foreign Exchange Regulation Act (1947), S. 12(2) — Disobedience of provision — Subsequent act or omission after export and not antecedent one contemplated.

Section 12(2) does not prohibit an act or omission which is antecedent to the exportation of the goods. Thus, it is a subsequent act or omission after the exportation of the goods by reason of which there is non-payment of the full amount payable by the buyer which amounts to disobedience to the relevant part of clause (b).

(Para 19)

(C) Foreign Exchange Regulation Act (1947), S. 12(2) — Permission of Reserve Bank — When necessary.

Permission of Reserve Bank to which sub-section (2) refers has relevance only to deficiencies in the amounts payable by the Foreigner and such permission which is permissible only for deficient repatriation for good and acceptable reasons, is scarcely necessary if there is no inadequacy and so no occasion for deduction.

(Para 23)

(D) Foreign Exchange Regulation Act (1947), S. 12(2) — Whether the words "no person entitled to sell or procure the sale of the stated goods" occurring in S. 12(2) exclude from its purview a case in which the export is made pursuant to an already completed sale — (Quaere)

(Para 26)

K. Srinivasan, for Petitioners; B. S. Keshav Iyengar, for Respondents.

SOMNATH IYER, J.:— These two writ petitions raise common questions, and so, could be disposed of by a common order. The petitioner in Writ Petition No. 441 of 1966 is a firm called K. O. Krishnaswamy. The petitioner in Writ Petition No. 443 of 1966 is another firm called Nagaraja Overseas Traders. Both these firms were proceeded against by the Director of Enforcement Directorate in respect of an accusation that they had contravened the provisions of Section 12(2) of the Foreign Exchange Regulation Act, 1947 (Central Act VII of 1947). The Director, after setting out the relevant facts concerning that accusation, proceeded to state that the two firms had pleaded guilty to that

accusation, and so, imposed a penalty in the following words:—

"Accepting their pleas, I find the first two firms, viz., M/s. K. O. Krishnaswamy and M/s. Nagaraja Overseas Traders and their respective partners guilty under Section 12(2) of the Foreign Exchange Regulation Act and, in view of the magnitude of the amounts involved, and the poor realisation of the export proceeds, I impose on either of the firms, a penalty of Rs 3 lakhs each (Total Rs. 6 lakhs)"

Although the Director did find the partners also guilty of the offence with which they are charged, he did not impose any penalty on them individually.

2. We do not accede to the contention of Mr Srinivasan that there is any obscurity in the language employed by the Director with respect to the question whether the penalty was imposed on both the petitioners or on only one of them. The word "either" occurring in the relevant part of the Director's order means, in our opinion, each, and, there can be no doubt about it.

3. We are asked in these writ petitions to quash the penalties so imposed on the firms

4. The material facts which are not in dispute are these: The two firms sent 52 shipments of art silk fabrics, ready-made garments, handicrafts and sari goods to Singapur and other places under declaration which they made as required by Section 12(1) of the Act in which they stated the value of the goods sold. The finding of the Director was that the statements in those declarations concerning the value of the goods so exported were false, and that there was, what he described, overinvoicing with respect to those sales.

5. According to the declaration made by K. O. Krishnaswamy, the value of the goods exported by that firm through the 31 shipments with which we are concerned was Rs. 21,97,04,662 while the finding of the Director in effect is that the price payable by the foreign buyer in Malasia for those goods was only Rs. 1,01,165,07. Similarly the declared value of the exported goods with respect to 22 shipments sent by Nagaraja Overseas Traders was Rupees 17,06,159,00, while their real value which was payable by the foreign buyer was Rs 38,510 25. The director was of the opinion that under the provisions of the Act it was the duty of the two firms to repatriate the entire value of the goods stated in the declarations made by them under S. 12 (1) and that the repatriation of smaller sums of money amounted to a contravention of Section 12(2) of the Act.

6. Mr. Srinivasan appearing for petitioners contended that, that view taken by the Director receives no support from the relevant statutory provision.

7. Now, the relevant part of Section 12 reads:

"12(1) The Central Government may, by notification in the official gazette, prohibit the taking or sending out by land, sea or air (hereafter in this section referred to as export) of any goods or class of goods specified in the notification from India directly or indirectly to any place so specified unless a declaration supported by such evidence as may be prescribed or so specified, is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been, or will within the prescribed period be, paid in the prescribed manner. (2) Where any export of goods has been made to which a notification under sub-section (1) applies, no person entitled to sell, or procure the sale of the said goods shall, except with the permission of the Reserve Bank, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing that—

(a) the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade, or

(b) payment for the goods is made otherwise than in the prescribed manner or does not represent the full amount payable by the foreign buyer in respect of the goods, subject to such deductions, if any, as may be allowed by the Reserve Bank, or is delayed to such extent as aforesaid:

Provided no proceedings in respect of any contravention of this sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full amount as aforesaid has not been made in the prescribed manner.

xx xx xx
Sub-section (1) of this section which authorises a notification regulating payment for exported goods, prohibits the export of such goods, except on condition that the exporter makes a declaration that the full export value of the goods has been, or will within the prescribed period be, paid. Sub-section (2) prohibits acts or omissions intended to delay the sale of the goods exported, or the payment of the full amount payable by the foreign buyer in respect of the exported goods, barring authorised deductions permitted by the Reserve Bank. While the delay in the sale of goods is prohibited by clause (a) of sub-section (2) of section 12, the act or omission which results in the failure of the payment of the full amount payable by the foreign buyer is what constitutes disobedience to clause (b) of that sub-section.

8. The director was of opinion that there was disobedience to clause (b), and, it is not the case of any one that there was any to clause (a). If, on the facts stated

by the Director and on the finding recorded by him, it can be said that there was no disobedience to clause (b) of Section 12(2), the fact that the petitioners pleaded guilty to the charges brought against them can have no materiality and cannot support the imposition of a penalty which was in law not possible. So, the question to be decided is whether the petitioners did or refrained from doing any act which impeded the payment of the whole of the amount payable by the foreign buyer in respect of the exported goods. If they did not, there was no transgression of the Act.

9. The precise reason for which there was no payment by the foreign buyer of the value of the goods stated in the declaration made by the petitioners under Section 12(1) of the Act was set out in great detail by the Director. He stated in his order that the investigation made by him revealed the fact that the petitioners had overinvoiced the goods exported by them, and that they resorted to that subterfuge for the purpose of misusing the provisions of the export promotion scheme under which, with respect to a substantial portion of the value of the goods which the petitioners purported to export, they became entitled to import

licenses in respect of which there was systematic trafficking for illicit gains.

10. The clear finding recorded by the Director was that the petitioners did not export goods of the value stated in the declaration, and that they inflated the value of the goods which they exported, solely with the intention of getting an import licence with respect to a substantial portion of such inflated value. Since, under the declaration made under Section 12(1) the petitioners were under a duty to repatriate the full value of the goods so exported, they resorted to the artifice, according to the Director, of securing foreign exchange of a corresponding value in the foreign country through the instrumentality of certain persons in India who offered to sell foreign exchange against payments in India in excess of the corresponding value of the foreign exchange in Indian currency. On the basis of these facts which, in the opinion of the Director, had been fully established, he prepared a tabular statement setting out the value of the exported goods shown in the declaration under Section 12(1), the amounts repatriated and the foreign exchange acquired in Malasia and the amount which was described as the 'amount outstanding'.

That tabular statement reads:

Name	Value of export as shown in the GRI forms.	No. of shipments.	Amount repatriated.	Foreign exchange purchased.	Amount outstanding.
1. M/s. K. O. Krishna-swamy.	2197046-62	31	101165-70		2095880-92
2. M's. Nagaraja Overseas Traders, Bangalore.	1706159-00	22	39,510-25		1637,648-75

(11) The Director, after setting out these figures, proceeded to observe—

"From the above statement, it will be clear that, as regards the first two firms, the total sum shown as outstanding (which is non-existent) and hence non-repatriable, due to deliberate over-invoicing is Rs. 37,63,529-67 and that as regards the third firm M/s. K. O. Krishnaswamy had unauthorisedly purchased foreign exchange to the tune of Rs. 300,00/- for the purpose of repatriating it into India, under the guise of export proceeds."

12. It is on this finding that the imposition of a penalty for contravention of Section 12 (2) of the Act was made to rest.

13. We are of the opinion that on the finding recorded by the Director, no transgression of Section 12 (2) of the Act could be deduced. The relevant part of Section 12 (2) (b) on which the Director

depended, prohibits an act or omission the consequence of which is the non-payment of the full amount payable by the foreign buyer in respect of the exported goods. So there would be a contravention of that part of clause (b) only when the foreign buyer was under an obligation to pay a certain sum of money which represented the true market value of the exported goods purchased by him and there was non-payment of that entire sum of money in consequence of something done or omitted to be done by the exporter.

14. The Director thought that the full amount payable by the foreign buyer was the amount stated as the value of the exported goods in the declaration made by the petitioners in the prescribed form to which sub-section (1) of Section 12 refers. But it is clear that the finding recorded by the Director himself that the

value of the goods stated in the declaration was not the true value of the goods, is completely destructive of the view taken by him that that sum of money was the amount payable by the foreign buyer within the meaning of clause (b) of Section 12 (2). What was overlooked by the Director was the contrariety between the language of sub-section (1) and that of clause (b) of sub-section (2). While sub-section (1) speaks of the "full export value of the goods," clause (b) of sub-section (2) refers to the "full amount payable by the foreign buyer."

15. It is abundantly clear that the amount to which cl. (b) of sub-section (2) refers is distinct from the declared export value of the goods to which sub-section (1) refers, for the obvious reason that not quite infrequently it may happen that the amount payable by the foreign buyer is not necessarily the value of the goods specified in the declaration. The value mentioned in the declaration may in a conceivable case be very much in excess of the market value of the goods especially when a higher value is mentioned in the declaration for some illegitimate purpose. And, if in such a case the stated value of the goods is not the price for which a foreign buyer purchases or would be willing to purchase them, which generally speaking is the market value of the goods, what is so payable by him as the price under a bona fide contract of sale, is, what should be repatriated and not the artificial value stated in the declaration. It is this distinction which is emphasised by the word "payable" occurring in clause (b) of sub-section (2), which is not to be found in sub-section (1).

16. We do not accede to the contention that the words "amount representing the full export value of the goods" occurring in sub-section (1) have reference to the "amount payable by the foreign buyer" to which sub-section (2)(b) refers, and that the amount referred to in the one is the same as the amount stated in the other. Else, it is difficult to understand why the language employed in sub-section (2)(b) is so different from the language of sub-section (1). Sub-section (1) does no more than to insist on a statement of the full export value of the goods, while sub-s. (2) (b) incorporates a prohibition against what impedes the payment of the full amount payable by the foreign buyer. It is clear that the one is not the same as the other.

17. Any other view may be productive of strange consequences. If, even in a case where an exporter states the correct value of the goods in his declaration under sub-section (1), the goods are exported for sale in foreign country and there is an enormous increase in the price of those goods attributable to unforeseen

circumstances or conditions, the acceptance of the contrary interpretation suggested by Central Government Pleader would produce the consequence that the the exporter would be under an obligation to repatriate no more than the stated value of the exported goods. An interpretation which would thus enable the exporter to accumulate foreign exchange in the foreign country, notwithstanding the fact that the acquisition of such foreign exchange was possible by reason of the permitted export, cannot, in our opinion, be sound.

18. The true meaning, in our opinion, of the relevant part of Section 12(2)(b) is that the act or omission which is prohibited by it is what impedes the payment of the full amount payable by the buyer on a bona fide sale of the exported goods for a proper price. It is on this construction of that clause that we should examine the sustainability of the imposition of the impugned penalty.

19. Now, what is abundantly clear from sub-section (2) of Section 12 is that it prohibits no act or omission which is antecedent to the exportation of the goods. That that is so, is clear from the opening words of that section which read "where any export of goods has been made to which a notification under sub-section (1) applies". It is a subsequent act or omission after the exportation of the goods by reason of which there is non-payment of the full amount payable by the buyer which amounts to disobedience of the relevant part of clause (b).

20. So, the question which the Director had to decide was whether there was any such act or omission on the part of the petitioners, and, it is clear from his order that he recorded no finding that there was any. On the contrary the act of the petitioner which in his opinion was in contravention of the law was what preceded the export of the goods, and that act was a false declaration under section 12(1) with respect to the full export value of the goods. While the firm of K. O. Krishnaswamy made a statement that goods of the value of Rs. 21 lakhs and more had been exported, the finding of the Director was that their value did not exceed a little more than a lakh of rupees.

Likewise, while the stated value of the goods exported by Nagaraja Overseas Traders was a little more than Rs. 17 lakhs, the true value was only Rs. 38,000 and more. Although in the tabular statement prepared by the Director, the sixth column purports to state what he described as the "amount outstanding," it is obvious that, that description of the amount specified in that column was not an accurate description as can be seen from what the Director himself stated in the course of his order which discussed

the effect of that statement. The Director had no doubt in his mind that the statement prepared by him revealed the fact that the sums of money shown as outstanding were "non-existent and hence non-repatriable".

21. This finding recorded by the Director can have no other meaning than that those sums of money shown underneath the sixth column were not really payable by the foreign buyer and so were not paid. And the facts revealed by his investigation could not support any other conclusion. If X is the declared value of the exported goods but Y is the proper price for which they are sold, under a contract which is above the reproach of collusion or collaboration for circumvention of the law, the amount payable by the foreign buyer is Y and not X. The clear finding of the Director was that the amount repatriated in the cases before us was the whole of the amount properly payable by the foreign buyer.

22. It was at one stage suggested by Mr. Central Government Pleader that even so the permission of the Reserve Bank under Section 12(2)(b) should have been obtained by the petitioners for the repatriation of those smaller amounts. We do not agree.

23. It is plain that that permission to which sub-section (2) refers has relevance only to deficiencies in the amounts payable by the foreign buyer, and, in the cases before us there was none. Such permission of the Reserve Bank which is permissible only for deficient repatriation for good and acceptable reasons, is scarcely necessary if there is no inadequacy and so no occasion for deduction.

24. So, once the Director reached the conclusion that the amounts stated by him in the fifth column of his tabular statement were "non-repatriable" amounts, it became impossible for him to fasten on the petitioners any disobedience to sub-section (2) (b) of Section 12 of the Act.

25. That being so, the plea of guilty to which the Director referred in the course of his order cannot produce a transgression of the law when there was in fact none.

26. In the view we take, it becomes unnecessary for us to discuss the further contention raised by Mr. Srinivasan that the words "no person entitled to sell or procure the sale of the stated goods" occurring in sub-section (2) exclude from its purview a case in which the export is made pursuant to an already completed sale, such as, the one in the cases before us. On that question, we abstain from expressing any opinion in these cases.

27. So, we allow these writ petitions and quash the penalties imposed on the petitioners.

28. No costs.

Petitions allowed.

AIR 1970 MYSORE 7 (V 57 C 3)

K. R. GOPIVALLABHA IYENGAR AND
B. VENKATASWAMI, JJ.

M. R. Pundarkakshappa and another
Petitioners v. The Molakalmuru Taluk
Development Board and others Respondents.

Writ Petn. Nos. 4595 of 1968 and 132 of
1969, D/- 2-4-1969.

Panchayats — Mysore Village Panchayats and Local Boards Act (10 of 1959), Ss. 96 (2) and 105 — Position of member of Legislative Council being different from that of member of Assembly, Section 96 (2) is not discriminatory—Provisions of S. 96 (2) are reasonable and cannot be read as confining participation in proceedings by member of Assembly to one Taluk Board only — Constitution of India, Arts. 14, 170, 171, 173.

S. 96(2) of the Mysore Village Panchayats and Local Boards Act, 1959, is not discriminatory on the ground that it makes a distinction between a member of the Legislative Assembly and a member of the Legislative Council both of whom are Legislators. The provisions of Article 171 vary considerably from the provisions of Article 170 of the Constitution. While it is possible to predicate the territorial constituencies from which the members of the Legislative Assembly are elected, it is not possible to do so in the case of the members of the State Legislative Council. The powers of the Assembly and the council are not the same. It thus follows that the position of a member of the Assembly is different from that of the member of the Legislative Council. Therefore, the basis on which the argument of discrimination is advanced is unacceptable.: AIR 1951 SC 41 & AIR 1954 SC 314, Rel. on. (Para 4)

A member of the Assembly who is chosen from the Assembly constituency can be allowed to be a member of a Taluk Development Board whose jurisdiction includes a part of his constituency, so that he may safeguard the interest of his constituency. These considerations do not avail in the case of a member of the Legislative Council. The Legislative intention appears to be that if the constituency of a member of the Mysore Legislative Assembly covers a part or the whole of a particular Taluk Board, the member of the Legislative Assembly should have a right to take part in the proceedings of the Taluk Board concerned; it may be one or more. (Para 4)

GM/HM/C809/69/RSK/M

Cases Referred: Chronological Paras

(1954) AIR 1954 SC 314 (V 41) =

1954 SCR 1117, V. M. Sayed
Mohammad and Co. v. State of
Andhra

(1951) AIR 1951 SC 41 (V 38) =

1950 SCR 269, Churanjit Lal v.

Union of India

S. G. Doddakale Gowda and B. V.
Krishnaswamy Rao, for Petitioners (in W.
P's No 4595/68 and 132/69); E. S. Venkata-
ramiah High Court Spl Govt. Pleader, for
Nos 2 and 4 (in No. 4595/68) and Nos. 1,
2 and 4 (in No 132/69) for Respondents,
N. V. Ramachandra Rao, for Respondent
No 3.

GOPIVALLABHA IYENGAR, J:—

These two writ petitions are heard
together as the questions raised in the two
proceedings are identical.

2. The petitioner in each of these
petitions is a member of the Taluk
Development Board of Molakalmuru and
Chitradurga respectively. In each of these
the third respondent is a member of the
Mysore Legislative Assembly; one from
Molakalmuru Constituency and the other
from Chitradurga Constituency. In con-
nection with the election of President and
Vice President to the Taluk Development
Boards, notices have been served on the
third respondent in each of these cases.
The petitioner complains that under Sec-
tion 96 (2) of the Mysore Village Pancha-
yats and Local Boards Act, 1959 (herein-
after referred to as the Act), the Taluk
Development Board of Challakere and
Molakalmuru in one case and Chitradurga
Hiriyur in another case have sent notices
to the third respondent to participate in
the first meeting and in the election of
President and Vice President of the Taluk
Development Boards. The petitioners'
contention is that the provisions of Sec-
tion 96 (2) of the Act are discriminatory
and therefore violative of Article 14 of
the Constitution. It is further contended
that even if the provisions of Section 96
(2) of the Act are valid, the third respon-
dent can take part in the proceedings of
one of the Taluk Development Boards, i.e.,
either in Molakalmuru Taluk Development
Board or Challakere in one case and
Hiriyur or Chitradurga Taluk Develop-
ment Board in the other. The third res-
pondent cannot take part in both the
Taluk Boards. The petitioners have filed
these petitions under Article 226 of the
Constitution of India, seeking a writ
striking down the provisions of S. 96 (2)
of the Act and also seeking other conse-
quential reliefs.

3. Sri Doddakalegowda appears for the
petitioner in W. P. 4595/68 and Sri B. V.
Krishnaswamy Rao appears for the peti-
tioner in W. P. 132/69. The first conten-
tion of the learned counsel Sri Doddakalegowda is that Section 96 (2) of the
Act is discriminatory as it makes a dis-

inction between a member of the Legis-
lative Assembly and a Member of the
Legislative Council both of whom are
Legislators. This legal provision hence-
should be struck down. Section 96 (2) of
the Act is in the following terms:

"96. Composition of Taluk Boards:—

1) " " " "

2) The members of the State Legislative
Assembly representing a part or whole of
the taluk whose territorial constituencies
lie within the Taluk, and the members of
the State Legislative Council ordinarily
resident in the Taluk shall be entitled to
take part in the proceedings of, and vote
at, the meetings of the Taluk Board".

It refers to members of the State Legis-
lative Assembly and members of the State
Legislative Council. So far as the mem-
bers of the State Legislative Assembly
are concerned, they are entitled to take
part in the proceedings and vote at the
meeting of the Taluk Development Board
having jurisdiction over a part or the
whole taluk, lying within the territorial
constituency of the Legislative Assembly
concerning the particular member. Pro-
vision is also made in respect of members
of the State Legislative Council. Their
right to take part in the Taluk Board is
subject to the condition that they should
be "ordinarily resident" in the Taluk.
The learned counsel point out that no
provision like this is made in so far as
village Panchayats and District Develop-
ment Councils are concerned. A broader
provision is made under Section 187 of
the Act in respect of District Develop-
ment Councils. The main ground of
attack by the petitioners is that the mem-
bers of the State Legislative Assembly
and State Legislative Council are persons
similarly placed and therefore there
should have been no discrimination be-
tween them; the provisions of law making
the distinction between them is invalid
and liable to be struck down. This argu-
ment presupposes that the members of
the Legislative Council are persons
similarly circumstanced or placed. It
appears to us that this assumption is
fallacious.

4. Our attention was invited by the
learned Special Government Pleader to
the relevant provisions of the Constitu-
tion relating to the composition of the
Legislative Assembly and the Legislative
Council of the State. Reference may be
made to the provisions of Articles 170,
333 and 171 of the Constitution of India.
Article 170 provides that the Legislative
Assembly of each State shall consist of
not more than 500, and not less than
sixty, members chosen by direct election
from territorial constituencies in the
State. Article 333 provides for a special
representation of the Anglo Indian Com-
munity by nomination. Article 171 deals
with the composition of the Legislative

Council. Its strength is much less than that of the Legislative Assembly. The tenure of the members of the Legislative Council is not the same as that of the members of the Legislative Assembly nor is their qualification the same (vide Article 173). The provisions of Article 171 vary considerably from the provisions of Article 170 of the Constitution. While it is possible to predicate the territorial constituencies from which the members of the Legislative Assembly are elected, it is not possible to do so in the case of the members of the State Legislative Council. The powers of the Assembly and the Council are not the same. It thus follows that the position of a member of the Assembly is different from that of the member of the Legislative Council. Therefore, the basis on which the argument of discrimination is advanced is unacceptable.

It is a well-accepted principle that equality before the law and the equal protection of the laws means equal treatment of persons placed in similar circumstances. There can be no discrimination between one person and another if as regards the subject-matter of the Legislation their position is the same. This dictum is laid down by the Supreme Court in AIR 1951 SC 41=1950 SCR 869, Chiranjit Lal v. Union of India. In this connection, our attention is invited by the counsel for Respondents 1 and 2 to the decision reported in AIR 1954 SC 314, V. M. Syed Mohammad and Co. v. State of Andhra where it is observed as follows:—

“.....there is a strong presumption in favour of the validity of legislative classification and it is for those who challenge it as unconstitutional to allege and prove beyond all doubt that the Legislation arbitrarily discriminates between different persons similarly circumstanced”.

In the affidavit filed on behalf of the Respondents 1 and 2, the difference between the members of the Legislative Assembly and the Legislative Council is set out in great detail. Even if the argument of the petitioner's counsel is accepted, it appears to us that the provisions of Section 96 (2) of the Act are quite reasonable. Section 96 (2) of the Act provides for representation by members of the State Legislative Assembly on the Taluk Development Boards. Why such a provision is made should be considered with reference to the functions of the several Boards constituted under the Act. The functions of the several Boards are set out in the Act. The obligatory functions of the Taluk Boards are prescribed under Section 130 of the Act and the discretionary functions are detailed in S. 131 of the Act. The Legislature has in its wisdom thought it necessary to provide for members of the State Legislative Assembly of a Assembly constituency

including a part or the whole Taluk to take part in the proceeding of and vote at the meetings of the Taluk Boards. It is reasonable to suppose that this provision is made to make available to the Taluk Boards the views of the concerned members of the Legislative Assembly who are interested in the Constituency. This would be considered with reference to the functions of the several Boards constituted under the Act. The functions of the Boards are set out in the Act under the Article 130 of the Constitution. It appears to us therefore reasonable that a member of the Assembly who is chosen from the Assembly constituency can be allowed to be a member of a Taluk Development Board whose jurisdiction includes a part of his constituency, so that he may safeguard the interest of his constituency. These considerations do not avail in the case of a member of the Legislative Council.

If, once the provisions of Section 96 (2) of the Act are held to be reasonable, the next question will be to interpret the provisions of the said Section. The petitioner's counsel drew our attention to the provisions of Section 105 of the Act, providing for the prohibition of simultaneous membership to more than one Taluk Board. They submit that the principle underlying this provision is that a person cannot be a member of more than one Taluk Development Board. Therefore, they argued that the provisions of Section 96 (2) should be read as confining the right to participate in the proceedings of the Taluk Board by a member of the Legislative Assembly to one Taluk Board only.

The wording of Section 96 (2) of the Act does not support this contention. It is reasonable to accept the interpretation placed by the respondent that when the Assembly constituency covers a part of one Taluk Board or another, he must have the right to take part in the proceedings of the Taluk Boards falling within his assembly constituency. To confine the right given to a member of the Legislative Assembly under Section 96 (2) of the Act to only one Taluk Board the jurisdiction of which falls partly within his assembly constituency, it would result in depriving the other Taluk Board a part or whole of whose territorial jurisdiction is covered by the constituency of the said member of the Mysore Legislative Assembly from the participation of such member. This cannot be the intention of the Legislature. The legislative intention appears to be that if the constituency of a member of the Mysore Legislative Assembly covers a part or the whole of a particular Taluk Board, the member of the Legislative Assembly should have a right to take part in the proceedings of the Taluk Board con-

cerned; it may be one or more. Therefore, it appears to us that Section 96 (2) of the Act does not support the contention of the petitioners that the third respondent in each of these cases, can be a member of only one of the Taluk Boards a part of whose jurisdiction falls within his Assembly Constituency. Therefore we do not find any merit in these two writ petitions. They are dismissed.

5. In the circumstances of these cases, we make no order as to costs.

Petitions dismissed

AIR 1970 MYSORE 10 (V 57 C 4)

A R SOMNATH IYER AND
AHMED ALI KHAN JJ

T S Krishnamurthy Shetty, Petitioner
v. M. Bharamappa and others, Respondents.

Writ Petn. No 2380 of 1966, D/-3-6-1969

(A) Panchayats — Mysore Village Panchayats and Local Boards Act (10 of 1959), Ss. 53 (4) and 207 — Finality of order of Assistant Commissioner under S. 53 (4) does not affect independent revisional jurisdiction conferred on Divisional Commissioner under S. 207 — Order of Assistant Commissioner restraining panchayat from demolishing unauthorised construction — Revision against is competent — Divisional Commissioner not justified in dismissing it as not maintainable — (1968) 1 Mys LJ 512, Applied.

(Para 4)

(B) Constitution of India, Arts. 226 and 227 — Discretion of High Court — Delay and laches — Order of Panchayat directing respondent to demolish unauthorised construction passed under S. 53(2), Mysore Village Panchayat and Local Boards Act after unexplained delay of two years and without applying mind to the question whether demolition was necessary for promotion of public health or prevention of damage to life or property — On appeal Assistant Commissioner setting aside order — Divisional Commissioner wrongly dismissing revision as not maintainable — Writ petition to quash both the orders filed after unexplained delay of one year — Held that in the circumstances High Court would refuse to interfere especially when the order passed by Assistant Commissioner was unexceptionable — (Panchayats — Mysore Village Panchayats and Local Boards Act (10 of 1959), Sec. 53 (2) (b)).

(Paras 4 to 10)

Cases Referred: Chronological Paras
(1968) 1963-1 Mys LJ 512 = 14
Law Rep 535, Village Panchayat
v. T. Butchiah

4

R. P. Hiremath, for Petitioner; T. Venkanna, for Respondent No. 1.

SOMNATH IYER J.:— The petitioner before us is the village panchayat of Ujjini in Bellary district. When respondent 1 constructed a house in the year 1961 without the permission of the village panchayat, a notice was issued to him by that Panchayat on March 9, 1964 calling upon him to demolish the unauthorised construction. He was intimated that in his failure to do so, that demolition would be made by the panchayat.

2. The Assistant Commissioner, to whom respondent 1 preferred an appeal under Section 53 (3) of the Mysore Village Panchayats and Local Boards Act, directed the village panchayat to desist from the demolition which it proposed to make, and the revision petition presented by the village panchayat to the Divisional Commissioner under Section 207 of the Act was dismissed as not maintainable.

3. The panchayat asks us to quash the orders made by the Assistant Commissioner and the Divisional Commissioner in that way.

4. Mr. Hiremath is right in contending that the view taken by the Divisional Commissioner that the revision petition was not maintainable could no longer be supported after the pronouncement of this Court in Village Panchayat v. T. Butchiah, (1968) 1 Mys LJ 512 in which it was held that the finality of the order of the Assistant Commissioner under Section 58 (3) of the Act, about which that section speaks, does not affect the independent revisional jurisdiction bestowed on the divisional commissioner by Section 207. That enunciation is equally applicable to the decision of the assistant commissioner in the case before us under Section 53 (4) and so the divisional commissioner was not right in declining to entertain the revision petition on the mistaken view taken by him that revisional jurisdiction could not be exercised in respect of an order made by assistant commissioner under Section 53 (4).

5. But Mr. Venkanna appearing for respondent 1 advanced the plea that even so, this is not a case in which we could exercise our writ jurisdiction having regard to all the facts and circumstances of the case. He submitted that respondent 1 made the construction as early as in 1961 and the impugned direction for demolition was not made by the panchayat until March 9, 1964.

6. Although Mr. Hiremath, for the first time, produced before us a document which purports to be an agreement executed by respondent 1 in the year 1962 that he would demolish the unauthorised construction within twenty-four hours failing which the panchayat could take action against him, the panchayat took no

action for more than two years after the date of that agreement, the genuineness of which is not admitted by Mr. Venkanna appearing on behalf of respondent 1. So even if that agreement is taken as a genuine agreement, and on that question we express no opinion, nor would it be necessary for us to do so there is unexplained delay on the part of the Panchayat to take any action with respect to the demolition for a period of more than two years even after the execution of that agreement though respondent 1 did not within the period of twenty-four hours specified in that agreement remove the unauthorised construction.

7. Moreover, the Assistant Commissioner was of the view that the demolition was not within the competence of the panchayat since there was no application of the mind of the panchayat to the question whether the demolition was necessary for the promotion of public health or the prevention of danger to life and property which are the indispensable ingredients on which Section 53 (2) (b) of the Act insists before any demolition could be either demanded or made.

8. From the records made available to us by Mr. Hiremath, appearing for the village panchayat, it is seen that the notice by which the petitioner was called upon to make the demolition under Section 53 (2) of the Act did not allude to the promotion of public health or the prevention of danger to life and property as reasons which impelled such demolition. The panchayat produced before the assistant commissioner no other material on the basis of which he could reach a conclusion contrary to that which he reached and there is no statement in the affidavit accompanying the writ petition produced before us that what the assistant commissioner stated in the course of his order is factually not correct. If the assistant commissioner was, therefore, right as we can see that he was, in the view that he took that there was no application of the mind of the village panchayat to the question whether the demolition was necessary for the promotion of public health or for the prevention of danger to life and property the demolition directed by the panchayat was clearly beyond its competence.

9. Moreover, the divisional commissioner pronounced his order in December 1965 and this writ petition was not presented until November 1966 and no reason has been assigned in the application produced before us in justification of the delay in the presentation of this writ petition.

10. Having regard to all these circumstances, and also having regard to the fact that what is alleged to be an unauthorised construction was made as early as in 1961 and no action was taken by the panchayat

until March 1964, we decline to exercise our jurisdiction especially since the order of the assistant commissioner, the validity of which is called in question in this writ petition is unexceptionable. That being so, and since Mr. Hiremath appearing on behalf of the panchayat did criticise the validity of the assistant commissioner's order, and we see no reason to think that there is any point in his criticism, it would be quite unnecessary for us to make the divisional commissioner waste public time and money in hearing the revision petition against the assistant commissioner's order which has been demonstrated to be irreproachable. So we dismiss this writ petition without making any order as to costs.

Writ petition dismissed.

AIR 1970 MYSORE 11 (V 57 C 5)

A. R. SOMNATH IYER AND
AHMED ALI KHAN JJ.

N. C. Samasthanmath, Petitioner v.
Commercial Tax Officer I Circle, Hubli
and others, Respondents.

Writ Petn. Nos. 1436 to 1438 of 1966.
D/-13-12-1968.

Sales Tax — Bombay Sales Tax Act (3 of 1953), Ss. 14 (3) (a) and 14 (4) — Forming of the specified opinion, a condition precedent to issue of notice — Best judgment assessment must be preceded by notice under S. 14 (3) (a) — Opinion formed by a person other than assessing authority is no opinion — Issue of notice under S. 14 (3) (a) and subsequent assessment under S. 14 (4) liable to be quashed.

One R who was not a commercial tax officer issued notice to the dealer under Sec. 14 (3) (a) of the Bombay Sales Tax Act calling upon him to produce evidence in support of his returns. R, was later on appointed as a Commercial tax officer and on production of the evidence by the dealer, R made the best judgment assessment under Section 14 (4) of the Act.

Held, (1) that the power and jurisdiction to issue a notice under Section 14 (3) (a) of the Act would be available to the concerned assessing authority only when he is satisfied that he could not accept the returns produced by the dealer as correct and complete without the production of further evidence which he may call upon the dealer to produce before him; (Para 6)

(2) that a best judgment assessment under Section 14 (4) could be made only after proper issue of a notice under Section 14 (3) (a) and there was disobedience to that notice. (Paras 7 and 8)

(3) that the opinion which R formed while he was not yet a Commercial tax

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officer was no opinion at all and the notice under Section 14 (3) (a) which had as its basis such opinion and subsequent assessment under Section 14 (4) although by such time he became commercial tax officer, were liable to be quashed

(Paras 9 to 11)

B. V. Katageri, for Petitioner; Shantharaju for E. S. Venkataramiah, High Court Spl Govt Pleader, for Respondents

SOMNATH IYER J.:— The petitioner is a dealer in Hubli and with respect to the turnover of his business in respect of three different periods starting on April, 1965 and ending on September, 30, 1967 three assessment orders were made by the concerned commercial tax officer. The commercial tax officer who made the assessments was one Ramasetty. But the petitioner had produced his returns before another commercial tax officer, and Ramasetty was the commercial tax officer who issued notices under Sec 14 (3) (a) of the Bombay Sales Tax Act which was then operating in the area with which we are concerned calling upon the dealer to produce evidence in support of his returns. One of the members of the petitioner's family who was carrying on the business to which the orders of assessment related appeared before Ramasetty and produced evidence which Ramasetty called upon the dealer to produce and on the production of that evidence, he made the impugned order of assessment. He purported to make them under S. 14 (4) of the Act.

2. From these orders of assessments, the petitioner appealed to the assistant collector, who dismissed them. There were second appeals to the collector who dismissed these appeals on the ground that they were incompetent appeals. Then the petitioner presented revision petitions to the sales tax appellate tribunal under Section 31 of the Act and the tribunal took the view that since the appeals to the collector were incompetent appeals, the revision petitions were liable to be dismissed.

3. The orders of assessment so made by Ramasetty are called in question in these writ petitions on the ground that when he issued notices under Section 14 (3) (a) of the Act, he had not been appointed as a commercial tax officer but was only appointed subsequently.

4. The notices under Section 14 (3) (a) of the Act were issued on March 10, 1960, and it is undisputed that Ramasetty was appointed by Government as a commercial tax officer only on April 6, 1960. So, it will be seen that although Ramasetty was not a commercial tax officer on March 10, 1960 when he issued the notices under Section 14 (3) (a), he had become the commercial tax officer when he made the orders of assessments on May 31, 1962.

5. The orders or assessment made by Ramasetty state that the assessment was made under Section 14 (4) and, in a case like the one before us it is debatable whether the assessment could be made under sub-section (4) of Section 14 or whether it could be made only under Section 14 (3) (b). Since we are deciding these writ petitions on another ground, it is not necessary for us to spend any time over that question.

6. Now, when the notices under Section 14 (3) (a) were issued by Ramasetty he issued those notices by reason of the fact that he was not satisfied with the correctness or completeness of the returns produced by the dealer. The power and the jurisdiction to issue a notice under Section 14 (3) becomes available to the concerned assessing authority only when he is satisfied that he could not accept the returns produced by the dealer as correct and complete without the production of further evidence which he may call upon the dealer to produce before him. When that notice is issued, the dealer is under a duty to produce under Cl. (b) of Section 14 (3) the evidence which he is so called upon to produce and when he fails to do so, the assessing authority acquires the power to make best judgment assessment under Section 14 (4).

7. It will, therefore, be seen that the power to make a best judgment assessment such as the one which Ramasetty made in the cases before us becomes available to the assessing authority only when a notice under Cl. (a) of Sec. 14 (3) has been issued and there is failure to comply with that notice. Section 14 (3) (a) reads:

"(3) (a) If the Collector is not satisfied without requiring the presence of a dealer who has furnished his returns or the production of evidence that the returns furnished in respect of any period are correct and complete, he shall serve on such dealer a notice in the prescribed manner requiring him, on a date and at a place specified therein, either to attend in person or to produce or to cause to be produced any evidence on which such dealer may rely in support of such returns or such other evidence as may be specified in such notice.

(b) On the date specified in the notice or as soon afterwards as may be, the Collector shall, after considering such evidence as the dealer may produce and such other evidence as the Collector may require on specified points, assess the amount of the tax due from the dealer." Sub-section (4) of Section 14 reads:

"If a dealer having furnished returns in respect of a period fails to comply with the terms of the notice issued under sub-section (3), the Collector shall assess to

the best of his judgment, the amount of the tax due from the dealer."

8. It is thus clear that no best judgment assessment under sub-section (4) is possible until that assessment is preceded by the notice properly issued under Cl. (a) of sub-section (3) and there is disobedience to that notice.

9. Now, in the cases before us, the notices under Section 14 (3) (a) were issued by Ramasetty when he was not a commercial tax officer and before he became one on April 6, 1960. So, the opinion which he formed under Section 14 (3) (a) that the returns produced by the dealer could not be accepted either as correct or complete without the production of further evidence which the dealer was called upon to produce was not an opinion formed under Section 14 (3) (a) since he was not the assessing authority when that opinion was formed. That opinion could not therefore, form the basis of the issue of a notice under that clause, and so, the notices issued by Ramasetty had no validity and the dealer was under no duty to comply with those notices. So, it could not be said that there was failure to comply with the notices issued under sub-section (3) within the meaning of Section 14 (4) such as could authorise a best judgment assessment under sub-section (4).

10. That being so, the subsequent acquisition of the power to make an assessment under the Act by reason of his appointment on April 6, 1960 did not bestow power on Ramasetty to make the best judgment assessment under Section 14 (4) in a case like the present one in which the notice issued by him under sub-section (3) was issued without the authority of law.

11. In the view that we take, the orders of assessment made by Ramasetty are liable to be quashed and we quash them reserving liberty for the concerned assessing authority to proceed to make an order of assessment in all the cases before us in accordance with law.

12. In the view that we take, it becomes unnecessary for us to express any opinion on the correctness of the view taken by the collector and the sales tax appellate tribunal about the competence of the appeals which were preferred to the collector.

13. We reserve liberty for the petitioner to urge before the concerned assessing authority when he proceeds to make an assessment in respect of the assessment years with which we are concerned all the contentions which are available to him including a plea of limitation.

14. No costs.

Petitions allowed.

AIR 1970 MYSORE 13 (V 57 C 6)

G. K. GOVINDA BHAT AND
M. SADANANDASWAMY JJ.

Government of India by Secy. to the Govt. of India. Post and Telegraphs Dept. New Delhi and another, Appellants v. Jeevaraj Alva, minor by next friend and father Dr. Nagappa Alva and others, Respondents.

First Appeal No. 152 of 1962 C. W. 149 of 1962, D/-26-7-1968 against judgment and decree of 2nd Addl. Dist. J. Bangalore D/-9-4-1962.

(A) Tort — Master and servant — Sovereign act — Act by servant of State in performance of sovereign act — Liability of State — Postal service of Government of India is not a sovereign function of State — Civil P. C. (1908), Section 9 — Sovereign act of State — Post Offices Act (1898), Ss. 4, 6.

Where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which is meant powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie. By sovereign powers is meant powers which cannot be lawfully exercised except by a sovereign or private individuals delegated by a sovereign to exercise them. (1868-69) 5 Bom HCR App 1 and AIR 1965 SC 1039, Followed. (Paras 11, 13)

The Postal Department is a commercial cum public utility Department of the Government of India and it by no means constitutes a sovereign function of the State. (Para 14)

(B) Fatal Accidents Act (1855), S. 1-A — In deciding cases under Indian Act. English decisions under English Act are useful — (Civil P. C. (1908), Preamble — Interpretation of statutes — English decisions, on pari materia English statutes — Value of) — (Fatal Accidents Act (1846), (9 and 10, Vict. C. 93), Ss. 1 and 2).

Section 1-A of the Fatal Accidents Act, 1855, as amended by Act No. III of 1951 is in pari materia with the provisions of Sections 1 and 2 of the Fatal Accidents Act, 1846 (9 and 10 Vict. C. 93) and therefore the decisions of Courts in the United Kingdom under the Fatal Accidents Act, 1846 will be useful in deciding cases under the Indian Act. (Para 18)

(C) Fatal Accidents Act (1855), S. 1-A — Loss of pecuniary benefit due to death of deceased — Measure of damages — Considerations — Reasonable expectation of pecuniary advantage—Proof of—(Civil P. C. (1908), Ss. 100-101 — Expectation of pecuniary advantage is question of fact) — (Evidence Act (1872), Ss. 101-104 — Expectation of pecuniary advantage — Proof of) — (Civil P. C. (1908), O. 6, R. 4 — Suit for damages in tort — Pleadings).

Damages are based on the amount of actual pecuniary benefit which the persons mentioned in Section 1-A might reasonably have expected to enjoy had the deceased person not been killed. Damages cannot be recovered for the gravity of the injury to the deceased or as a compassionate allowance or solatium for the mental anguish or loss of society due to the death. The pecuniary loss is not limited to the value of money lost, or the money value of the benefits lost, but includes the monetary loss incurred by replacing services rendered gratuitously by the deceased, if there was a reasonable prospect of their being rendered freely in the future but for the death of the deceased. The pecuniary loss may be evidenced by proof of a reasonable expectation of some future pecuniary benefit. (Para 20)

The pecuniary loss may be prospective and that prospective loss may be taken into account. It is not a condition precedent to the maintenance of an action under the Fatal Accidents Act, that the deceased should have been actually earning money or money's worth or contributing to the support of the plaintiff at or before the date of the death and all that is necessary to sustain an action is that the plaintiff had a reasonable expectation of pecuniary benefit from the continuance of the life. It is, however, not sufficient for the plaintiff to prove that he has lost by the death of the deceased a mere speculative possibility of pecuniary benefit; in order to succeed, it is necessary for him to show that he has lost a reasonable probability of a pecuniary advantage. (Para 19)

The question of reasonable expectation of pecuniary advantage is a mixed question of fact and law. Mere difficulty in assessing damages should not bar a plaintiff from recovering; but the plaintiff must adduce such evidence as affords the judge a reasonable basis on which to infer that pecuniary damage has been inflicted on the plaintiff; where there is a mere speculative possibility of benefit, the plaintiff has failed, whereas in the cases where there was a reasonable probability of pecuniary advantage, the plaintiff has succeeded. 1913 AC 1 & 1921-2 KB 461 & AIR 1941 Mad 733, Rel. on

(Paras 19, 22)

Where in the plaint in the suit by the father of the deceased school-going boy of 10 years of age, there is no specific averment to the effect that there was a reasonable expectation of pecuniary benefit and all that is stated is that the boy had a bright future before him and he could have been of considerable comfort and assistance to his parents and that as a result of his death, they, the parents have been deprived of the assistance and support which they would otherwise have derived from their son, the pleadings are

vague and lack essential averments.

(Para 23)

Where in the evidence, the plaintiff (a medical practitioner) had admitted that at the time of the death of the son aged 10 years he was not rendering any help to the family as he was too young but only alleged that on account of his talents and personality he would have earned a great deal and he would have been of much greater help to the parents than Rs. 20,000 the amount claimed as damages and that in assessing damages the plaintiff had taken into account his (plaintiff's) status and income, what was established, was that the father of the deceased boy was a medical practitioner having a lucrative practice and that he was in affluent circumstances. Though the deceased was a brilliant boy, one cannot be certain that he would continue to be a brilliant boy throughout his academic career. He may or may not have turned out to be a useful young man. He may never have aided his parents even if he had earned. When the parents are well to do, the boy could scarcely have been expected to contribute for the maintenance of his parents. The whole matter is beset with doubts, contingencies and uncertainties and what has been established from the evidence on record is that there was a mere speculative possibility of benefit but not a reasonable probability of pecuniary advantage. The former is non-assessable while the latter is assessable. (1868-69) 5 Bom HCR App 1, Rel. on

(Para 24)

(D) Fatal Accidents Act (1855), Ss. 1-A and 2 — Claims under, are founded on distinct causes of action and must be separately averred in plaint — (Civil P. C. (1908), O. 6, R. 4).

The claims arising under Sections 1-A and 2 of the Act are founded on two distinct causes of action. The practice is to make a specific claim for loss of expectation of life. Where the plaintiffs have claimed a consolidated sum of Rs. 20,000 as damages, and have not stated separately the amount claimed in respect of the two distinct causes of action, the pleadings are defective; when the plaint clearly states that the damage claimed is the loss suffered by the plaintiffs, that pleading cannot be construed as a claim for damages suffered by the estate of the deceased. (Para 26)

(E) Fatal Accidents Act (1855), S. 2 — Loss of expectation of life — Assessment of damages — Principle — Death of very young child — Moderate figure should be taken as compensation.

The main considerations to be borne in mind in assessing the damages for loss of expectation of life under Section 2 are: (1) the thing to be valued is not the prospect of length of life, but the prospect of predominantly happy life. The age of

the individual may in some cases be a relevant factor but such damages should not be calculated solely or even mainly on the basis of the length of life that is lost. (2) It is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him to future unhappiness or despondency, that would be a circumstance justifying a smaller award. (3) No regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects. (4) In the case of a very young child there is necessarily so much of uncertainty about the child's future that no confident estimate of prospective happiness can be made and therefore, the appropriate figure of damages should be reduced. (5) When an individual has reached an age to have settled prospects having passed the risks and uncertainties of childhood and having in some degree attained to an established character and to firmer hopes his or her future becomes more definite and the extent to which good fortune may probably attend him at any rate becomes less incalculable. (6) In assessing damages whether in the case of a child or an adult very moderate figures should be chosen. 1941 AC 157, Rel. on.

Held, that in instant case the deceased boy was ten years old and had met an instantaneous death. No damages could be awarded, therefore, for mental agony and suffering and damages under Section 2 of Rs. 5000 awarded by the trial Court though excessive was not extravagantly large. AIR 1962 SC 1 & AIR 1953 Mad 981, Ref. (Para 33)

(F) Tort — Damages — Personal injury due to accident — Assessment of damages — Principles — (Civil P. C. (1908), Sections 100-101 — Interference by appellate Court in assessment of damages by lower Court).

In an action for damages for personal injuries caused to the plaintiff in an accident the plaintiff is entitled to be compensated for the pain and suffering undergone by him as a result of the accident as also in respect of the general impairment of his health, if there has been any such impairment, and reduced capacity for work, if there has been lowering of his endurance or stamina in that regard, besides the special damages awardable to him for the expenses which he had to incur for his treatment during the period he was an inpatient in the hospital. In an action for personal injuries it is impossible, in view of the difference in the facts of individual cases, to standardise

the amounts of damages which should be awarded; damages should be assessed so as while bearing in mind the special facts of the case under consideration, to accord with the general run of assessments made by the Courts over a substantial time in comparable cases. AIR 1960 Mys 222, Rel. on. (Para 36)

Whether the assessment of damages be by a judge or a jury, the appellate Court is not justified in substituting a figure of its own for that awarded below after considering decided case simply because it would have awarded a different figure if it had tried the case at first instance. Even if the Tribunal of first instance was a judge sitting alone, then, before the appellate Court can properly intervene, it must be satisfied either that the judge, in assessing the damages applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one), or, short of this that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. 1951 AC 601, Rel. on. (Para 38)

Where the Court below had referred to the correct principles governing the assessment of damages for personal injuries and after referring to the previous judgments of different High Courts, had assessed the damage at Rs. 25,000 which could not be considered as extravagantly high, the High Court in appeal confirmed the finding. (Para 38)

(G) Tort — Master and servant — Vicarious liability — Hire of motor vehicle with driver — Driver committing accident while driving vehicle in course of employment by hirer — Liability of hirer and owner of vehicle — Extent of — (Civil P. C. (1908), Preamble — Maxims — Pro-hac-vice) — (Evidence Act (1872), Ss. 101-104 — Vicarious liability for tort committed by servant — Onus to prove employment).

When accident occurs by reason of the negligent driving of a vehicle hired out with its driver to another person, difficult questions may arise whether the owner or the hirer is responsible. The facts of one case can never rule another case and are only useful so far as similarity affects and are a help and guide to decision. The general employer of servants is normally liable, as being their master, for all torts committed by them in the course of their employment and within the scope of their authority, and his liability is not affected by the existence of a contract between him and some other person for the temporary employment of the servants in work for that person or for the hiring of the servants to that person. Where, however, the relationship of master and servant has been constituted pro-hac-vice (for the turn or the occasion) between the

temporary employer and the contractor's servant, the temporary employer or the hurer is vicariously liable for the acts of the contractor's servant committed in the course of his employment and within the scope of his authority. There being a presumption against such a transfer of a servant as to make the hurer or the person on whose behalf the servant is temporarily working responsible, a heavy burden rests upon the party seeking to establish that the relationship of master and servant has been constituted Pro Hac Vice between temporary employer and the contractor's servant. To succeed in discharging the burden it must be shown that Pro Hac Vice the temporary employer was in the position of a master, i.e. he not only could give directions as to what work the servant had to perform but had the right to control how the work should be done. Whether or not the temporary employer had such a right in any particular case is a question of fact.

Where, under a contract, a vehicle is hired out with its driver to another person, the owner of the vehicle exercises his authority by delegating to his driver the discretion in regard to the manner of driving. Ordinarily when a vehicle with its driver is hired, the driver continues to exercise his own discretion which had been vested in him by his regular employer when he was sent out with the vehicle. If, however, the hirers intervene to give directions as to how to drive for which they have no authority to give, and the driver Pro Hac Vice complies with them, with the result that a third party is negligently damaged, the hirers may be liable as joint tort-feasors. 1947 AC 1 & 1897-1 QB 629 & AIR 1927 PC 173 & 1942 AC 601, Rel. on.

To make the hirer liable the plaintiff has to establish that the hurer had a right not only to give direction as to what work the driver of the vehicle had to perform, but also had the right to control how he should drive the vehicle. That question primarily rests on the broad effect of the agreement between the owner of the vehicle and the general employer of the driver of the vehicle on the one hand and the hirer.

Held after considering the facts and the agreement between the hirer and the owner of the vehicle that the plaintiffs failed to establish that the relationship of master and servant had been constituted Pro Hac Vice between the hirer and the driver. (Para 51)

(H) Tort — Master and servant — Vicarious liability — Union of India having statutory duty to convey and carry mail, giving contract to independent contractor, an owner of motor vehicle, to convey mail from one place to another — Driver of contractor's vehicle, while conveying mail, by negligent act meeting an

accident and causing death of plaintiff's son — Liability of Union of India is truly not vicarious but because of breach of statutory duty — (Post Offices Act (1898), Section 4).

The liability of an employer for the tort of his independent contractor where a special duty is laid by the statute on the employer is not a truly vicarious liability, he is liable for a duty which he has broken himself. (Para 54)

The Post Offices Act, 1898, has granted the exclusive privilege of conveying letters to the Central Government. That exclusive privilege includes all the incidental services of receiving, collecting, sending, despatching and delivering of letters except in the cases mentioned in Cls. (a), (b) and (c) of sub-section (1) of Section 4 of the Act. Where the Union Government is sued for damages for loss of a letter owing to the negligence of a servant employed in the Post Office, it is no defence to plead that the work of conveying letters was entrusted to an independent contractor and the loss of the letter was caused owing to the negligence of the contractor or the contractor's servant. But where a contractor is employed for transporting postal articles from one post office to another or from the railway station to the post office and the contractor's driver by his negligence commits a tort, say, running over a man, the Union Government is not liable because that is a collateral negligence. (Para 55)

It is not in consequence of any order of the postal authorities that the driver ran against the victim; it is in a consequence of his negligence in driving the vehicle, that is to say, in performing the work for which he was employed by the contractor to do. In performance of the work of the driver viz., the manner of driving the vehicle, the postal authorities have not intervened. Therefore the Union of India are not liable for the negligence of the driver. (Para 56)

Cases Referred: Chronological Paras

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| 1965 (2) Cri LJ 144, Kasturi Lal v. State of Uttar Pradesh | 13 |
| (1962) AIR 1962 SC 1 (V 49) = | |
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- (1868-69) 5 Bom HC App 1 = Bourke AOC 166, Peninsular and Oriental Steam Navigation Co. v. Secy. of State for India 12, 13
- (1859) 4 H & N 653 = 29 LJ Ex 25, Duckworth v. Johnson 20
- (1857) 29 LT (OS) 111, Bramall v. Lees 20
- (1840) 6 M & W 499 = 9 LJ Ex 308, Quarman v. Burnett 47
- B. S. Keshava Iyengar, for Appellants (in both the appeals); S. G. Sundararswamy, for Respondent (in R. F. A. No. 149/62).

G. K. GOVINDA BHAT J.:— These appeals brought on behalf of the Union of India and the Post Master General, Madras Circle (Defendants Nos. 1 and 2) are directed against the judgment and decrees of the Court of the Principal District Judge, Bangalore in Original Suits Nos. 37 and 38 of 1959. Original Suit No. 37 of 1959 was a suit brought by Respondents in Regular First Appeal No. 149 of 1962 for damages under the Fatal Accidents Act, 1855 and Original Suit No. 38 of 1959 was a suit brought by the Respondent in Regular First Appeal No. 152 of 1962 for damages for personal injuries.

2. The plaintiffs in Original Suit No. 37 of 1959 are the parents of Subhas Alva,

hereinafter called Subhas, who died in the accident. The plaintiff in Original Suit No. 38 of 1959 is Jeevaraj Alva, hereinafter called Jeevaraj and he is the elder brother of the said Subhas. In July 1958 Subhas and Jeevaraj were students in the Arya Vidya Shala, Sheshadripuram, Bangalore City. The Railway Mail Service office is situated in a private building on the Seshadripuram Main Road opposite to the said Arya Vidya Shala. On the forenoon of the 18th July 1959 at about 10-30 a. m. Subhas and Jeevaraj along with other boys were sitting near the gate of the said R. M. S. Office. At that time, a motor lorry bearing No. MYF 971 belonging to the Bangalore Ex-Servicemen's Transport Co. Ltd., Bangalore (Defendant No. 3 in both suits) employed for the carriage of mails by Defendants 1 and 2 emerged out of the compound of R. M. S. office. As the said lorry was coming out, one of the gate pillars of the R. M. S. Office compound collapsed and the debris fell on Subhas and Jeevaraj. Subhas died on the spot instantaneously. Jeevaraj suffered grievous injuries of fracture to the bones of one of his legs and one of his arms. The parents of Subhas brought Original Suit No. 37 of 1959 for damages under the Fatal Accidents Act, 1855 claiming Rupees 20,700. Jeevaraj brought Original Suit No. 38 of 1959 claiming Rs. 36,225 for personal injuries suffered. The defendants in both the suits are common; the first defendant is the Union of India, the second defendant is the Post Master General, Madras Circle, Defendant No. 3 is the Bangalore Ex-Servicemen's Transport Company Limited (which Company is the owner of the Motor Lorry No. MYF. 971), defendant No. 4 is the driver of the said vehicle and defendant No. 5 is the Mysore Government Insurance Department with which the said motor vehicle was insured for third party risk.

3. The case of the plaintiffs in both the suits was that under an agreement between Defendant No. 1 and Defendant No. 3, the work of conveyance of mails between the Head Post Office and the City's sub-post offices was entrusted to Defendant No. 3; that the contractors (Defendant No. 3) were discharging their work under the control and direction of Defendant No. 2; that Defendant No. 4 was the driver in the employment of Defendant No. 3; that one of the vehicles engaged for the conveyance of the mail was lorry No. MYF 971 belonging to Defendant No. 3; that on 18-7-1958 defendant No. 4 was driving the said vehicle in the course of his employment when the said vehicle dashed against the gate pillar and the compound wall of the R. M. S. Office resulting in the collapse of one of the gate pillars and the debris thereof fell on Subhas

and Jeevaraj and consequently Subhas died on the spot and Jeevaraj sustained grievous hurt. The plaintiffs alleged that the accident was caused by the gross negligence of defendant No. 4, and that Defendant No. 3 as employer of defendant No. 4 is vicariously liable for the acts of Defendant No. 4, and that Defendant No. 1 is also liable for the consequences of the acts done in the course of the employment of Defendants 3 and 4. The plaintiffs in Original Suit No. 37 of 1959 alleged that Subhas was a healthy smart boy with a bright future before him and he could have been of considerable comfort and assistance to his parents and that as a result of his death, his parents have been deprived of the assistance and support which they would have otherwise derived from their deceased son. They estimated the damage at Rs. 20,000 on which they claimed Rs. 700 as interest. Jeevaraj claimed Rs. 35,000 as damages and Rs. 1,225 as interest thereon.

4-5. Defendants 1 and 2 filed a common written statement denying their liability. They denied that Defendant No. 4 was in their employment and in the alternative they contended that Defendant No. 4 was not negligent. They further contended that Defendant No. 3 was an independent contractor and that they were not liable for the negligence of Defendant No. 3 or the servants of Defendant No. 3. A legal contention was also raised that defendant No. 1 is not liable to be sued in tort for acts done in exercise of sovereign functions. The quantum of damages was also disputed. Defendant No. 3 denied that Defendant No. 4 was negligent but admitted that Defendant No. 4 was its employee. Defendant No. 4 remained *ex parte*. It is not necessary for the purpose of these appeals to refer to the written statement of Defendant No. 5.

6. On the pleadings the trial Court framed the following issues:—

In Original Suit No. 37 of 1959:

- (1) Was the death of Subhas Alva brought about by acts of gross negligence on the part of defendant 4?
- (2) Have the plaintiffs sustained damages to the tune of Rs. 20,000 due to the death of Subhas Alva?
- (3) Are the plaintiffs entitled to claim interest at six per cent per annum as further damages?
- (4) Is defendant 3 liable for the consequences of the acts of defendant No. 4 as done in the course of employment?
- (5) Is defendant 1 liable for the consequences of acts done in the course of employment of defendants 3 and 4 through defendant 2?

(6) Is defendant 5 as the insurer of the vehicle liable to satisfy the suit claim?

(7) To what reliefs are the plaintiffs entitled?

In Original Suit No. 38 of 1959:

- (1) Were the injuries caused to the plaintiff brought about by acts of gross negligence on the part of defendant 4?
- (2) Are the damages sustained by the plaintiffs estimated at Rs. 35,000?
- (3) Is the plaintiff entitled to claim interest at 6 per cent per annum as further damages?
- (4) Is defendant 3 liable for the consequences of the acts of defendant 4 as done in the course of employment?
- (5) Is defendant 1 liable for the consequences of acts done during the course of employment of defendants 3 & 4 through Defendant 2?
- (6) Is defendant 5 as the insurer of the vehicle, liable to satisfy the suit claim?
- (7) To what relief, is the plaintiff entitled?

7. As the main issues were common, the suits were tried together and common evidence was adduced. The trial Court pronounced a common judgment in which it found all the issues excepting the claim for interest covered by Issue No. 3 in both the suits in favour of the plaintiffs. In Original Suit No. 37 of 1959 the trial Court awarded a sum of Rs. 15,000 under Section 1-A of the Fatal Accidents Act and Rs. 5,000 under Section 2 of the said Act. Thus a sum of Rs. 20,000 was decreed with interest from the date of the decree. In Original Suit No. 38 of 1959, the Court awarded Rs. 25,000 with interest from the date of the decree.

8. Defendants 3 to 5 have not appealed against the said decrees and they are not before us. Defendants Nos. 1 and 2 have appealed.

9. On the contentions urged by the learned counsel on both sides, the points that arise for determination are:

- I. Are the suits not maintainable against the Union of India Defendant No. 1?
- II. Was the accident caused by the negligent driving of defendant No. 4?
- III. Have the plaintiffs in Original Suit No. 37 of 1959 proved that they had a reasonable expectation of pecuniary benefit from the continuance of the life of Subhas?
- IV. Is the amount of compensation decreed for the loss of expectation of life of Subhas arbitrary and excessive?
- V. Does the amount of compensation awarded to Jeevaraj for personal injuries call for interference in appeal?

VI. Have the plaintiffs established that the relationship of master and servant has been constituted pro hac vice between defendant No. 1 and defendant No. 4?

VII. If point No. VI is found against the plaintiffs, is defendant No. 3 liable for the negligent driving of defendant No. 4?

10. Point No. I: The contention urged by the learned Central Government Pleader on behalf of the appellants was that the exclusive privilege of conveying by post of postal articles vested in the Government of India under the Indian Post Offices Act, 1898, is a sovereign function and consequently no action lies against the Union of India in respect of a tort committed by the servants of the Postal Department in the course of discharge of their duties, even assuming that defendant No. 4 was a servant of the appellants at the time of the accident.

11. Where an act is done in the exercise of the powers usually called sovereign powers, by which is meant powers which cannot be lawfully exercised except by a sovereign or private individual delegated by a sovereign to exercise them, no action will lie against the State in respect of a tort committed by a servant of the State.

12. The leading case on the subject is the *Peninsular and Oriental Steam Navigation Co. v. Secy. of State for India*, (1868-69) 5 Bom HC App 1 wherein Chief Justice Peacock enunciated the principles governing the suability of the State in regard to its tortious acts. That was a case where the plaintiffs had sued for damages for injury to their horses caused by the negligence of some of the servants employed in the Government Dock Yard in the Hoogly. In allowing the claim for damages, the learned Chief Justice held that the East India Company could have been sued for the torts of its servants committed in the course of transactions like the maintenance of a dock-yard, carrying of persons or goods on a railway or conveying messages by telegraph. The learned Chief Justice explained as to what is meant by the expression 'sovereign powers' thus:

"Where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie."

The judgment cited cases of exercise of powers not sovereign where the State is not immune from liability for torts of its servants. The case of *Electric Telegraph* is one such instance: A gentleman re-

turning home on a dark evening was dragged backwards out of the conveyance in which he was driving himself, by the wire of the Electric Telegraph which crossed the public road, and which hung loosely and so low that he was unable to pass under it. The gentleman was seriously injured and lamed for life. Peacock, Chief Justice posed the question and answered that if the accident had occurred at the time of the East India Company by the negligence of their servants, they would have been liable.

13. The decision in *Peninsular and Oriental Steam Navigation Company's case*, (1868-69) 5 Bom HC App 1 was approved in *Kasturilal v. State of Uttar Pradesh*, AIR 1965 SC 1039 and the principles enunciated by Peacock, Chief Justice, were accepted as laying down the correct law. The question therefore is, is the tortious act committed by Defendant No. 4 referable to, and ultimately based on the delegation of the sovereign powers of the State? If the answer is in the affirmative the plaintiffs will be non-suited. If the answer is in the negative, the action will lie.

14. In the Middle Ages, postal services as existed in Great Britain were maintained by the Universities and the Guilds of Merchants and it was only during the reigns of Queen Elizabeth I and James I that the State prohibited private posts maintained by merchants. Rulers in India from time immemorial maintained their own system of communication and in the year 1766 the East India Company established somewhat similar postal services mainly intended for official correspondence. The post was first made available to the public in the year 1774 when a regular organisation was set up but it was not until 1837 that a monopoly was established in favour of the official post. The Departments of Posts and Telegraphs and Railways are under one Ministry in the Government of India. The members of the public for making use of the postal services have to pay for the same. The postal Department is worked on commercial principles. If the telegraph service is a commercial activity not attributable to sovereign powers of the Government, we fail to see how the operation of postal services can be considered as exercise of sovereign functions. In our opinion, the Postal Department is a commercial cum public utility Department of the Government of India and it by no means constitutes a sovereign function of the State. Therefore the contention urged on behalf of the appellants is clearly untenable and is rejected.

15. Point No. II: There is no dispute that a boy named Subhas Alva aged 10 years was killed and his brother Jeevaraj Alva aged 12 years was seriously injured at about 10-30 A. M. on July 18, 1958 in

an accident by the fall of the debris of one of the gate pillars of the R. M. S. office at Seshadripuram in Bangalore City. The case of the plaintiff is that the motor vehicle driven by Defendant No. 4 dashed against the gate pillar as it emerged out of the R. M. S. office compound and the top portion of the gate pillar fell on the said two boys sitting near the said pillar resulting in the death of Subhas and serious injury of Jeevaraj. Defendant No. 4, the driver of the Motor vehicle, did not file any written statement and remained ex parte. Defendant No. 3, the owner of the motor vehicle, denied that the Motor Vehicle dashed against the gate pillar; it contended that it had rained heavily on the previous day and at the particular moment when the motor vehicle was coming out of the R. M. S. office compound, the iron gates accidentally turned against the running vehicle, when defendant No. 4 applied his brakes instantaneously and brought the vehicle to a stop within the minimum possible time and in that process the accident was caused, and that the accident was not attributable to any negligence of defendant No. 4. Defendants Nos 1 and 2 denied that the accident was caused by any negligence of defendant No. 4.

16-17. For the plaintiff four eye-witnesses were examined; they are P. Ws. 1, 3, 4 and 8 (After discussing their evidence his Lordship proceeded). The Court below has accepted the evidence of P. Ws. 1, 3, 4 and 8 and we see no reason to differ from the learned trial Judge. If that finding is correct, it is not disputed by the learned Central Government Pleader that defendant No. 4 was negligent in his driving. Our finding is that defendant No. 4 was negligent when he drove the motor vehicle and his negligence was responsible for the fatal accident to Subhas and the personal injury to Jeevaraj.

18. Point No. III: Section 1-A of the Fatal Accidents Act, 1855, as amended by Act No. III of 1951 is in pari materia with the provisions of Sections 1 and 2 of the Fatal Accidents Act, 1846 (9 and 10 Vict. C. 93) and therefore, the decisions of courts in the United Kingdom under the Fatal Accidents Act will be useful in deciding cases under the Indian Act. The law as settled in England is: Damages are based on the amount of actual pecuniary benefit which the persons mentioned in the section might reasonably have expected to enjoy had the deceased person not been killed. Damages cannot be recovered for the gravity of the injury to the deceased, or as a compassionate allowance or solatium for the mental anguish or loss of society due to the death. The pecuniary loss is not limited to the value of money lost, or to the money value of the benefits lost, but includes the monetary loss incurred by replacing

services rendered gratuitously by the deceased, if there was a reasonable prospect of their being rendered freely in the future but for the death of the deceased. The pecuniary loss may be evidenced by proof of a reasonable expectation of some future pecuniary benefit. (Vide Halsbury's Laws of England Vol. 28-III Edition, page 100 at paras 110-111).

19. The pecuniary loss may be prospective and that prospective loss may be taken into account. It is not a condition precedent to the maintenance of an action under the Fatal Accidents Act, 1846 that the deceased should have been actually earning money or money's worth or contributing to the support of the plaintiff at or before the date of the death and all that is necessary to sustain an action is that the plaintiff had a reasonable expectation of pecuniary benefit from the continuance of the life. It is however, not sufficient for the plaintiff to prove that he has lost by the death of the deceased a mere speculative possibility of pecuniary benefit; in order to succeed, it is necessary for him to show that he has lost a reasonable probability of a pecuniary advantage.

The question of reasonable expectation of pecuniary advantage is a mixed question of fact and law. Mere difficulty in assessing damages should not bar a plaintiff from recovering; but the plaintiff must adduce such evidence as affords the judge a reasonable basis on which to infer that pecuniary damage has been inflicted on the plaintiff where there is a mere speculative possibility of benefit, the plaintiff has failed, whereas in the cases where there was a reasonable probability of pecuniary advantage, the plaintiff have succeeded.

20. In Taff Vale Railway Co. v. Jenkins, 1913 AC 1 a girl of 16 was killed in an accident and an action was brought by her father for damages under the Fatal Accidents Act, 1846. The facts found were that the girl was learning the business of dress making that she was an unusually intelligent girl and though she was still an apprentice, she was shortly coming out of the apprenticeship and that she had the prospects of beginning before long to earn a remuneration which might quickly have become substantial. There was further evidence that the girl came to her parents' house at night and that from time to time she gave them some assistance in the house. The father was beginning to fail somewhat in health and there were facts from which the jury may reasonably have taken the view that the amount of assistance which she would have given to the parents would have been considerable and also that she might have carried on her own business and earned some money. Rejecting the contention of the defendants that the deceased should have been actually earning money or contributed to

the support of the plaintiff at or before the death of the deceased, Viscount Haldane, L. C. spoke thus:

"The basis is not what has been called solatium, that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss. But when loss may be prospective, and it is quite clear that prospective loss may be taken into account. It has been said that this is qualified by the proposition that the child must be shown to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition either in the statute or in any doctrine of law which is applicable; nor do I think it is really established by the authorities when you examine them."

Lord Atkinson who concurred with the Lord Chancellor spoke thus:

"I think it has been well established by authority that all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact; there must be a basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first, that the deceased earned money in the past, and second, that he or she contributed to the support of the plaintiff. These are, no doubt, pregnant pieces of evidence, but they are only pieces of evidence; and the necessary inference can, I think, be drawn from circumstances other than and different from them."

In *Barnett v. Cohen*, 1921-2 KB 461 a child under four years of age through the negligence of the defendants was killed and his father brought an action under the Fatal Accidents Act, 1846 to recover damages for the death of his son. The facts found by the Court were: the deceased child was a bright and healthy boy. He had gone to school when only two years of age. The plaintiff (his father) had two other children, both boys aged 9 and 13. The plaintiff was retail and wholesale trading engineer and had a good business. He earned about 1000£ a year, his age was 40 and his health was not good. His wife was aged 33 years and her health was also not good. The plaintiff meant to give the deceased child good education by sending him to an ordinary school till about 14 years, then to a secondary school, and then, to a University. The question before the Court was whether the plaintiff had proved the pecuniary loss requisite to establish a cause of action. It was held that the plaintiff had not satisfied the Court that he had a reasonable expectation of pecuniary benefit.

Mc. Cardie, J., after referring to the passages in the speech of Lord Haldane in *Taff Vale Railway Company's case*, 1913 AC 1 stated thus:

"This question of reasonable expectation of pecuniary advantage seems to me to be a mixed question of fact and law. Mere difficulty in assessing damages should not bar a plaintiff from recovering; see the principle involved in *Chaplin v. Hicks*, 1911-2 KB 786. But, on the other hand, I think that the plaintiff must adduce such evidence as affords the judge a reasonable basis on which to infer that pecuniary damage has been inflicted on the plaintiff. Such a basis was held to exist in *Bramall v. Lees*, (1857) 29 LT (OS) 111, where the father secured a verdict for 15£ before Crompton J. and a jury, although the child was only 12 years old, was earning nothing and was at the time of its death pecuniarily a burden to its parents. Apparently verdict was based on the ground that in the course of a year or two the child would have earned wages at a factory near its father's home. A rule nisi for a new trial was granted by the Exchequer Court, but was not, I gather, further pursued.

In *Duckworth v. Johnson*, (1859) 4 H & N 653, the father gained a verdict for 20£ for the death of his son aged fourteen who had when twelve years old earned 4 s. a week in a painter's shop. In discharging the rule nisi for a new trial Pollock C. B. said, (1859) 4 H & N 653, 657:— 'My opinion is that, looking at the Act of Parliament, if there was no damage the action is not maintainable. It appears to me that it was intended by the Act to give compensation for damage sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence by making them pay costs.' The Court, however, felt that there was just enough evidence to support the verdict. The matter was put somewhat vaguely by Watson B. in the course of his judgment when he said "there must be some evidence of a prospect of benefit."

"I think that the only way to distinguish between the cases where the plaintiff has failed from the cases where he has succeeded is to say that in the former there is a mere speculative possibility of benefit, whereas in the latter there is a reasonable probability of pecuniary advantage. The latter is assessable. The former is non-assessable. This test, though necessarily loose, seems to be the only one to apply. The plaintiff, a widow, failed in *Stimpson v. Wood & Son*, (1888) 59 LT (NS) 218 because, as I read the decision of Manisty and Stephen, JJ. there was nothing more than a mere possibility of loss upon the facts of the case. So too in *Harrison v. London & North Western*

Rly. Co., (1885) Cab & El 540, the plaintiff, a husband, was also defeated because he failed to prove anything more than a possibility of loss through the death of his wife. As Lopes, J. said (ibid 541), 'I must take into account all the circumstances of the case, and all the contingencies and uncertainties that arise'.

"The case which might appear to go nearest in favour of the present plaintiff is *Wolfe v. Great Northern Railway Co. of Ireland*, (1890) 26 LR Ir 548, where the plaintiff, a telegraph clerk, obtained a verdict for 150£ for the death of his daughter, aged ten, who helped her parents in the house and who, moreover, was of such exceptional value in that way as to enable them to dispense with a servant. The Irish Court of Appeal held that there was evidence which justified the jury in the conclusion that the services of the deceased were of a pecuniary value exceeding the cost of bare maintenance and education. The verdict, however, was reduced to 50 L. The facts in that case were exceptional as to the value of the child.

In the present action the plaintiff has not satisfied me that he had a reasonable expectation of pecuniary benefit. His child was under four years old. The boy was subject to all the risks of illness, disease, accident and death. His education and upkeep would have been a substantial burden to the plaintiff for many years if he had lived. He might or might not have turned out a useful young man. He would have earned nothing till about sixteen years of age. He might never have aided his father at all. He might have proved a mere expense. I cannot adequately speculate one way or the other. In any event he would scarcely have been expected to contribute to the father's income, for the plaintiff even now possesses 1000£ a year by his business and may increase it further, nor could the son have been expected to aid in domestic service. The whole matter is beset with doubts, contingencies and uncertainties. Equally uncertain, too, is the life of the plaintiff himself in view of his poor health. 'He might or might not have survived his son.' That is a point for consideration, for, as was pointed out by Bray, J. when sitting in the Court of appeal, in *Price v. Glynea and Castle Coal and Brick Co.* (1915) 9 BWCC 188, 198: 'Where a claim is made under Lord Campbell's Act, as it is here, it is not only a question of the expectation of life of the deceased man, but there is also a question of the expectation of the life of the claimant'. Upon the facts of this case the plaintiff has not proved damage either actual or prospective. His claim is pressed to extinction by the weight of multiplied contingencies. The action therefore, fails."

21. In *Subramanyam v. District Board, Narasapur*, AIR 1941 Mad 733, the plaintiffs, a father and his three minor children brought a suit for damages against the District Board of Narasapur under the Fatal Accidents Act on account of an accident alleged to have been caused by the negligence of the defendants which was responsible for the fall of a tree on a cart passing along the Narasapura Nidadavole Road, with the result that the wife and two sons aged three years and one year, were killed. While rejecting the claim for damages for loss of pecuniary benefit alleged to have been suffered on account of the death of the wife and children of plaintiff No. 1, Horwill, J. who delivered the judgment of the Court observed:

"It is quite clear, as the lower Court says, that the only damages for which the defendant can be liable are those arising out of any financial or pecuniary loss which the plaintiffs have suffered on account of the death of the wife and children of plaintiff 1. The ages of the two little boys who were killed were three years and one year respectively; and it would be absurd to argue that any of the plaintiffs suffered any financial loss on account of their death. The possibility that these two little boys would, in some far distant times, be of some help to their father in his declining years is too speculative to be the basis of any calculation for damages."

22. The question for our determination is whether the plaintiffs have on the evidence on record satisfied the Court that they had a reasonable expectation of pecuniary benefit. They must adduce such evidence as affords the Court a reasonable basis on which to infer that pecuniary damage has been inflicted on them. The trial Court's conclusion on the evidence has been summarised in paragraph 7 of its judgment thus:

"From the evidence of the father it is seen that he was quite well-to-do and was a successful medical practitioner and he was in a position to give the best education to his sons. The deceased boy possessed the capacity spoken to by his teachers, and it is obvious that the education would have helped him to become quite successful in life and that he would have been of great help to his parents, who had helped him to achieve that position. It is not suggested that there has been any advantage to the parents by the death of this boy in the way of any insurance amounts. To a specific enquiry in this behalf it has been stated on behalf of the plaintiffs that there has been no such advantages from any such sources. From the evidence noticed above, it is clear that there was reasonable prospect of Subhas Alva completing his educational career very successfully and being able to get a

good position in life. The difficulty in a case of this type is that it cannot be stated that the plaintiffs are the defendants, but the contrary was the case. Subhas Alva was a dependant of the plaintiffs. But what is claimed by way of damage is that the family had lost the prospect of getting support from Subhas Alva on his completing his educational career and getting a good position in life. It is not made out that a claim of this type is not tenable in law."

It was urged before us by the learned Central Government Pleader that that there was no reasonable basis from the evidence on record on which the Court below could have come to the conclusion that there was reasonable expectation of pecuniary benefit which has been lost on account of the death of Subhas.

In order to appreciate the said contention, we will examine the pleadings and the relevant evidence. The relevant pleadings are contained in plaint paragraphs 8, 9, 10 and 11.

They read:—

"8. Plaintiffs have sustained grievous loss as a result of the death of their son Subhas Alva under tragic circumstances as narrated above. This boy went to school as usual on that morning and while waiting for the school bell to ring he was on the road side when he met with violent death. Apart from the distress, sorrow and mental pain which the parents have been subjected to, plaintiffs have sustained substantial damage as a consequence of the death of their son in the circumstances set forth above,

9. The boy was healthy, smart, and good at his studies and had a bright future before him. He could have been of considerable comfort and assistance to his parents. As a result of his sudden death, plaintiffs have been deprived of the assistance and support which they would otherwise have derived from their son.

10. The damage so sustained is estimated at a sum of Rs. 20,000. This includes the amount spent for funeral expenses.

11. Plaintiffs are entitled to the reliefs claimed herein by virtue of the provisions of the Fatal Accidents Act read with the Indian Succession Act (Sections 42 and 306).

23. There is no specific averment in the plaint to the effect that there was a reasonable expectation of pecuniary benefit. All that is stated is that the boy had a bright future before him and he could have been of considerable comfort and assistance to his parents and as a result of his death, they have been deprived of the assistance and support which they would otherwise have derived from their son.

The pleadings, in our opinion, are vague and lack essential averments.

24. Turning to the evidence, the only material evidence on the question is that of plaintiff No. 2, Dr. Nagappa Alva, the father of the deceased boy. Plaintiff No. 1 is the mother of the deceased. Dr. Nagappa Alva, examined as P. W. 18, stated that he had four sons and one daughter; that the deceased Subhas was the youngest son and was aged about 10 years. He is a medical practitioner aged 53 years when he was examined on 12-1-1962. He was practising in Mangalore until June 1958 when he shifted to Bangalore with his family. On coming to Bangalore he got his sons admitted to Arya Vidya Shala. Subhas who was studying in Class IV in Mangalore was promoted to Class V; he was studying in the V Class at the time of the accident. P. W. 13 a teacher of Subhas in Mangalore, stated that Subhas was a brilliant boy. P. W. 14 a private tutor of Subhas in Mangalore stated that Subhas was brilliant boy. P. W. 18 had a lucrative practice in Mangalore; after he shifted to Bangalore he continued to have a good practice in medicine. The deceased boy was not rendering any service to his parents. The evidence of P. W. 18 in support of his claim concerning reasonable expectation of pecuniary benefit is as follows:—

"I have claimed damages regarding Subhas on the basis that if he had lived a normal life he would have been of monetary assistance to his parents. The family would have benefited much more. Considering his talents and personality he would have come up very well in life. I have claimed only a token.

* * * * *

'At the time of this accident the two boys Jeevaraj and Subhas were not actually rendering any help to the family as they were too young.'

* * * * *

The 20,000 Rs. I have claimed is a token of the loss we have suffered by the death of Subhas. If he were alive he would have been of far greater help to the family. 'On account of his talents and personality he would have earned a great deal and he would have been of much greater help to us than 20,000 Rs. and I have taken into account mainly the bright future the boy had, my status and my income.'

(Underlining (here in ' ') is ours).

From the above evidence, what is established is that the father of the deceased boy is a medical practitioner having a lucrative practice and that he is in affluent circumstances. The deceased boy was not rendering any domestic or other service to his parents. The boy was aged about 10 years studying in the V class.

His parents were in a position to give him higher education. Subhas being a brilliant boy, it may be reasonably expected that his father might have sent him for medicine. By the time Subhas completed his education and was in a position to earn, his father would have been past 65 years. The boy was subjected to all the risks of illness, accidents and death. There was possibility that his parents might or might not have survived their son. The education and maintenance of the boy for about 15 years would have been a substantial burden. Though Subhas, was a brilliant boy, one cannot be certain that he would continue to be a brilliant boy throughout his academic career. He may or may not have turned out to be a useful young man. He may never have aided his parents even if he had earned. When the parents are well-to-do, the boy could scarcely have been expected to contribute for the maintenance of his parents. As observed by Mc. Cardie, J. in (1921) 2 KB 461: "The whole matter is beset with doubts, contingencies and uncertainties and what has been established from the evidence on record is that there was a mere speculative possibility of benefit but not a reasonable probability of pecuniary advantage. The former is non-assessable while the latter is assessable. Therefore, the Court below, in our opinion, was in error in awarding damages to the plaintiffs under Section 1-A of the Fatal Accidents Act. On point No. III, we hold against the plaintiffs in Original Suit No. 37 of 1959 and in favour of the appellants.

25. Point No. IV: The Court below has decreed a sum of Rs. 5,000 for loss of expectation of the life of Subhas. The learned Special Central Government Pleader urged that the Court below acted on wrong principles in arriving at the amount of damages and that the amount awarded is extravagantly large. He also urged that the plaintiff has laid no basis for a claim under Section 2 of the Fatal Accidents Act for the loss of expectation of life.

26. The material pleadings regarding the entire claim made in Original Suit No. 37 of 1959 are contained in plaint paragraphs 8 to 11 which we have set out earlier while dealing with Point No. III. The plaintiffs have claimed damages for the loss of future assistance to them. There is no averment made in the plaint that any damages are claimed for loss of expectation of life of Subhas. The Court below has held that since paragraph 11 of the plaint states that a claim is made under the Fatal Accidents Act read with the Indian Succession Act, that can be construed as a claim made under Section 2 also. The claims arising under Sections 1-A and 2 of the Act are founded on

two distinct causes of action. Odgers in his Principles of Pleading and Practice, 18th Edition at page 474 has given a precedent for a claim arising from death by accident. The practice is to make a specific claim for loss of expectation of life. The plaintiffs have claimed a consolidated sum of Rs. 20,000 as damages; they have not stated separately the amount claimed in respect of the two distinct causes of action. The pleadings, in our opinion, are defective; when the plaint clearly states that the damage claimed is the loss suffered by the plaintiffs, that pleading cannot be construed as a claim for damages suffered by the estate of the deceased.

27. Assuming that the plaint can be construed as one laying a claim for damages under Section 2 of the Act, we proceed to consider whether the Court below acted on any wrong principle in assessing the amount of damages in order to entitle the appellate Court to interfere.

28. The Court below has dealt with the question of the quantum of damages under Section 2 in paragraph 8 of its judgment. It has fixed a sum of Rupees 5,000 for loss of expectation of life taking into consideration of the fact that Subhas was not an infant and was already showing definite signs of coming up well in life. This is what the Court has stated:

"Taking note of the fact that Subhas Alva was not an infant and was more than about 14 years old and he was already showing definite and certain signs of coming up well in life, I would fix the damages at Rs. 5,000 for loss of expectation of life. In this case there is no question of recovering any specific amount by way of special damages for treatment of injuries etc. suffered by Subhas Alva as he died an instantaneous death. No evidence is available as to how much was spent for his funeral obsequies."

29. The statement that Subhas was more than about 14 years is factually incorrect. According to the evidence which we have discussed under Point No. III, he was about 10 years of age and was studying in V class. His father had a lucrative medical practice; the deceased was an intelligent boy and he could have expected his father to give him good education.

30. The main considerations to be borne in mind in assessing the damages for loss of expectation of life cannot be stated better than in the following passages in the speech of Viscount Simon L. C. in *Benham v. Gambling*, 1941 AC 157.

"The house is now set the difficult task of indicating what are the main considerations to be borne in mind in assessing damages under this head, and, in the event of its differing from the view taken in the Courts below, of deciding whether this difference is of a kind which would

justify interfering with the figure of £200 fixed by the learned Judge.

In the first place, I am of opinion that the right conclusion is not to be reached by applying what may be called the statistical or actuarial test. Figures calculated to represent the expectation of human life at various ages are averages arrived at from a vast mass of vital statistics; the figure is not necessarily one which can be properly attributed to a given individual. And in any case the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life. The age of the individual may, in some cases, be a relevant factor. For example, in extreme old age the brevity of what life may be left may be relevant, but, as it seems to me, arithmetical calculations are to be avoided, if only for the reason that it is of no assistance to know how many years may have been lost, unless one knows how to put a value on the years. It would be fallacious to assume, for this purpose, that all human life is continuously an enjoyable thing, so that the shortening of it calls for compensation, to be paid to the deceased's estate, on a quantitative basis. The ups and downs of life, its pains and sorrows as well as its joys and pleasures all that makes up 'life's fitful fever' have to be allowed for in the estimate. In assessing damages for shortening of life, therefore, such damages should not be calculated solely, or even mainly, on the basis of the length of life that is lost. Asquith, J. appreciated this view, as his judgment shows. But I think that, in the light of the large amounts awarded in some previous cases in respect of quite young children, the figure he arrived at was unduly swollen by the consideration that the child might otherwise have had many years of life before it.

The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. Such a problem might seem more suitable for discussion in an essay or Aristotelian ethics than in the judgment of a Court of law, but in view of the earlier authorities, we must do our best to contribute to its solution. The learned Judge observed that the earlier decisions quoted to him assumed 'that human life is, on the whole, good'. I would rather say that, before damages are awarded in respect of the shortened life of a given individual under this head, it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him to a future of happiness or despondency that would be

a circumstance justifying a smaller award. It is significant that, at any rate in one case of which we were informed, the jury refused to award any damages under this head at all. As Lord Wright said in *Rose v. Ford*, 1937 AC 826, special cases suggest themselves where the termination of a life of constant pain and suffering cannot be regarded as inflicting injury, or at any rate as inflicting the same injury as in more normal cases. I would further lay it down that, in assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness; the test is not subjective and the right sum to award depends on an objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.

The main reason, I think, why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects—having passed the risks and uncertainties of childhood and having in some degree attained to an established character and to firmer hopes—his or her future becomes more definite and the extent to which good fortune may probably attend him at any rate becomes less incalculable. I would add that, in the case of a child, as in the case of an adult, I see no reason why the proper sum to be awarded should be greater because the social position or prospects of worldly possessions are greater in one case than another. Lawyers and Judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status.

It remains to observe, as Goddard, L. J. pointed out, that, stripped of technicalities, the compensation is not being given to the person who was injured at all, for the person who was injured is dead. The truth of course is that in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived, the jury or judge of fact is attempting to equate incommensurables. Damages which would be proper for a disabling injury may well be much greater than for deprivation of life. These considerations lead me to the conclusion that in assessing damages under this head, whether in the case of a child

or an adult, very moderate figures should be chosen. My noble and learned friend Lord Roche was well advised when he pointed out in 1937 AC 826 the danger of this head of claim becoming unduly prominent and leading to inflation of damages in cases which do not really justify a large award.

My Lords, I believe that we are all agreed in thinking that the proper figure in this case would be 200 £ and that even this amount would be excessive if it were not that the circumstances of the infant were most favourable. In reaching this conclusion, we are in substance correcting the methods of estimating this head of loss, whether in the case of children or adult, which have grown up in a series of earlier cases, and which Asquith J. naturally followed, and are approving a standard of measurement which, had it been applied in those cases, would have led, at any rate in many of them, to reduced awards. I trust that the views of this House, expressed in dealing with the present appeal, may help to set a lower standard of measurement than has hitherto prevailed for what is in fact incapable of being measured in coin of the realm with any approach to real accuracy."

31. The correct principles governing the assessment of the damages for loss of expectation of life to be deduced from the above decision are:

(1) The thing to be valued is not the prospect of length of days, but the prospect of predominantly happy life. The age of the individual may in some cases be a relevant factor but such damages should not be calculated solely or even mainly on the basis of the length of life that is lost.

(2) It is necessary for the Court to be satisfied before damages are awarded in respect of the shortened life of the given individual, that the circumstances of the individual's life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him to future unhappiness or despondency, that would be a circumstance justifying a smaller award.

(3) No regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects.

(4) In the case of a very young child there is necessarily so much of uncertainty about the child's future that no confident estimate of prospective happiness can be made and therefore, the appropriate figure of damages should be reduced.

(5) When an individual has reached an age to have settled prospects—having passed the risks and uncertainties of child-

hood and having in some degree attained to an established character and to firmer hopes—his or her future becomes more definite and the extent to which good fortune may probably attend him at any rate becomes less incalculable.

(6) In assessing damages whether in the case of a child or an adult very moderate figures should be chosen.

32. The Court below in assessing the damages has not taken into consideration the fact that Subhas was yet a young boy of 10 years and there is necessarily so much uncertainty about his future that no confident estimate of prospective happiness can be made.

33. In the case of Gobald Motor Service Ltd. v. Veluswami, AIR 1962 SC 1, a sum of Rs. 5,000 was awarded for loss of expectation of life of one Rajarathnam aged 34 years. The deceased Rajarathnam died three days after the accident and for the mental suffering and loss of expectation of life, a sum of Rs. 5,000 was awarded. That case went to the Supreme Court on appeal from the High Court of Madras in Gobald Motor Service Ltd v. Veluswami, AIR 1953 Mad 981. It is seen from paragraph 16 of the judgment of the High Court that Rajarathnam, was a man of the age of 34 years carrying on business as a doctor with reasonable prospects of improving in his business and that he was living in comfort. Rajarathnam had reached an age to have settled prospects, having passed the risks and uncertainties of childhood, and in such a case the proper figure of damages should have been more than in the case of a boy of 10 years who has not reached the age to have settled prospects. According to the evidence in the present case, the death of Subhas was almost instantaneous and therefore, no damages could be awarded for mental agony and suffering. The appropriate figure of damages in the instant case could not have been the same as that was awarded in Gobald Motor Service's case, AIR 1962 SC 1. If we were sitting as the Court of first instance, the proper sum to be awarded could have been fixed at Rs. 3,000. The sum awarded by the Court below however, cannot be considered as extravagantly large and therefore, we will not be justified in interfering with the amount assessed by the trial Court. On Point No. IV, we hold that the sum awarded under Section 2, though excessive, is not extravagantly large, and we affirm the finding of the Court below fixing the damage at Rs. 5,000.

34. Point No. V: The question is whether the quantum of damages awarded to Jeevaraj in Original Suit No. 38 of 1959 is extravagantly excessive and calls for interference. That Jeevaraj is entitled to damages for personal injuries in the event of appellants being held liable, was not disputed before us. The learned Central

Government Pleader urged that the assessment of damages by the trial Court is not based on any principles and that it is extravagantly excessive. That Jeevaraj sustained grievous injuries and consequently he was an in-patient in the hospital from 18-7-1958 to 22-10-1958, that the bones of his right forearm and left leg were fractured, are facts that are not disputed. P. W. 10, Dr. Authikeshavalu, the Dean of the Medical College, Bangalore and Superintendent and Surgeon of Victoria Hospital, Bangalore, has stated that he attended on Jeevaraj who had suffered a compound fracture of lower end of his right forearm, a fracture on the upper part of ulna, a lacerated wound in the same region with bone fragments protruding out of the wound, fractures of both bones of left leg at the middle with overriding deformity and lacerated injury over the lateral part of the upper portion of the right forearm. He has further stated that as a result of the injuries, Jeevaraj had a little difficulty in the movement of the right hand and right elbow and weakness of the left leg and that it would be correct to say that they were handicaps for the boy, that the boy could not act freely and he had to be careful in using the fractured leg and arm while playing games. His further evidence was that it is not easy to say that as the boy grows older, his handicaps will be set right and that the tendency as he grows older is for the bones to get deformed as further growth is arrested.

35. P. W. 11 Dr. David, Assistant Surgeon, Victoria Hospital, Bangalore, who was on duty when Jeevaraj was admitted to the hospital, has given the description of injuries found on his body. P. W. 17 is Jeevaraj. He has stated that the shape of his right elbow has changed and there are four deep and long scars there, that after the fracture he is not able to use his right elbow and arm as before and that even in 1962 when he gave evidence, he was not able to write fast and that he could not lift any book or article in his right hand without causing pain.

36. The learned trial Judge has summarised the material evidence in paragraph 19 of his judgment and has rightly arrived at the conclusion that Jeevaraj has become handicapped physically and to some extent mentally also. In regard to the principles governing the assessment of damages for personal injuries, the learned trial Judge referred to the principles laid down by this Court in *Ganapathy Bhatta v. State of Mysore*, AIR 1960 Mys 222. In the said decision, Somnath Iyer J. has succinctly stated the principles for the guidance of the courts in the matter of assessment of the damages for personal injuries. This is what the learned Judge has stated:

"In an action for damages for personal injuries caused to the plaintiff in an accident the plaintiff is entitled to be compensated for the pain and suffering undergone by him as a result of the accident as also in respect of the general impairment of his health, if there has been any such impairment, and reduced capacity for work, if there has been lowering of his endurance of stamina in that regard, besides the special damages awardable to him for the expenses which he had to incur for his treatment during the period he was an in-patient in the hospital....."

In an action for personal injuries it is impossible, in view of the difference in the facts of individual cases, to standardise the amounts of damages which should be awarded; damages should be assessed so as, while bearing in mind the special facts of the case under consideration, to accord with the general run of assessments made by the Courts over a substantial time in comparable cases."

37. The learned trial Judge referred to several cases of this court and other courts and on a consideration of the awards made in the said cases: fixed a sum of Rs. 25,000/- to be awarded to Jeevaraj for personal injuries on account of general damages. Since no evidence was placed before the Court regarding the medical expenses, no special damages were awarded.

38. What principles should be observed by an appellate Court in deciding whether it is just in disturbing the findings of the Court of first instance have been laid down by the Judicial Committee of the Privy Council in *Nance v. British Columbia Electric Ry. Co. Ltd.*, 1951 AC 601. At page 613, Viscount Simon stated:

"The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the Tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. (*Flint v. Lovell*, 1935-1 KB 354, approved by the House of Lords in *Davies v. Powell Duffryin' Associated Collieries Ltd.*, 1942 AC 601)."

38-A. The basis of assessment of damages in actions for personal injuries is stated in *Winfield on Tort* (7th Edition)

at pages 779 to 781. Summing up, this is what the learned author says at page 781:

"Unsatisfactory though it may be, all that can be said is that the damages awarded should be fair and reasonable compensation for the injury, bearing in mind all the relevant heads of damage, and that, so far as is possible, the sums awarded should bear a reasonable relationship to one another. The need for consistency is now fully recognised by the courts, and if judges can be persuaded to apportion the total sum awarded between the various heads of damage and to set out the factors which they take into account there is no reason why that consistency should not be achieved to a substantial extent. But it remains true that every case must ultimately be decided on its own facts and that 'the choice of the right order of figure is empirical and in practice results from a general consensus of opinion of damage awarding tribunals-juries, judges and appellate courts'".

The Court below has referred to the correct principles governing the assessment of damages for personal injuries and after referring to the previous judgments of different High Courts, has assessed the damage at Rs. 25,000/- which we do not consider as extravagantly high and therefore we confirm the finding of the Court below on Issue No. 2 in Original Suit No. 38 of 1959.

39. Point No. VI: The question whether Defendants 1 and 2 are vicariously liable for the negligence of Defendant No. 4 is the most important question presented for decision in these appeals. From the plaintiffs' pleadings which are vague, it is not possible to infer the exact legal basis of the liability sought against Defendants 1 and 2. Defendants 1 and 2 contended that Defendant No. 3 was an independent contractor and that they are not liable for the negligence of the contractor's servants. The trial Judge has not given any clear finding on the contentions raised by the defendants; he seems to have accepted the contention that Defendant No. 3 was an independent contractor but held defendants 1 and 2 liable relying on a passage in Ramaswami Iyer's Law of Torts (6th Edition) page 496 which states:

"An employer of an independent contractor is not liable for the faults of the latter or his servants. The Rule would not apply if the employer reserves for himself a right of control or actually exercises it."

On a consideration of the agreement Exhibit D-5 entered into between Defendant No. 1 and Defendant No. 3, the trial Judge came to the conclusion that the Postal Department exercises sufficient control over the drivers and therefore, the case falls within the exception to the rule.

40. In this Court, Sri Sundaraswamy, the learned counsel for the Respondents submitted that the plaintiffs seek to make defendants 1 and 2 liable on the basis that Defendant No. 3 was a general employer of Defendant No. 4 but by virtue of Exhibit D-5 he became the temporary employee under Defendant No. 1 when he transported mail; in the alternative, the learned counsel submitted that under the Indian Post Offices Act, Defendant No. 1 enjoyed the exclusive monopoly of the right to convey the mail and the conveyance of mail being a statutory duty, the Union of India is liable even if Defendant No. 3 is an independent contractor. The material pleadings on this issue are found in paragraphs 2, 3, 7 and 12 of the plaint in Original Suit No. 37 of 1959 and in paragraphs 2, 3 and 10 of Original Suit No. 38 of 1959. Since the pleadings are identical it is enough if we refer to the pleadings in Original Suit No. 37 of 1959. They read:

"2. Defendant No. 1 is impleaded as the Posts and Telegraphs Department is one of their establishments Defendant 2 is the head of the Department of the Madras Circle which includes Bangalore. The R. M. S. Office at Bangalore is within the jurisdiction of Defendant No. 2. Defendant No. 3 was in charge of the conveyance of mails on behalf of Defendants 1 and 2, during the relevant period; Defendant 4 was in their employment as driver of their lorry which carried the mails. Defendant 5 appears to have insured the lorry MYF 971 and therefore, they have been impleaded here.

"3. By arrangement between defendants 1, 2 and 3 the exclusive conveyance of mails between Bangalore Head Office and town Sub Post Offices was entrusted to Defendant 3 during the relevant period. Defendant 3 was discharging this work under the control and direction of Defendant 2. Defendant 4 was the driver in the employment of Defendant 3. One of the vehicles engaged for the conveyance of mails is lorry No. MYF 971 belonging to Defendant 3.

7. The death of Subhas Alva and the injuries caused to Jeevaraj Alva were brought about by acts of gross negligence on the part of defendant 4 and as a direct consequence of his negligent acts. Defendant 4 was prosecuted by the State and found guilty.

* * * * *

12. Defendant 4 is liable to pay the damages claimed herein. The death of the boy was brought about by the acts of gross negligence on his part, and he is responsible for the consequence of his actions.

Defendant 3 as the employer of Defendant 4, is liable in law for the consequences of the acts of Defendant 3, done in the course of his employment.

Defendant 1 is liable in law for the consequence of acts done in the course of employment of Defendant 3 and 4 through Defendant 2.

Defendant 2 is the Head of the local Circle of Defendant 1's establishment and the work of Defendants 3 and 4 is under his direction and control. He is both a necessary and proper party to the suit.

Defendant 5 as the Insurer of the vehicle is also liable to satisfy the plaintiffs' claim in this suit.

The liability of defendants is joint and several."

From the above pleadings, it is not possible to read that the plaintiffs' case is that Defendant 3 was a general employer of Defendant 4 and that under the agreement Exhibit D-5, Deft. No. 1 became the temporary employer of Defendant 4. In paragraph 12 set out above, the plaintiffs have clearly alleged that Deft. No. 3 was the employer of Deft. No. 4 and therefore, Defendant No. 3 was liable for the torts committed by its servants. It is nowhere alleged that Defendant 4 became a temporary employee of Defendant 1. Defendant 1 is sought to be made liable on the ground that the work of Defendants 3 and 4 was under the direction and control of Defendant 2. Defendants 1 and 2 in paragraphs 2 and 3 of their written statement contended that Defendant 3 was an independent contractor, that Defendant 4 was not in their employment, and that Defendant 4 was an employee under Defendant 3 and controlled by the said Defendant No. 3. In paragraphs 14 and 15 of their written statement, Defendants 1 and 2 denied that they have employed Defendant 3 as their servant. In paragraph 15 of the written statement, they denied that the work of Defendants 3 and 4 was under the direction and control of Defendant 2. Defendant 3 in paragraph 2 of its written statement submitted that it was an independent contractor and Defendant No. 4 was an employee of Defendant 3. D. W. 4, Sri K. N. Shetty was the Senior Superintendent of Post Offices in the year 1958. He stated that the daily transit, conveyance and delivery of all postal articles, mail bags and postmen were entrusted to the third defendant as a contractor, that it was the contractor's responsibility to safely convey them, that the transport vehicles were owned and maintained by the contractor and that the contractor employed its drivers and the said drivers are not the servants of the Postal Department. In cross-examination, he stated that the Postal Department does not pay the drivers' salary and the remuneration paid to Defendant 3 includes the drivers' salaries. In re-examination, he stated that the Department did not give any direction to the drivers regarding the speed and the way in which the vehicles

were to be driven. Defendant No. 4 as D. W. No. 6 stated that he was the driver under Defendant No. 3 on 18-7-1958 when he drove the vehicle. In cross-examination he stated that Defendant No. 3 had employed him, paying his salaries and giving him directions. This is all the oral evidence.

41. When accident occurs by reason of the negligent driving of a vehicle hired out with its driver to another person, difficult questions may arise whether the owner or the hirer is responsible. The facts of one case can never rule another case and are only useful so far as similarity affects and are a help and guide to decision. The general employer of servants is normally liable, as being their master, for all torts committed by them in the course of their employment and within the scope of their authority, and his liability is not affected by the existence of a contract between him and some other person for the temporary employment of the servants in work for that person or for the hiring of the servants to that person. Where however, the relationship of master and servant has been constituted *pro hac vice* (for the turn of the occasion) between the temporary employer and the contractor's servant, the temporary employer or the hirer is vicariously liable for the acts of the contractor's servant committed in the course of his employment and within the scope of his authority. There being a presumption against such a transfer of a servant as to make the hirer or the person on whose behalf the servant is temporarily working responsible, a heavy burden rests upon the party seeking to establish that the relationship of master and servant has been constituted *pro hac vice* between the temporary employer and the contractor's servant. To succeed in discharging the burden, it must be shown that *pro hac vice* the temporary employer was in the position of a Master, i.e. he not only could give directions as to what work the servant had to perform but had the right to control how the work should be done. Whether or not the temporary employer had such a right in any particular case is a question of fact.

42. Where under a contract a vehicle is hired out with its driver to another person, the owner of the vehicle exercises his authority by delegating to his driver the discretion in regard to the manner of driving. Ordinarily when a vehicle with its driver is hired, the driver continues to exercise his own discretion which had been vested in him by his regular employer when he was sent out with the vehicle. If however, the hirers intervene to give directions as to how to drive for which they have no authority to give, and the driver *pro hac vice*

complies with them, with the result that a third party is negligently damaged, the hirers may be liable as joint tort-feasors.

43. Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd., 1947 AC 1 is the leading case where the House of Lords clarified a particularly difficult branch of the Law of Torts. The appellant Harbour Board, the owner of a mobile crane driven by a workman whom it had engaged and paid, hired it to the respondents, a firm of stevedores who were unloading a ship. Owing to the negligence of the driver of the crane a man was injured, and the question for decision was whether the driver was the servant of the Harbour Board or of the stevedores. The House of Lords, in affirming the judgment of the Court of appeal, unanimously reached the conclusion that the driver was the servant of the Harbour Board. In his speech, Viscount Simon, the Lord Chancellor, emphasised that the burden of proof in his case rests on the general or the permanent employer to shift the *prima facie* responsibility for the negligence of servants engaged and paid by him on to the hirer. 'This burden', he said 'is a heavy one' and it can only be discharged in quite exceptional cases. The Harbour Board paid the driver's wages, it alone had the power to dismiss him, and it alone had power to direct him how he should work the crane. The only power which the stevedores had was to direct the operations to be executed by the crane driver'. Lord Simonds summed up the law by saying that the hirer does not assume the responsibilities of an employer unless he 'can direct not only what the workman has to do, but also how he is to do it'.

44. The law as established in 1947 AC 1 closely resembles the law as stated in the American Law Institute's Restatement of the Law of Agency. Section 227 therein says:

"A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. He may become the other's servant as to some acts and not as to others."

In the comment, it is said:

"Since the question of liability is always raised because of some specific act done, the important question is not whether or not he remains the servant of the general employer / as to matters generally, but whether or not, as to the act in question, he is acting in the business of and under the direction of one or the other. It is not conclusive that in practice he would be likely to obey the directions of the general employer in case of conflict of orders. The question is whether it is understood between him and his employers that he is to remain in the allegiance of the first as to a specific act, or is to be

employed in the business of and subject to the direction of the temporary employer as to the details of such act. This is a question of fact in each case".

The Restatement points out that there is always the inference that the original service continues and then it adds:

"A continuance of the general employment is also indicated in the operation of a machine where the general employer rents the machine and a servant to operate it, particularly if the instrumentality is of considerable value. Normally, the general employer expects the employee to protect his interests in the use of the instrumentality, and these may be opposed to the interests of the temporary employer. If the servant is expected only to give results called for by the temporary employer and to use the instrumentality as the servant would expect his general employer would desire, the original service continues, upon this question, the fact that the general employer is in the business of renting machines and men is relevant, since in such case there is more likely to be an intent to retain control over the instrumentality. A person who is not in such business and who, gratuitously or not, as a matter not within his general business enterprise, permits his servant and instrumentality to assist another, is more apt to intend to surrender control."

The following illustrations given at pages 502 and 503 of the Restatement of the Law in the American Law Institute's book are useful:

"Illustration 1: P, a taxicab company, rents a cab and driver to B for a day, upon the understanding that the driver is to take B anywhere that B wishes to go and is to obey all reasonable commands of B. In the absence of evidence that B is to control the details as to the management of the cab, the driver is P's servant while driving the cab.

Illustration 5: P, who operates a trucking business, rents to B, an express company, a truck and driver to deliver goods and to do such incidental work as the express company may require in its transportation, for which B is to pay P at the rate of five dollars an hour. B specifies that, if available, A, an employee of P, is to be sent. A is sent. While driving the truck, the inference is that A remains in P's employment, and in the absence of further facts A is P's servant during such time. If loading and unloading is part of the service which P agreed to render, A remains in P's employment, unless B assumes control over the manner of loading and A submits thereto.

Illustration 6: P rents to B for a week a truck and a driver A, at five dollars per hour, to do general express work, but not to load or unload the truck. A, however,

at B's request and under his directions, loads the truck. In this, A is the servant of B.

Illustration 7: Same facts as in Illustration 6, except that B directs A to put chains upon the truck to keep it from slipping. In putting on the chains A is not B's servant.

Illustration 8: Same facts as in illustration 6, except that B directs A to drive rapidly and in excess of the speed limit. Because of the rapid driving, A runs into T. P. as the master of A, is subject to liability to T. B is also subject to liability to T since he directed the negligent act."

45. The facts in *Mersey Docks and Harbour Board's case*, 1947 AC 1 were almost identical with those in *Donovan v. Laing*, 1893-1 QB 629 in which the Court of Appeal had held that the hirer was responsible for the crane driver's negligence. The Judicial Committee of the Privy Council in *A. H. Bull & Co. v. West African Shipping Agency and Lighterage Co.*, AIR 1927 PC 173 expressed approval of the *Donovan's case*, 1893-1 QB 629. In the *A. H. Bull's case*, AIR 1927 PC 173 the appellants had lent on hire to the respondents a lighter which was manned by two of the appellant's employees. During the night, the two native lighter boys negligently left the lighter, which got a drift and was broken up. The Judicial Committee of the Privy Council held that the respondents were responsible, as the lightermen were under their orders and control during the night as well as during the actual loading. According to the facts as found, the lighter boys were out of the control of the appellants, and subject to the orders and under the control of the respondents. *A. H. Bull & Co's case*, AIR 1927 PC 173 can be distinguished from the *Mersey Docks case*, 1947 AC 1 on the ground that on the special facts of the case, the lighters hired had to be watched over by the bailee and it was the bailee's duties to keep an eye upon the labourers, or to furnish others so that the Chattel might not be lost.

46. The decision in *Donovan's case*, 1893-1 QB 629 can be supported on ground that under the contract, the hirer had the right to discharge the driver. The principle of the carriage cases and the crane cases appears to be the same (vide Viscount Simon's speech in *Mersey Docks case*, 1947 AC 1 at p. 11).

47. In *Century Insurance Co. Ltd. v. Northern Ireland Road Transport Board*, 1942 AC 509 the facts as stated in the headnote of the case reads:

"Under a contract with a petroleum company for the carriage and delivery of their petrol in its lorries, a transport undertaking agreed (a) to keep the petrol while in transit insured against fire and

spillage; (b) to dress its employees engaged in the delivery in such uniforms as the company might direct; and (c) that its employees engaged in the delivery were to accept the orders of the company (regarding such delivery, the payment of the accounts and all matters incidental thereto) provided that this should not be taken as implying that its employees were the employees of the company. While one of the lorries belonging to the undertaking, in respect of which a policy had been issued by an insurance company against liability to third parties arising from damage to property caused by its use by the undertaking, was being used to deliver petrol at a garage in accordance with the agreement, the driver, while transferring petrol from the lorry to an underground tank, struck a match to light a cigarette and threw it on the floor, causing a conflagration and an explosion. Claims in respect of consequent damage having been made against the undertaking, the insurance company contended that they did not fall within the scope of the policy."

It was held that the contract did not contemplate any transference of servants as contrasted with transference of service, and the driver at the time of the accident was acting as the servant of the undertaking. Clause 9 of the agreement mainly relied on by the appellants in the said case had established that, at the time of the accident, Davison (driver) was a servant not of the Respondent but of Holmes, Mullin and Dunn Ltd. and was to the effect that all employees of the respondent engaged in such delivery should accept the orders of Holmes, Mullin and Dunn Ltd. regarding such delivery, the payments of accounts and of matters incidental thereto and that the Respondent should dismiss any employee disregarding or failing to obey such orders. Notwithstanding that clause, it was held that there was no transference of the services of the driver. Dealing with Clause 9 of the contract, as to its effect, this is what Lord Wright said:

"It is I think clear that the presumption is all against there being such a transfer. Most cases can be explained on the basis of there being an understanding that the man is to obey the directions of the person with whom the employer has a contract, so far as is necessary or convenient for the purpose of carrying out the contract. Where that is the position, the man who receives direction from the other person does not receive them as a servant of that person, but receives them as servant of his employer. Where the contract is a running contract, for the rendering of certain services over a period of time, the places where, and the times at which, the services are to be performed, being left to the discretion (subject to

any contractual limitations) of the other contracting party, there must be some one who is to receive the directions as to performance from the other party and they are given to the employer, whether he receives them personally or by a clerk or by the servant who is actually sent to do the work. That I think is the position here. The contract is of a character very common between the owner of lorries or other vehicles and one who wants to hire them for the conveyance of his goods. In principle the facts here are indistinguishable from those in *Quarman v. Burnett*, (1840) 6 M & W 499. Davison was subject to the control of Holmes, Mullin and Dunn Ltd., only so far as was necessary to enable the respondents to carry out their contract. In doing so he remained the respondent's servant. They paid him and alone could dismiss him. Even in acting on the directions of Holmes Mullin and Dunn Ltd., he was bound to have regard to paramount directions given by the respondents and was to safeguard their paramount interests CL 9 provides that the employees of the respondents or their predecessors engaged in the delivery should accept the orders of Holmes, Mullin and Dunn Ltd., 'regarding such delivery, the payment of accounts and all matters incidental thereto'. These are just the matters in respect of which, for the convenient performance of the contract, the lorrymen employed would naturally be required to obey the wishes of those for whom the petrol was being carried. I do not find anything in the rest of the agreement to lead to any other conclusion. It is not, however, necessary to make any nice examination of its terms. A question of this sort must be decided on the broad effect of the contract."

48. The question for our decision is whether the plaintiffs have established that when Defendant No. 4 negligently drove his motor vehicle and caused the accident, the relationship of master pro hac vice had been constituted between the appellants and the driver defendant No. 4. The question has to be decided on interpretation of the agreement Exhibit D-5, applying the principles laid down by the House of Lords in *Mersey Docks case*, 1947 AC 1. The plaintiffs have to establish that the appellants had a right not only to give directions as to what work defendant No. 4 had to perform, but also had the right to control how he should drive the lorry. That question primarily rests on the broad effect of the agreement between defendant No. 3 the owner of the vehicle and the general employer of Defendant No. 4 on the one hand and the appellants. The learned trial Judge relied on Cl. 7 of Exhibit D-5 for coming to the conclusion that the appellants are liable as *Respondent Superior*. In the Court

also, the learned counsel for the plaintiff-respondents rested his argument mainly on Cl. 7 of Exhibit D-5.

49. Exhibit D-5 is the agreement dated 30th November 1955 entered into between the President of India and the Bangalore Ex-Service Men's Transport Company Ltd., Bangalore (Defendant No. 3). Under the said agreement, Defendant No. 3 agreed to provide motor vehicle services for the daily transit, conveyance and delivery in Bangalore of all postal articles, mail bags and postmen as defined in the Indian Post Offices Act, 1898, and the Government of India agreed to entrust the said work to Defendant No. 3 upon the terms and conditions appearing in the contract. Clause (1) of the agreement provided that during the continuance of the agreement which is for a period of three years, Defendant No. 3 shall duly and safely convey within Bangalore between the General Post Office and the various postal sub-offices, railway stations and places mentioned in the First Schedule annexed to the agreement and such other places as may be ordered by the Post Master General by means of regular and efficient motor vehicles to be approved by the Post Master General, all postal articles, mail bags and postmen to the satisfaction and under the general direction of the Post Master General. All motor vehicles reserved by Defendant No. 3 for conveyance of mail were to be used solely and exclusively for the conveyance of the said postal articles and for no other purpose. A postal official on duty was entitled to travel on every motor vehicle employed in the carrying of the said postal articles and the driver of such motor vehicle was required to comply with all reasonable directions by the Postal Official in the motor vehicle. No other passenger was allowed to be carried without the permission of the Post Master General.

50. Clause 7 of the agreement Exhibit D-5 which is a relevant clause reads:

"The contractor shall provide as driver for the motor vehicles when used for the purposes of this agreement competent, careful, trustworthy, civil and responsible and duly licensed drivers who shall at all times be subject to the approval of the Post Master General. The contractor shall pay the wages of every such driver and shall be responsible that he is clear and sober and suitably dressed to the approval of the Post Master General and that no other person shall be permitted to drive such motor vehicles.

All such drivers shall be deemed to be the servants of the Contractor but shall drive and maintain the motor vehicles in their charge in accordance with and shall obey all orders and directions given to them by duly authorised postal officials for the purpose of carrying out the ser-

THE All India Reporter

1970

Orissa High Court

AIR 1970 ORISSA 1 (V 57 C 1)

G. K. MISRA, C. J.
AND R. N. MISRA, J.

Sri Purna Chandra Das, Petitioner v.
Chairman, State Transport Authority,
Orissa and another, Opposite Parties.

O. J. C. No. 327 of 1965, D/- 9-7-1969.

Constitution of India, Art. 311 (2) — Reasonable opportunity — What is — Enquiry against employee of State Transport Authority — Under R. 15 (4) and (6) of Orissa Civil Services (Classification, Control and Appeal) Rules 1962, it is the right of delinquent to know time and place of evidence to be led on behalf of employer Authority — This right is not taken away merely because the employee failed to show cause — The employee has rights at different stages of the proceeding. His default at one stage will not take away his right to cross-examine witnesses—The fact that no witnesses had been examined makes no difference if their previous statements were taken into consideration as evidence—If the petitioner had got notice, he would have insisted on those persons being called for cross-examination and in cross-examination he might have been able to establish that their statements were unreliable — Held that petitioner was not afforded reasonable opportunity in the instant case—(Orissa Civil Services (Classification, Control and Appeal) Rules (1962), R. 15 (4) and (6)). AIR 1958 SC 300, Rel. on. (Paras 4, 6)

Cases Referred: Chronological Paras
(1958) AIR 1958 SC 300 (V 45) =
1958 SCR 1080, Khemchand v.
Union of India 5

B. K. Pal, B. Pal and A. Mohanty, for
Petitioner; Advocate General and Stand-
ing Counsel, for Opposite Parties.

G. K. MISRA, C. J.: The petitioner was a peon attached to the office of the State Transport Authority and was a permanent Class IV servant. On 12th May 1964 he was charged with tampering and misdelivery of two envelopes meant for registration and of handing over the same to a person not the addressee and misappropriation of service postage stamp. He was suspended on that very day. One Sri B. B. Roy, was appointed the Enquiring Officer. In his Enquiry Report he exonerated the petitioner. Mr. Ramnathan, Chairman of the State Transport Authority, the ultimate punishing authority, did not agree with the Enquiry Report and passed the final order of dismissal. Against this order the writ application has been filed under Articles 226 and 227 of the Constitution. The aforesaid facts are not challenged by the State in its counter-affidavit.

2. In the petition Mr. Pal covered a large many grounds. In the course of argument he confined himself to the main contentions enumerated in paragraph 10 of the petition. The essence of the averment in that paragraph is that there was no enquiry at all into the charges by the Enquiring Officer and no date was fixed for any such enquiry, and that the petitioner was not intimated about the time and place of such enquiry and he was not given a reasonable opportunity of showing cause against the charges and to defend himself by adducing evidence. The petitioner came to know of the entire proceeding only from the punishing authority. Most of these assertions are not correct. The petitioner was supplied with the charge-sheet. He was asked to show cause, but without showing cause he asked for copies of documents from time to time. The petitioner was intimated that he could take copies from the records in the office. When the petitioner took exception that

he had no knowledge of English he was further intimated that he might come with a person having knowledge of English to take copies from the records. The petitioner did not take advantage of this opportunity on the date fixed. This complaint has, therefore, no substance.

3. The petitioner however asserted that though he did not give any explanation to show cause, no date was intimated to him as to when the evidence, oral and documentary, was to be led on behalf of the opposite parties. In the counter-affidavit filed on behalf of the opposite parties 1 and 2 this fact has not been denied. Mr. Mohapatra took time to examine the records. He stated before us that after examining the records he was satisfied that, in fact, no intimation was given to the petitioner about the date when the evidence on behalf of the opposite parties was to be led.

4. The sole question for consideration in this writ application, therefore, is whether the absence of notice to the petitioner regarding the date of hearing when evidence was to be led on behalf of the Transport Authority would vitiate the final order of dismissal.

Sub-rules (4) and (6) of Rule 15 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 may be noticed:

"15. (4) On receipt of the written statement of defence, or, if no such statement is received within the time specified, the disciplinary authority may itself inquire into such of the charges as are not admitted, or if it considers it necessary so to do, appoint a board of inquiry or an inquiring officer for the purpose."

"(6) The inquiring authority shall, in the course of the inquiry, consider such documentary evidence and take such oral evidence as may be relevant or material in regard to the charges. The Government servant shall be entitled to cross-examine witnesses examined in support of the charges and to give evidence in person. The person presenting the case in support of the charges shall be entitled to cross-examine the Government servant and the witnesses examined in his defence. If the inquiring authority declines to examine any witness on the ground that his evidence is not relevant or material, it shall record its reasons in writing."

On a bare perusal of these rules it is manifest that it was the duty of the Transport Authority to fix a date of hearing and to intimate the same to the petitioner. The right of the petitioner to know the date of hearing so as to cross-examine the witnesses for the Transport Authority or to make comments in respect of any documents given by way of evidence is not taken away

merely because the petitioner failed to show cause. It is well known that the petitioner has rights at different stages of the proceeding. His default at one stage will not take away his right to cross-examine witnesses which is an altogether different stage.

5. The identical view was taken by the Supreme Court in a series of decisions beginning with Khemchand's case reported in AIR 1958 SC 300. In paragraph 19, their Lordships summed up the position thus:

"To summarise: the reasonable opportunity envisaged by the provision under consideration includes:

(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) An opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally

(c) An opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant, tentatively proposes to inflict one of the three punishments and communicates the same to the Government servant.

In short the substance of the protection provided by rules like R. 55 referred to above, was bodily lifted out of the rules and together with an additional opportunity embodied in S. 240 (3) of the Government of India Act 1935, so as to give a statutory protection to the Government servants and has now been incorporated in Article 311 (2) so as to convert the protection into a constitutional safeguard".

6. On the admitted position that no notice was given to the petitioner about the date of hearing when the Transport Authority was to present its evidence, both oral and documentary, conclusion is irresistible that reasonable opportunity was not afforded to the petitioner to cross-examine the witnesses appearing on behalf of the Transport Authority, or to insist upon the examination of persons on whose previous statements an adverse view was taken against the petitioner. In this particular case no witnesses had been examined. That makes no difference. Even if the witnesses were not examined their previous statements were taken into consideration as evidence. If the petitioner had got notice, he would have insisted on those persons being called for cross-examination and in cross-examination he might have been able to estab-

blish that their statements were unreliable.

7. It is not necessary to refer to another ground raised by Mr. Pal that certain statements recorded before charge-sheet was given were taken into consideration by the punishing authority.

8. On the aforesaid analysis, we are of opinion that the petitioner was not afforded a reasonable opportunity as envisaged in Article 311 (2). The order of dismissal must accordingly be quashed on this simple ground. It need hardly be stated that it is always open to the punishing authority to proceed with the enquiry from the stage where it became illegal.

In the result the writ application is allowed with costs. Hearing fee Rupees 100/- (Rupees one hundred only).

9. R. N. MISRA, J.: I agree.

Writ petition allowed.

AIR 1970 ORISSA 3 (V 57 C 2)

A. MISRA, J.

In re: Beda

Criminal Ref. No. 1 of 1968 (Deaf & Dumb), D/- 14-1-1969 made by Sub-divisional Magistrate, Athmallik, D/- 23-4-68.

Criminal P. C. (1898), S. 341 — Trial of deaf and dumb accused — Duties and powers of Court before forwarding proceedings to High Court — Magistrate before making reference should ascertain whether accused can be made to understand proceedings — Similar duty is cast on Sessions Court after accused is committed to it.

It is well settled that before making a reference u/s 341 Cr. P. C. it is obligatory on the Court to make necessary enquiries and endeavour to find out if the accused can be made to understand the proceedings and come to a definite conclusion.

Where the Magistrate has simply recorded his conclusion that the accused is deaf and dumb and has committed the accused to take his trial before the Sessions Court it is hardly sufficient to make a reference under Section 341. It is also necessary for the Sessions Judge to ascertain for himself whether the accused can be made to understand the proceedings with the help of relations and friends and if necessary to keep him under medical observation to enable him to come to his conclusion. If he finds that the said accused can be made to understand the proceedings, he will proceed in the ordinary way. If on the other hand, he is satisfied that the said accused cannot be made to understand the proceed-

ings of the Court, the procedure prescribed u/s 341 Cr. P. C. should be followed. AIR 1957 Ker 9 & AIR 1960 Mys 315 & AIR 1960 Bom 526, Foll.

(Para 4)

Cases Referred: Chronological Paras
(1960) AIR 1960 Bom 526 (V 47)=

1960 Cri LJ 1575, State v. Radha-
mal

3

(1960) AIR 1960 Mys 315 (V 47)=

1960 Cri LJ 1476, State v. N.

Maktumsab Jatgat

3

(1957) AIR 1957 Ker 9 (V 44)=

1957 Cri LJ 447, In re, Padma-
nabhan Nair Narayanan Nair

2

A. B. Misra, for the State.

ORDER: This is a reference u/s 341 Cr. P. C. by the Sub-divisional Magistrate. Athmallik forwarded by the Sessions Judge, Cuttack-Dhenkanal.

This pertains to Beda alias Suramani Sahu (accused no. 3) who along with two others charged with offences u/ss 302, 324 and 323 read with S. 341 P. C. has been committed to take his trial before the Court of Session. After making the commitment, the learned Magistrate has made the present reference having come to the conclusion that the said accused who is deaf and dumb is incapable of being made to understand the proceedings.

2. Shri A. B. Misra, learned counsel appearing for the State points out that before making the reference, the learned Magistrate should have made adequate enquiries about the antecedents of the said accused, an endeavour to find out as to how his friends and close relatives are accustomed to communicate with him in ordinary affairs, got him kept under medical observation and thereafter recorded his own conclusions. In this case, no such steps appear to have been taken and the learned Magistrate seems to have come to his conclusions on the basis of his impression and made this reference. Therefore, learned counsel for the State suggests, as was done in a Kerala case reported in AIR 1957 Ker 9, In re: Padmanabhan Nair Narayanan Nair, to issue necessary directions to the Sessions Judge, who is to try the case, to ascertain and satisfy himself whether the said accused can be made to understand the proceedings and thereafter proceed with the trial.

3. The learned committing Magistrate has simply observed as follows:

"During committal enquiry, it came to light that accused Beda alias Suramani Sahu is not able to understand the proceedings of the enquiry as he happens to be deaf and dumb."

He appears to have reached the aforesaid conclusion simply on the ground that the said accused is deaf and dumb. This manner of coming to a conclusion by the learned Magistrate is neither proper nor

helpful to this Court. Apart from observing the demeanour and conduct of the said accused and being influenced by the fact that he is deaf and dumb, the learned Magistrate does not seem to have made any attempt or taken any steps to make him understand the proceedings of the court. So also, no endeavour seems to have been made to find out as to whether it was not possible for any of the relations or friends of the said accused to communicate with him by signs and as to whether it would not be possible for such a person to interpret the proceedings of the court by means of such signs to him. In the decision reported in AIR 1960 Mys. 315, *State v. N. Mak-tumsab Jatgat*, it has been observed:

"The fact that the person is deaf and dumb does not necessarily mean that he cannot understand or cannot be made to understand the proceedings before a court, though the disability is undoubtedly a serious handicap to communication either way. Before the Court of enquiry or trial forwards the proceedings to the High Court u/s 341 Cr. P. C., it must be satisfied that the accused cannot be made to understand the proceedings and the enquiry or trial must result in a commitment or a conviction."

Similarly, in the decision reported in AIR 1960 Bom 526, *State v. Radhamal*, it was observed:

"When it is alleged in any criminal proceedings that an accused is deaf and dumb, the court may proceed with the enquiry or trial, but it should first enquire into the antecedents of the accused and should also make an endeavour to find out as to how his friends and close relatives are accustomed to communicate with him in ordinary affairs and record its own conclusions, if necessary, by taking evidence."

In the Kerala case referred to by the learned counsel, though the learned Magistrate who conducted the earlier stage of the enquiry had got the accused kept under medical observation and the doctor's evidence had also been taken to the effect that the accused was deaf and dumb and unable to hear and reply to questions put by him, the Court observed,

"The enquiry as to the capacity of the accused to understand the proceedings in court preceded the preliminary enquiry. The Magistrate who conducted the latter enquiry did not endeavour to see whether the accused can be made to understand the proceedings. x x x. It is the court's duty to make a proper endeavour to see whether the accused can be made to understand the proceedings."

4. Thus, it is well settled that before making a reference u/s 341 Cr. P. C. it is obligatory on the court to make necessary enquiries and endeavour to find out

if the accused can be made to understand the proceedings and come to a definite conclusion. In the present case, the learned Magistrate has simply recorded his conclusion that the accused is deaf and dumb which, in my opinion, is hardly sufficient to make such a reference. Any way, as the commitment has already been made, it is for the learned Sessions Judge who will try the case to satisfy himself about the capacity of the accused to understand. If it is found that the accused cannot be made to understand the proceedings, the court can convict him, if the evidence warrants it, but it cannot pass sentence against him. The court must forward the proceedings to this Court for such orders as the court thinks fit. On the other hand, if the court finds that it is possible for the accused to be made to understand the proceedings, the trial will proceed in the ordinary way and the court, if the accused is found guilty, convict him and pass sentence. Therefore, I direct that the learned Sessions Judge should first ascertain for himself whether the accused Bada alias Suramani Sahu can be made to understand the proceedings with the help of his relations or friends, if any such person is available, and if he considers necessary, he may keep him under medical observation to enable him to come to his conclusion. If he finds that the said accused can be made to understand the proceedings, he will proceed in the ordinary way. If on the other hand, he is satisfied that the said accused cannot be made to understand the proceedings of the court, the procedure prescribed u/s 341 Cr. P. C. should be followed. The learned Sessions Judge will see that the said accused gets the necessary legal assistance, if he finds him undefended. The trial will proceed against him on the basis that he has pleaded not guilty to the charge and all possible defences open to him, in the circumstances of the case, shall be taken into consideration. The reference stands disposed of accordingly.

Reference disposed of accordingly.

AIR 1970 ORISSA 4 (V 57 C 3)

S. K. RAY, J.

Prithiviraj Pailo, Appellant v. Kautuka Babi, Respondent.

Misc. Appeal No. 6 of 1966, D/- 23-6-1969, from decision of Dist. J., Koraput. In Civil Misc. Appeal No. 2 of 1965.

(A) Civil P. C. (1908), O. 20, R. 4 — Decree for maintenance — Construction — (Hindu Law — Maintenance — Commencement of right to).

GM/IM/D100/69/TVN/P.

In a case, the preliminary decree dated 8-11-55 in a partition suit granted maintenance at a particular rate in favour of the defendants (sisters) and declared the same to be a charge on the immovable property. The sisters in the appeal, challenged only the quantum. The appellate court's preliminary decree superseding the trial court decree provided that they were entitled to maintenance from the date of partition at enhanced rate. One of the sisters sought to execute the decree and claimed maintenance from 8-11-55, the date of the trial court decree. The judgment debtor contended that she was entitled to maintenance from 9-7-63 when the properties were divided by metes and bounds.

Held, that it was unreasonable to attribute to the expression "date of partition" in the appellate decree, the meaning contended for by the judgment debtor. The decree of the appellate court must be construed consistently with what partition means in Hindu Law and as judicially interpreted. Partition in the Hindu Law consists of defining shares of coparceners in the joint property and the actual division of property by metes and bounds is not necessary. In this sense, the date of partition will mean the date when there is disruption of joint status amongst the coparceners resulting in numerical division of the property. Therefore, the date of partition would be the date on which the action for partition was initiated by filing the plaint i.e., on 14-2-55, from which date the sisters were entitled to maintenance. By the principle of relation back, the appellate decree superseding the trial court decree operated as if they had been incorporated in trial court decree dt. 8-11-55, which in its turn related back to the date of commencement of the proceeding i.e. 14-2-55. AIR 1958 SC 1042, Foll.

(Para 7)

(B) Civil P. C. (1908), Ss. 11 and 47—Partition suit — Application for maintenance pending final decree — Order in — Principle of *res judicata*, held, would not apply — Order not one in execution proceedings.

In a case, after the preliminary decree in a partition suit was passed, a party who was held entitled to maintenance applied before the court in its original jurisdiction for obtaining maintenance from the judgment debtors. The application was dismissed on the ground that the petition was premature as partition was not yet effected. The applicant did not challenge this order in appeal. Subsequently, in an execution petition, the applicant claimed maintenance from the date of the preliminary decree.

Held, that the principle of *res judicata* would not apply since the order was passed while the partition suit was still

pending inasmuch as final decree was not yet passed; that the petition was for maintenance pending passing of final decree and that the order was not in execution of any decree for maintenance and therefore not an order made under S. 47 of Civil P. C. The decree-holder was not therefore compelled to file an appeal against it. Further, the order was ambiguous and did not finally decide any controversy. It merely stated that the petition was premature. AIR 1960 SC 941, Foll. (Para 3)

Cases Referred: Chronological Paras

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| (1964) AIR 1964 SC 136 (V 51) = | |
| (1964) 2 SCR 933, Raghavamma v. Chenchamma | 7 |
| (1960) AIR 1960 SC 941 (V 47) = | |
| (1960) 3 SCR 590, Satyadhyan Ghosal v. Smt. Deorajin Debi | 8 |
| (1958) AIR 1958 SC 1042 (V 45) = | |
| 1959 SCR 1249, K. Pedasubbayya v. K. Akkamma | 7 |
| (1917) AIR 1917 PC 39 (V 4) = | |
| 44 Ind App 159, Kawal Nain v. Budh Singh | 7 |
| (1916) AIR 1916 PC 104 (V 3) = | |
| 43 Ind App 151, Girja Bai v. Sadashiv Dhundiraj | 7 |
| (1912) 40 Ind App 40 = ILR 35 All 80 (PC), Suraj Narain v. Ikbal Narain | 7 |
| H. C. Panda, for Appellant; N. V. Ramdas and K. V. Sharma, for Respondent. | |

JUDGMENT: This is an appeal preferred by the judgment-debtor from the decree of the District Judge, Jeypore, dated 17-12-65 passed in Civil Misc. Appeal No. 2/65 reversing the order of the Subordinate Judge, Jeypore, dated 19-12-64, and rejecting the objection of the judgment-debtor appellant made under section 47 of the Code of Civil Procedure in an execution proceeding (E. P. No. 54/64), levied by the decree-holder for executing her decree for maintenance.

2. To understand the implications of the points raised in this appeal, it is necessary to recount in brief the historical background of the litigation leading to the execution proceeding started by the respondent in E. P. No. 54/64.

3. One Bikram Raj had four issues. The first two issues were sons by name Prithwiraj and Ramakrishna. The last two issues were daughters by name Nakhyatramala Babi and Kautuka Babi. Upon the death of Bikramraj, Ramakrishna filed a partition suit, T. S. 8/55 against Prithwiraj as defendant 1 in the court of Munsif of Jeypore in which Nakhyatramala was impleaded as defendant 2 and Kautuka as defendant 3. These defendants 2 and 3 claimed maintenance in the said suit, and that the same should be made a charge on the family property. A preliminary decree for partition was passed on 16-11-55 (the date of judgment was 8-11-55). While decreeing the suit

for partition, it was directed in the said decree that defendants 2 and 3 were entitled to maintenance at the rate of eight putties of paddy and Rs. 40/- per annum and it was made a charge on immovable property in suit described in the plaint schedule.

From this decree two appeals were preferred. One was by the plaintiff which was numbered as T. A. No. 76/55. The main relief claimed in this appeal was against defendant 1 and has no present relevancy. The other was preferred by the two daughters, defendants 2 and 3, which was numbered as T. A. No. 1/56. This appeal of the daughters was concerned with the quantum of maintenance only. Both the appeals were disposed of by one common judgment dated 5-5-59. In the ordering portion of this judgment it was said: "... A preliminary decree is passed declaring half share of each of the plaintiff and the defendant no. 1 in the suit properties except the second-storey building on the ancestral house and another building mentioned in item no. 7 in the plaint schedule which respectively belong to the plaintiff and defendant no. 1. ... A Civil Court Commissioner shall be appointed in proper proceedings if applied for by either of the parties in the trial court to effect partition of the properties as mentioned above by metes and bounds after which and after hearing objections if there be any to the allotments made by the Civil Court Commissioner, a final decree shall be passed accordingly.

Each of the defendants 2 and 3 shall be entitled to maintenance from the date of partition at the rate of 10 putties of paddy and Rs. 48/- per annum which shall remain a charge on the joint family property. As the two brothers are to maintain the two sisters, the liability of maintaining the sisters may also be divided at the discretion of the trial court between the two brothers, so that each of them would be liable to maintain one sister."

Accordingly two decrees were drawn up, one in respect of each appeal. The decree in the daughter's appeal No. 1/56 incorporated verbatim the directions contained in the last para of the ordering portion of the common judgment quoted above. Thereafter the matter remained pending in the trial court for passing of the final decree.

While the litigation was at that stage, both the defendants 2 and 3 filed an application before the trial court on 16-3-60 praying that the maintenance due to them be ordered to be paid to them by the plaintiff and defendant 1. This prayer was countered by the brothers. On this application, the following order was passed on 3-7-61 and it runs as follows:

"Read the petition filed by defendants 2 and 3 on 16-3-60. They pray that the maintenance due to them be ordered to be paid by the plaintiff and defendant No. 1. The first defendant has filed a counter stating that under the decree the petitioners, that is, the defendants 2 and 3 are entitled to maintenance only from the date of the partition and not before, and since partition has not yet been made, the petition is liable to be rejected as premature.

T. A. 76/55: The decree of the first appellate court in T. A. No. 1/56 so far it relates to the question of payment of maintenance to defendants 2 and 3 has become final. The portion of the decree provides that defendants 2 and 3 shall be entitled to maintenance from the date of partition at a particular rate. We are not here concerned with the rate of maintenance because that is not in dispute, but we are very much concerned with the time from which maintenance accrues due under the decree. The date of partition has been specifically mentioned in the decree as the date from which maintenance shall become due to defendants 2 and 3. That being the date of accrual of maintenance, the present petition does not lie now as partition has not yet been effected. The petition is therefore rejected."

The quoted order shows that the petition of the daughters for maintenance was ultimately rejected as not maintainable at that stage.

The daughters did not take any step to reverse or set aside the said order and awaited passing of the final decree. The final decree was passed on 7-11-62. The relevant portion of the decree touching the rights of the two daughters is quoted hereinbelow.

"It is further ordered that defendants 2 and 3 are entitled to maintenance at the rate of ten putties of paddy and Rupees 48/- per annum. The liability to maintain defendant 2 is made a charge on the property allotted to the plaintiff and the liability to maintain defendant 3 is made a charge on the property of defendant 1 specified above. It is accordingly ordered that the plaintiff shall maintain defendant 2 and defendant 1 shall maintain defendant 3."

Thereafter defendant 3 Kautuka levied execution in E. P. No. 54/64 on 15-4-64. She claimed her maintenance from the date of preliminary decree up-to-date. The judgment-debtor Prithviraj filed objection on 28-10-64. His stand was that he was liable to pay the maintenance under the decree from 9-7-63 when the properties were divided actually by metes and bounds. Upon this, a Misc. Case was started which was numbered as M. J. C. No. 125/55.

The Subordinate Judge disposed of this matter by his order dated 18-12-64 in which he held that the liability of Prithviraj, the judgment debtor, arose from 7-11-62 the date of final decree. He negatived the contention of the decree-holder on two grounds: The first was that though in law filing of a suit for partition or serving a notice for partition amounts to severance of joint status, yet in the present case the decree-holder being the maintenance-holder and not being entitled to severance of joint status by any act of her own, the date of filing the suit cannot be considered to be the date of partition for the purpose of deciding whether her claim for maintenance is to be deemed to have accrued from that date. The brother who is the judgment-debtor being under no personal liability to maintain her, which arises only under a decree, her claim for maintenance must be deemed to have accrued from the date of final decree under which the right to a certain amount by way of maintenance was for the first time determined and not before. The second ground was that the order dated 3-7-61 of the Munsif passed on an application by the daughters for maintenance while proceedings for final decree were pending, operates as *res judicata* and, hence, her present claim to the period prior to final decree is not maintainable in law.

4. The decree-holder appealed to the District Judge, Koraput-Jeypore. Her appeal was numbered as Civil Misc. Appeal No. 2/65. She succeeded. Both the grounds on which her claim was rejected by the executing court were reversed. The judgment-debtor, it may be noted, has paid all arrears of maintenance to the decree-holder from 7-11-62.

5. The very two points which were urged on behalf of the judgment-debtor before the executing court with success have been repeated here.

6. The first question, therefore, is as to from which point of time the claim for maintenance of the decree-holder has been decreed. A preliminary decree dated 8-11-55 granted maintenance at a particular rate in favour of the defendant and declared the same to be a charge on the immovable property in suit. By this the liability of plaintiff and defendant 2 was declared to maintain their sisters defendants 2 and 3 and the quantum of maintenance was also fixed. The daughters in their appeal challenged only the quantum and the other appeal by the plaintiff did not attack this part of the decree.

7. The appellate court decree was a preliminary one and superseded the trial court decree and provided that defendants 2 and 3 were entitled to maintenance from the date of partition at enhanced rate.

The question is what is the extent of supersession regarding the accrual of the right of maintenance. Normally, adjudicated rights in a decree become effective from the date of suit or at any rate from the date of decree unless otherwise provided for therein. Under the preliminary decree of the trial court maintenance was claimable at least from the date of that decree, i.e. 8-11-55. The appellate court decree, however, directed that liability to pay maintenance would arise from the date of partition, and while so decreeing it, provided that partition by metes and bounds would be made when applied for, either by the plaintiff or defendant no. 1. If the date of partition meant the date of partition by metes and bounds, the maintenance decree was liable to be defeated, if plaintiff and defendant no. 1 joined hands to defeat the claim of their sisters by desisting from applying for final decree. It would, therefore, be unreasonable to attribute to the expression "date of partition" the meaning contended for by the learned counsel for the appellant. The decree of the lower appellate court must be construed consistently with what partition means in Hindu Law and as judicially interpreted.

Partition in the Hindu Law consists of defining shares of coparceners in the joint property and the actual division of property by metes and bounds is not necessary. In this sense, the date of partition will mean the date when there is disruption of joint status amongst the coparceners resulting in numerical division of the property. The determination of quantum of shares of respective coparceners is a subsequent act of the Court. Upon such determination the coparceners are to be allotted their defined shares with effect from the date of severance of joint status. Such determination of shares amounts to working out the result of severance.

This question came to be considered by the Supreme Court in the case reported in AIR 1958 SC 1042. This is what their Lordships said in that case:

"Under the Mitakshara law, the right of a coparcener to share in the joint family properties arises on his birth, and that right carries with it the right to be maintained out of those properties suitable to the status of the family so long as the family is joint, and to have a partition and separate possession of his share, should he make a demand for it. The view was at one time held that there could be no partition, unless all the coparceners agreed to it, or until a decree was passed in a suit for partition. But the question was finally settled by the decision of the Privy Council in *Girja Bai v. Sadashiv Dhundiraj*, 43 Ind. App. 151 : (AIR 1916 PC 104) wherein it

was held on a review of the original texts and adopting the observations to the effect in *Suraj Narain v. Ikbāl Narain*, (1912) 40 Ind App 40 at p. 45 (PC) that every coparcener has got a right to become divided at his own will and option whether the other coparceners agree to it or not, that a division of status takes place when he expresses his intention to become separate unequivocally and unambiguously, that the filing of a suit for partition is a clear expression of such an intention and that in consequence, there is severance in status when the action for partition is filed. Following this view to its logical conclusion, it was held by the Privy Council in *Kewal Nain v. Prabhu Lal*, 44 Ind App 159= (AIR 1917 PC 39) that even if such a suit were to be dismissed, that would not affect the division in status which must be held to have taken place, when the action was instituted.

A decree may be necessary for working out the result of the severance and for allotting definite shares but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not."

According to this rule the date when action for partition is initiated, is the date of severance of status. This, in my view is the date of partition. This date in the instant case would be 14-2-55 when partition action was commenced, because upon communication of the plaintiff's intention to separate to the other coparcener of the family, defendant no. 1, by service of summons the declaration would be complete and would relate back to the date of institution of partition suit (Vide AIR 1964 SC 136). The preliminary decree by trial court was passed on 8-11-55, the date of judgment though a formal decree was drawn on 16-11-55. The terms and conditions of the appellate court decree which superseded the trial court decree must be given operation as if they had been incorporated in the original decree dated 8-11-55. So it is on 8-11-55 that the results of severance of status were worked out and shares were specified and defined. Effects of this decree would also similarly relate back to the date when the plaintiff's intention to separate was formed and expressed, that is, 14-2-55 when plaint was filed subject to the limitation that vested rights, if any, which accrued to others in the joint family property between expression of intention to separate and communication of the said intention to defendant no. 1, will not be affected. Thus, this being the legal position, as I conceive it, what the lower appellate court meant and must be deemed to mean, was that maintenance was payable with effect from the date of filing of partition suit. If the trial court's

decree is liable to a construction that maintenance accrued from the date of passing of that decree, i.e., 8-11-55, then to that extent it must be held to have been superseded by the appellate court decree. Even if it be held that date of preliminary decree (8-11-55) to be the date of partition because shares of coparceners were defined and declared, that would not affect the result of the appeal since the maintenance claim in the present execution is from 8-11-55.

8. The next question to be considered is whether the order of the Munsif dated 3-7-61 operates as *res judicata*. This order, as already quoted above, was on an application filed before the Munsif in its original jurisdiction and not in its execution side. It was passed while the partition suit was still pending inasmuch as final decree had not been passed. This petition was for payment of some maintenance pending passing of the final decree. It did not purport to execute any decree and it was therefore unnecessary for the Munsif to construe the appellate court decree. The order was not one under section 47 C. P. C. and that being so, there was nothing in law which rendered it imperative for the decree-holder to appeal from such order.

Further, the order is ambiguous and does not finally decide any controversy. It says that the petition is premature as 'partition has not been effected'. The appellate court decree to which reference has been made speaks of partitioning liability to pay maintenance between the two brothers and it is, therefore, not clear whether the Munsif refers to this partition of liability or partition of joint family property by metes and bounds. The order is liable to a construction that the claim for maintenance which would accrue from the date of partition would become payable only after the properties had been partitioned by metes and bounds between the plaintiff and defendant 1; it is also prone to a construction that since the direction in the appellate decree to allot the liability of maintaining a sister to each one of the two brothers had not been carried out, the claim for maintenance could not be levied. It did not categorically and unambiguously decide as to from which point of time maintenance decreed is to be computed. Thus, it was an order of ambiguous import and of interlocutory nature which lacked the force of a decree and did not purport to dispose of any case finally. In case of orders of such nature which do not have the force of a decree, the principle of *res judicata* does not apply. Reference may be made in this connection to a decision of Supreme Court reported in AIR 1960 SC 941. In view of all these, I am of opinion that *res judicata*

data point is without any substance and must fail.

9. Counsel for the appellant urges for the first time a point of limitation. He says that the claim for maintenance from the date of the preliminary decree till, 1961 or beyond three years preceding the date of execution, that is, 16-3-64, is barred by limitation. That is a point which for the first time was taken here and it had not been taken in the courts below. I am not inclined to entertain such a point at this stage. The execution case is still pending and he may take up that point there, if he is so advised. This point might involve questions of fact which may be disputed by parties.

10. In the result, therefore, there is no merit in this appeal which is accordingly dismissed with costs.

Appeal dismissed.

AIR 1970 ORISSA 9 (V 57 C 4)

G. K. MISRA, C. J.
AND R. N. MISRA, J.

Beni Bhuj Sahu, Petitioner v. Chief Engineer, Hirakud Dam Project and another, Opposite Parties.

O. J. C. No. 158 of 1965, D/- 11-7-1969.

(A) Industrial Disputes Act (1947), Ss. 25F (b), 2 (j), 2 (s) — Hirakud Dam Project is industry — Telephone operator under Government of Orissa, though unconnected with main industry comes within definition of 'workman' in S. 2 (s) and therefore provisions of S. 25F (b) are applicable to his case even though he is a Government servant — (Point conceded in view of decision in AIR 1968 SC 554). (Para 3)

(B) Industrial Disputes Act (1947), Section 25-F (b) — Payment of compensation is condition precedent — Non-performance of — Effect is that retrenchment order is vitiated. AIR 1960 SC 610, Relied on. (Para 4)

(C) Constitution of India, Art. 226 — Another remedy available — Ordinarily High Court will not interfere — In special case interference is proper — (Industrial Disputes Act (1947), S. 10.)

The power of High Court under Articles 226 and 227 is discretionary. Though it is wide, certain self-imposed restrictions are put on account of the wide amplitude of that power. Accordingly, when another alternative equally efficacious is available, the High Court ordinarily does not interfere. But where the case has its special features, namely, it involved no complicated question of fact, and under the accepted position that the order of retrenchment was void and despite an appeal being taken, no redress was

given to the petitioner, it is a fit case where the High Court should interfere without sending the petitioner to resort to the long procedure prescribed under the Industrial Disputes Act for getting the remedy. AIR 1969 SC 556, Relied on.

(Para 5)

Cases Referred: Chronological Paras

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| (1969) AIR 1969 SC 556 (V 56)= | |
| (1969) 1 SCJ 878, Baburam v. Zila Parishad | 5 |
| (1968) AIR 1968 SC 554 (V 55)= | |
| (1967) 2 SCWR 618, Madras Gym. Club Employees' Union v. Management of the Gymkhana Club | 3 |
| (1960) AIR 1960 SC 610 (V 47)= | |
| 1960-2 SCR 866, State of Bombay v. Hospital Mazdoor Sabha | 4 |

L. Rath, for Petitioner; Standing Counsel, for Opposite Parties.

G. K. MISRA, C. J.: The petitioner was appointed as a Telephone operator under the Government of Orissa in the Hirakud Dam Project on 1-4-60. A notice was issued on 30-4-63 intimating the petitioner that his services would be terminated after one month from the date of service of the notice. The notice was styled as "Retrenchment Notice". Against the order retrenching him, the petitioner filed an appeal before the concerned Chief Engineer. As he got no response, he filed the writ application under Articles 226 and 227 of the Constitution on 21-6-65.

2. The only point raised by Mr. Rath is that the Hirakud Dam Project is an industry and that the petitioner is a workman and as such he was entitled to the benefits of Section 25-F (b) of the Industrial Disputes Act, 1947. The section not having been complied with, the order of retrenchment is void and without jurisdiction.

3. Mr. Das, the learned Standing Counsel rightly does not dispute that the Hirakud Dam Project is an industry and that the petitioner is a workman. That such a project would come within the definition of 'industry' and the petitioner would come within the definition of 'workman' even if he was a telephone operator unconnected with the main industry concerned, is concluded by the decision of the Supreme Court in AIR 1968 SC 554, Madras Gym. Club Employees' Union v. Management of the Gymkhana Club. On the aforesaid position the provisions of the Industrial Disputes Act are applicable to the petitioner even though he was a Government servant.

4. Section 25-F (b) runs thus:
"25-F. Conditions precedent to retrenchment of workmen. — No workman employed in any industry who has been in continuous service for not less than one

year under an employer shall be retrenched by that employer until—

xx xx xx

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months;"

The section purports to lay down the conditions precedent to retrenchment of workmen. The petitioner worked for about 3 years and he should have got compensation equivalent to 45 days of average pay. Admittedly no such compensation was paid to him at the time when the retrenchment was to be effective, or even thereafter. It has been held in AIR 1960 SC 610, *State of Bombay v. Hospital Mazdoor Sabha*, that non-performance of this condition precedent vitiates the order of retrenchment. The order of retrenchment is accordingly void and is ineffective.

5. The only other question for consideration is whether the petitioner should have taken recourse to the remedies available under the Industrial Disputes Act and whether this Court should interfere under Articles 226 and 227 of the Constitution and give relief. The case is a very simple one and no complicated facts are involved. The whole argument proceeds on admitted position. The power of this Court under Articles 226 and 227 is discretionary. Though it is wide, certain self-imposed restrictions are put on account of the wide amplitude of that power. Accordingly when another alternative remedy equally efficacious is available, this Court ordinarily does not interfere. See AIR 1969 SC 556, *Baburam v. Zila Parishad*. This case has however its special features, namely, it involves no complicated question of fact, and under the accepted position that the order of retrenchment is void and despite an appeal being taken, no redress was given to the petitioner, we think this is a fit case where we should interfere without sending the petitioner to resort to the long procedure prescribed under the Industrial Disputes Act for getting the remedy.

6. We accordingly quash the order of retrenchment and issue a writ of mandamus directing the opposite parties to reinstate the petitioner in his work. The writ application is allowed with costs. Hearing fee Rs. 100/- (Rupees one hundred).

7. R. N. MISHRA, J.: I agree.

Writ application allowed.

AIR 1970 ORISSA 10 (V 57 C 5)

A. MISRA, J.

Prasanna Kumar Samal and others, Petitioners v. Anand Chandra Swain, Opposite Party.

Criminal Revn. No. 214 of 1966, D/- 2-7-1969, against order of Sub-Divisional Magistrate, Kamakshyanagar, D/- 28-3-1966.

(A) Criminal P. C. (1898), Ss. 236 and 237 — Principal offence and abetment — No specific charge of abetment — When accused can be convicted for — (Penal Code (1860), Ss. 323 and 109).

As a general rule it cannot be laid down that a person charged for the substantive offence can in no circumstances be convicted for abetment of the same. Where a case is covered under Ss. 236 and 237 of Criminal P. C. and the accused had notice of all the facts which go to make up the charge of abetment, he can be convicted for such abetment, even in cases where the charge framed against him is only for the substantive offence. On the other hand, if in a given case, it is found that the accused had no notice of the facts constituting abetment, and as such, had no chance of meeting such a case, a conviction for abetment will not be justified when he is charged with the substantive offence. (Para 5)

Where the accused were charge-sheeted only under S. 323 of Penal Code and the facts constituting abetment by any of them were not mentioned in the complaint petition nor in their examination under S. 342 Criminal P. C., and there was also no evidence that they had instigated or intentionally offered any aid by any act or omission for the commission of the assault by the other accused, they could not be convicted for abetment of the offence in the absence of a specific charge in that respect. (Para 6)

(B) Cattle Trespass Act (1871), Ss. 10 and 20 — Mistake as to one's right to land or crop — Seizure of cattle trespassing — Seizure not theft — Owner of cattle has no right to use force to rescue cattle — His remedy is only under S. 20 — Seizure by watcher appointed by villagers including owner of land into which cattle trespassed — Seizure, held, not theft. AIR 1965 SC 926, Foll.; AIR 1963 Orissa 52, *hed*, *bad Law* — (Penal Code (1860), Ss. 390 and 97). (Para 7)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 926 (V 52)=
1965 (2) Cri LJ 18, Ramratan v.
State of Bihar 7
(1963) AIR 1963 Orissa 52 (V 50)=
1963(1) Cri LJ 308, Lokenath v.
Rahas Beura 7

A. K. Padhi, for Petitioners; S. C. Mohapatra, S. Mohanty, for Opposite Party.

ORDER:— Petitioners Nos. 1 and 6 have been convicted under Section 323 I. P. C. and the other petitioners under Section 323/109 I. P. C. and each of them sentenced to pay a fine of Rs. 30/- and in default, to undergo S. I. for ten days.

2. In short, complainant's case, is that on 16-10-64 while P. Ws. 2 and 3 were taking some cattle belonging to petitioners to the pound alleging that they had damaged paddy crops in some field of Baligorada village, petitioner no. 1 assaulted P. W. 2 and threatened P. W. 3 when he intervened. The complainant (P. W. 1) tried to intervene, but was assaulted by petitioner no. 6. Thereafter, petitioners rescued and took away their cattle. Petitioners in defence deny to have assaulted P. W. 1 or P. W. 2. According to them, P. W. 1 and his villagers seized their cattle which were grazing on a waste land and when petitioner no. 1 protested, P. W. 1 rushed to assault him with a tangia. Petitioner no. 1 managed to snatch away the tangia and thereafter left the place, while petitioners drove away their cattle. The other petitioners deny to have been present at the time of occurrence.

3. The learned Magistrate who tried the case accepted P. W. 1's version about the occurrence and the place where it is said to have taken place and found that petitioners nos. 6 and 1 committed assault on P. Ws. 1 and 2 respectively. He accordingly convicted them under Section 323 I. P. C. So far as the other petitioners are concerned, he found them guilty of abetment and convicted them under Section 323/109 I. P. C.

4. Learned counsel for petitioners has assailed the convictions mainly on two grounds. Firstly, it is contended that the conviction of petitioners 2 to 5 who were accused Nos. 3 to 6 u/s 323/109, I. P. C. is not maintainable as no specific charge was framed for abetment against them and they had no notice of such a charge. The second contention is that the conviction of petitioners Nos. 1 and 6 u/s 323, I. P. C. is not maintainable, because the seizure of the cattle was illegal and they in exercise of their right of private defence of property were entitled to use force to rescue their cattle from such illegal seizure.

5. The aforementioned first contention, in my opinion has considerable force. It is not disputed that all the petitioners were charged with the substantive offence u/s 323 I. P. C. and no separate charge for abetment was framed against any of them. It is no doubt true that as a general rule it cannot be laid down that a person charged for the substantive

offence can in no circumstances be convicted for abetment of the same. The position seems to be fairly well settled that where a case is covered u/ss. 236 and 237, Cr. P. C. and the accused had notice of all the facts which go to make up the charge of abetment, he can be convicted for such abetment, even in cases where the charge framed against him is only for the substantive offence. On the other hand, if in a given case, it is found that the accused had no notice of the facts constituting abetment, and as such, had no chance of meeting such a case, a conviction for abetment will not be justified when he is charged with the substantive offence.

6. In this case, it is conceded by learned counsel for opposite party that facts constituting abetment by any of the petitioners are not mentioned in the complaint petition nor in their examination u/s 342, Cr. P. C., such facts have been put to petitioners Nos. 2 to 5. As clearly stated, there is no specific charge of abetment. There is hardly any evidence on the prosecution side that petitioners Nos. 2 to 5 instigated or intentionally offered any aid by any act or omission for the commission of the assault by the other two petitioners. Thus, in the circumstances proved in this case, it cannot be said that petitioners nos. 2 to 5 had any notice of facts which would constitute the accusation of abetment by them. As such, it cannot be said that they had any opportunity to defend themselves against such a charge. Therefore, the conviction of petitioners nos. 2 to 5 for abetment under Section 323/109 I. P. C. is not sustainable and must be set aside.

7. Coming to the conviction of petitioners nos. 1 and 6 under Section 323 I. P. C., learned counsel for petitioners refers to Section 10 of the Cattle Trespass Act and contends that the seizure of the cattle was illegal as P. W. 2 was not the cultivator or occupier of the land and there is no proof that the cattle had actually damaged the paddy crop. Reliance is placed on a decision of this Court reported in AIR 1963 Orissa 52, Lokenath v. Rahas Beura in support of the contention that the owner is entitled to rescue his cattle against illegal seizure even by use of force. In the aforementioned decision, it was observed:—

"Illegal seizure of cattle with a view to impound them is theft because though the person who has seized animals had no intention to cause wrongful gain to himself nevertheless his intention was to cause wrongful loss to the owner of the animals. In such a case, the owner of the cattle has a right to exercise the right of private defence of property in rescuing them."

If the aforesaid observations are accepted as laying down the correct posi-

tion of law, the necessity of considering whether the seizure in this particular case was legal or illegal would not have arisen.

In view of the decision reported in AIR 1965 SC 926, Ramratan v. State of Bihar, the above observations cannot be accepted as laying down the correct position of law. The Supreme Court in the aforementioned decision observed:—

"When a person seizes cattle on the ground that they were trespassing on his land and causing damage to his crop or produce and gives out that he was taking them to the pound, he commits no offence of theft however mistaken he may be about his right to that land or crop. The remedy of the owner of the cattle so seized is to take action under Section 20 of the Act. He has no right to use force to rescue the cattle so seized."

In the present case, rightly or wrongly P. Ws. 2 and 3 were admittedly taking the cattle to the pound giving out that the cattle had trespassed into and damaged the crop. This fact is not disputed. P. W. 2 seized the cattle in his capacity as watcher appointed by the villagers including the owner of the land into which the cattle are said to have trespassed to guard the crops. In such circumstances, even assuming that he was mistaken about his right to seize, as has been observed by the Supreme Court, his action will not amount to an offence of theft and the remedy of the owner was only to take action under Section 20 of the Act. No right to use force to rescue the cattle is available to the owner. Therefore, the contention of learned counsel, so far as petitioners nos. 1 and 6 are concerned, has no merit and has to be rejected.

8. In the result, the revision is allowed in part. The conviction and sentence of petitioners Narayan Samal, Bhikari Ch. Samal, Ugrasen Samal and Sudarsan Samal U/s 323/109 I. P. C. are set aside and they be acquitted of the charge. The conviction and sentence of petitioners Prasanna Kumar Samal and Dibakar Samal are confirmed.

Petition partly
allowed.

AIR 1970 ORISSA 12 (V 57 C 6)

G. K. MISRA, C. J.

AND R. N. MISRA, J.

N. Subramaniam, Petitioner v. Divisional Personnel Officer, South Eastern Railway, Opposite Party.

O. J. C. No. 66 of 1965, D/- 15-7-1969.

Constitution of India, Art. 311 (2) —
Officiation in higher post — Object of—

HM/IM/D595/69/DRR/D

Reversion to lower substantive post for unsatisfactory service — Does not amount to punishment — Art. 311 (2) not attracted.

Officiation in a higher post is ordinarily allowed to test the suitability of a servant, and rendition of satisfactory service in the officiating post is the *sine qua non* for continuation therein, ultimately leading to a substantive promotion of the incumbent to such higher post. The test of the efficiency or suitability of the incumbent is inherent in the process of officiation, and officiation normally ends up in reversion of the incumbent in case he does not render satisfactory service during officiation. AIR 1962 SC 794, Rel. on. (Para 6)

Further, 'reversion in all officiating appointments would necessarily lead to the loss of benefit of higher pay. But that by itself cannot indicate that the reversion was by way of punishment, because the officiating incumbent had no right to continue in the higher post, or to the benefits arising from it. AIR 1958 SC 36, Relied on. (Para 7)

Held that an order of reversion from the officiating higher post to the lower substantive post, indicating the reason that his services were not satisfactory, did not involve any stigma and did not attract the provisions of Article 311 (2) of the Constitution. Unreported decision of S. C. in C. A. No. 882 of 1966 D/- 7-4-1969 (SC), Rel. on. (Para 8)

Cases Referred; Chronological Paras:
(1969) Civil Appeal No. 882 of 1966
D/- 7-4-1969 = (1969) 1 SCWR
922, Union of India v. R. S. Dhaba 7
(1962) AIR 1962 SC 794 (V 49) =
(1962) Supp (1) SCR 92, State of
Bombay v. F. A. Abraham 7
(1958) AIR 1958 SC 36 (V 45) =
1958 SCR 828, P. L. Dhingra v.
Union of India 5
(1954) AIR 1954 Nag 229 (V 41) =
ILR (1954) Nag 371, M. A. Waheed
v. State of Madhya Pradesh 7
P. Palit, for Petitioner; B. K. Pal and
B. Pal, for Opposite Party.

R. N. MISRA, J.: The petitioner has come before this Court under Article 226 of the Constitution questioning the legality of the order dated 5-10-64. He happens to be an employee under the South Eastern Railway and was working as a Block Maintainer, Grade II. The Railway Administration sanctioned some Block Maintainers' posts in Grade I, temporarily for a period of 2 years in April, 1963, and the petitioner, after passing the prescribed test examination, was promoted from Grade II to Grade I as a Block Maintainer. The order of appointment is in Annexure A and is dated 6-3-64. About 7 months thereafter he was reverted to his former Grade II post.

2. Mr. Palit, appearing on behalf of the petitioner, contended (1) that the order of appointment in Annexure A was of a substantive nature and was not officiating in character and, therefore, the reversion which was made without complying with the requirements under Article 311 (2) of the Constitution is bad, and (2) that the order of reversion has cast a

stigma on the petitioner and, therefore, necessitated compliance of Article 311 (2) of the Constitution.

3. It is necessary to refer at length to the order of appointment to determine the validity of the first contention. So far as relevant, the said order of appointment reads as follows:

"M. No....E/artisan/Sig.

dated 6.3.64.

The following promotions and postings are ordered with immediate effect to implement the proposed Hd. Qr. Stn. of BM Gr. I, Gr. II and BM Gr. III as approved by D. S.

Serial No.	Name	From	Pay scale	To Desg.	Stn. Pay & scale	Remarks
		*	*	*	*	*
2.	Shri N. Subramanyam	BM-II CTC	145/- 130-212	BM-I CTC	175/- 175.240	Asst. new : post-sanctioned vide C P C No. 5/329/478 of 9.4.63.

Note:— Items 1 to 3 passed T/Test of BM-I. Promotions of Item 5 to 11 are ordered purely as temporary on stop-gap measure in the exigencies of services and therefore these do not confer any title or claim on offg. incumbents for future promotions either permanent or temporary and also will not count for seniority in the offg. grade.

sd/-

DPO, KUR. "

4. Mr. Palit mainly relied upon the Note appended at its foot, to support his contention that the first three persons including the petitioner were appointed substantively after having duly qualified themselves while the others were on temporary basis. This contention cannot be sustained. The distinction between the two categories indicated in the Note i.e. items 1 to 3 on one side and the remaining persons on the other, is apparently to indicate that the service of the second

category would not ensure for the seniority in the officiating grade. There is no material on record to hold that the petitioner's appointment was to continue for the entire period for which the post had been sanctioned as shown in Annexure I, that is, for a term of 2 years, as such it must be held that the petitioner had been appointed temporarily to officiate in the higher post of a Block Maintainer Grade I.

5. This leads us to examine the other contention of Mr. Palit as to whether the order of reversion attaches a stigma, and, therefore, attracts the application of Article 311 (2) of the Constitution. The order of reversion, so far as relevant, reads:

"South Eastern Railway.

office of the D. S., KUR.

Office Order No. E/Artisan/Sig.

dated 5-10-64.

The following postings are ordered with immediate effect:

Serial No.	Name	From	To	Remarks
		Disig. Stn.	Disig. Stn.	In place
1.	Sri Subramanyam	BM-I CTC 175.240	BM-II BHC 130-212	of Sri N. O. Kar
	*	*	*	*

Note:— Reversion of Item No. 1 is ordered since his services are not satisfactory."

According to Mr. Palit, the Note contains the stigma. It is not disputed on behalf of the petitioner that an order of reversion simpliciter in respect of a Government servant officiating in a higher post to his lower substantive post can be passed without complying with Article 311 (2) of the Constitution. What Mr. Palit takes exception to is the incorporation in the Note to the following effect:

"Reversion of Item No. 1 is ordered since his services are not satisfactory." and contends that this Note attracts the

application of Article 311 (2) of the Constitution. The Supreme Court in AIR 1958 SC 36, P. L. Dhingra v. Union of India, indicated at page 42:

"It is, therefore, quite clear that appointment to a permanent post in a Government service, either on probation or on an officiating basis, is, from the very nature of such employment, itself of a transitory character and, in the absence of any special contract or specific rule regulating the conditions of the service, the implied term of such appointment,

under the ordinary law of master and servant, is that it is terminable at any time. In short, in the case of an appointment to a permanent post in a Government service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time."

It was further indicated in the said judgment,

"If, however, he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. . . . The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty. The use of the expression 'terminate' or 'discharge' is not conclusive. In spite of the use of such innocuous expressions, the court has to apply the two tests mentioned above, namely, (1) whether the servant had a right to the post or the rank, or (2) whether he has been visited with evil consequences of the kind hereinbefore referred to? If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from service or the reversion to his substantive rank must be regarded as a reduction in rank and if the requirements of the rules and Art. 311, which give protection to government servant have not been complied with, the termination of the service or the reduction in rank must be held to be wrongful and in violation of the constitutional right of the servant."

6. The contention of Mr. Palit that the Note contains a stigma has to be tested in the light of the observations of the Supreme Court extracted above. Admittedly, the impugned order is not the consequence of any proceeding and Article 311 (2) of the Constitution has not been followed in this case. But was it

necessary to be followed? The answer would depend upon a finding as to whether the contents of the Note appended to the impugned order have visited the petitioner with any penal consequence or entail or provide for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion. We do not find that the petitioner has been visited with any evil consequence by the mere indication of the reason for his reversion in the Note to the impugned order. Officiation in a higher post is ordinarily allowed to test the suitability of a servant, and rendition of satisfactory service in the officiating post is the sine qua non for continuation therein, ultimately leading to a substantive promotion of the incumbent to such higher post. To us it appears that the test of the efficiency or suitability of the incumbent is inherent in the process of officiation, and officiation normally ends up in reversion of the incumbent in case he does not render satisfactory service during officiation.

7. In this view of the matter, the mere indication of the reason in the order of reversion cannot amount to punishment. We are fortified in this view of ours by the observations of the Supreme Court in AIR 1962 SC 794, *State of Bombay v. F. A. Abraham*, where it has been laid down:

"We are unable to agree with the observation in *M. A. Waheed's case*, AIR 1954 Nag 229, that when a person officiating in a post, is reverted for unsatisfactory work, that reversion amounts to a reduction in rank. A person officiating in a post has no right to hold it for all times. . . . Again, sometimes a person is given an officiating post to test his suitability to be made permanent in it later. Here again, it is an implied term of the officiating appointment that if he is found unsuitable, he would have to go back. If, therefore, the appropriate authorities find him unsuitable for the higher rank and then revert him back to his original lower rank, the action taken is in accordance with the terms on which the officiating post had been given. It is in no way a punishment and is not, therefore a reduction in rank."

Applying the aforesaid test to the case which was before it, the Supreme Court came to the conclusion that the respondent had of course no right to the post of Deputy Superintendent of Police to which he had been given an officiating appointment nor did he contend to the contrary. He could not, therefore, without more, complain if he was sent back to his original post. This is what happened in the case even if it be taken that the petitioner had even reverted to his original rank because he was found unsuit-

able for the higher rank to which he had been given an officiating appointment. Reversion in all officiating appointments would necessarily lead to the loss of benefit of higher pay. But that by itself cannot indicate that the reversion was by way of punishment, because the officiating incumbent had no right to continue in the higher post, or to the benefits arising from it. The reversion in the instant case must, therefore, be taken to have been under the terms of the officiating employment itself, and the contention raised by Mr. Palit that the indication of the reason in the order of reversion brings about a stigma cannot be supported. Our view also finds support from the recent decision of the Supreme Court in the case of Union of India and others v. R. C. Dhaba in Civil Appeal No. 882 of 1966 disposed of on 7-4-1969 (SC) (still unreported).

8. On the aforesaid analysis, the second contention of Mr. Palit must also fail. No other point is raised and therefore the writ application is dismissed, but in the circumstances we make no order as to costs.

9. G. K. MISRA, C. J.: I agree.
Writ petition dismissed.

AIR 1970 ORISSA 15 (V 57 C 7)

G. K. MISRA, C. J.
AND R. N. MISRA, J.

Gobind Ch. Panda, Petitioner v. Darsan Ch. Rout and others, Opposite Parties.

O. J. C. No. 352 of 1969, D/- 1-8-1969.

(A) Panchayats — Orissa Panchayat Samities and Zilla Parishads Act (7 of 1960) S. 44-A — Election Commissioner has jurisdiction to decide the dispute relating to election of chairman of Panchayat Samiti. (Para 5)

(B) Panchayats — Orissa Panchayat Samities and Zilla Parishads Act (7 of 1960) Ss. 25(1)(i) and 16(3) (a) — Election dispute — Plea of disqualification — Burden to prove lies on person who challenges the election on such ground — Disqualification on ground of arrears — Essentials — Mere demand by Co-operative society is not sufficient.

It is well settled in election law that the plea of disqualification has to be established by the Election petitioner against his rival. The entire burden to establish such disqualification would be on the petitioner who seeks to challenge the election on the ground that a disqualification attached to the elected candidate and evidence required to establish an existence of such disqualification must be conclusive. AIR 1954 SC 210, Rel. on. (Para 7)

In terms of the requirements of S. 25 (1)(i), the arrears must have accrued due in order that the disqualification may arise. The use of the word 'accrued' clearly goes to indicate that the legislature intended to provide that there must have been a due on the basis of a determination. 'Accrued' means, according to the dictionary, "to arise or spring as a natural growth or result; coming as a natural accession or result; arising in due course". It refers to "the existence of a present enforceable right" or "fixed" or "assessed and determined". Tax accrues when all events have occurred which fix the amount of tax and determine the tax payer's liability to pay the tax. The use of the word "accrued" in the aforesaid clause of the Gram Panchayat Act, therefore, clearly gives indication that the disqualification is contemplated to arise only when there has been an ascertainment of dues and the society has the right in praesenti to recover the said amount and in spite of quantification of the liability and consequent notice of demand to pay, the concerned person has defaulted. A mere demand raised by the co-operative Stores on the basis that a certain sum of money is payable by the petitioner when he refutes his liability to pay the same cannot give rise to a position when it can be said that a certain amount has "accrued due" to the Stores. AIR 1966 All 370 (FB), Ref. (Para 9)

(C) Constitution of India, Arts. 226 and 227 — Other remedy open — Remedy of review cannot be a ground to oust the jurisdiction of High Court.

Provision of finality under the Act can be no bar to exercise of jurisdiction by the High Court under Article 227 of the Constitution. The remedy of review in the Act can also not be raised as a bar to exercise of the High Courts' jurisdiction in a writ of certiorari, if, on examination of the materials, it is found that an error apparent on the face of the record of the Court below is manifest. AIR 1969 SC 556, Rel. on. (Para 11)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 556 (V 56) =

(1969) 1 SCJ 878, Baburam v. Zilla Parishad 11

(1966) AIR 1966 All 370 (V 53) =
1966 All LJ 426 (FB), Town Area Committee, Sirsaganj v. N. L. Churaman 9

(1954) AIR 1954 SC 210 (V 41) =
1954 SCR 892, Jagan Nath v. Jaswant Singh 7

S. Misra, B. Das, S. K. Mohanty, for Petitioner; Advocate General; M/s. S. C. Roy, J. N. Mohapatra, C. Rout and P. Biswal, for Opposite Parties.

R. N. MISRA, J.: This is an application under Articles 226 and 227 of the Constitution asking for the issue of a

writ of certiorari to quash the order passed by the Munsif of Balasore exercising the powers of an Election Commissioner under the provisions of the Orissa Panchayat Samiti and Zilla Parishads Act (No. 7 of 1960) (hereinafter referred to as the Act)

2. The petitioner and opposite parties 1, 2 and 3 were candidates in the contest for the office of the Chairman of the Khaira Panchayat Samiti in the district of Balasore. The election was held on 7-1-68, and the petitioner was declared elected as the Chairman. Opposite party no 1 thereupon made an election petition before the Munsif of Balasore who is the Commissioner duly appointed under the aforesaid Act, and the said application came to be registered as Election Misc. Case No. 1 of 1968. The election was sought to be challenged on various grounds, and one of them material for our present purpose was that the petitioner had incurred the disqualification prescribed under Section 25 (1) (b) of the Orissa Grama Panchayat Act, 1964, read together with Section 16 (3) (a) of the Act. The facts constituting the said disqualification were as follows:

3. The petitioner was a member and also the cashier of the Khaira Co-operative Stores and had misappropriated funds. In an audit made under Section 67 (1) of the Orissa Co-operative Societies Act, 1962 (Act 2 of 1963) a sum of Rs. 910-02 was found due from the petitioner. The Society raised a demand against the petitioner, passed resolutions and ultimately lodged a claim in Dispute Case No 334 of 1966-67 before the Assistant Registrar of Co-operative Societies, Balasore. The petitioner did not admit his liability for the aforesaid amount and contended that he had not incurred the disqualification in question.

The Election Commissioner raised several issues for determination in the case. The material issue touching this aspect of the matter was issue no. 2. The Election Commissioner, by his decision dated 31-3-69, came to hold that the petitioner was disqualified on the aforesaid score and rejected all the other grounds for his disqualification as raised by the opposite party no. 1. No other statutory remedy is provided under the Act against the decision of the Election Commissioner, and the petitioner, therefore, came up before this Court to quash the order of the Election Commissioner.

4. Mr. Srinivas Misra appearing for the petitioner raised two contentions (1) The Election Commissioner has no jurisdiction to entertain a dispute questioning the validity of the election of the Chairman of a Panchayat Samiti and (2) The finding that the petitioner had incurred the disqualification under Section 25 (1)

(b) of the Grama Panchayat Act read with Section 16 (3) (a) of the Act was based upon a wrong construction of the law, and, as such, the conclusion of the Election Commissioner was vitiated and there is an error apparent on the face of the record justifying interference of this Court.

5. Chapter VI-A of the Act makes provision for election disputes and section 44-A of the Act provides,

"No election of a person as a member of Samiti or a Parishad held under this Act shall be called in question except by an election petition presented in accordance with the provisions of this Chapter." Mr. Misra submits that election disputes are purely statutory proceedings and are not actions at law or suits in equity, and the election Courts possess no common law power. Therefore, once jurisdiction is not conferred under the special statute, the Election Commissioner is not entitled to entertain an election dispute. On a plain reading of section 44-A, he contends, a dispute relating to the election of a Chairman is not comprehended by the said provision. This contention seems to be absolutely without basis. Section 16 (1) of the Act provides for the constitution of the Samiti and it states who the members of a Samiti would be. By virtue of Section 16 (1) (a), the Chairman of the Samiti, elected in accordance with the provisions of sub-section (3) (a) of that section, is a member of the Samiti. Therefore, upon his election, the Chairman becomes a member of the Samiti and his election qua chairman is also covered by the provisions of S. 44-A of the Act. It would be relevant to refer to sub-section (5) of Section 44-B which is also a part of the said Chapter VI-A of the Act. The said sub-section reads as follows:

"No candidate who has been elected to be a Member, Chairman or Vice-Chairman of a Parishad or Samiti shall be debarred from holding office as such member, Chairman or Vice-Chairman merely by reason of any election petition having been filed against him unless his election has been declared void by the Election Commissioner".

We are, therefore, not prepared to hold that Section 44-A of the Act does not confer jurisdiction on the Election Commissioner to entertain a dispute relating to the election of the Chairman of a Samiti. The first contention raised by Mr. Misra, therefore, fails. The Election Commissioner had jurisdiction to entertain the election dispute in question.

6. We now proceed to examine the correctness of the second submission of Mr. Misra. Section 16 (3) (a) of the Act prescribes for the election of the Chairman, and it reads,

Patna High Court

(1883) ILR 5 All 602, Hira Lal v. Bhairon

(1881) ILR 7 Cal 414 = 9 Cal LR
 76, Radha Proshad v. Esuf 8
 (1851) 6 Ex 791=155 ER 765, Doed
 Hellyer v King 8

Kailash Rai, Parmanand Sharan Sinha
 and Lakshmi Narain Mishra, for Appel-
 lants, J. C. Sinha and Nagendra Prasad
 Singh No. II, for Respondents.

MISRA, C. J.: This is an appeal by the
 defendants-first-party. It arises out of a
 suit for a declaration of title and recovery
 of possession in respect of 7.50 acres of
 land equivalent to 11 bighas 14 kathas
 15 dhurs. The suit was instituted by
 fourteen sets of plaintiffs and the lands
 claimed have been shown in twelve
 schedules. The lands comprised in sche-
 dules Nos 1 to 9 of the plaint were
 claimed by the plaintiffs first party to
 ninth party, respectively; the land of
 schedule No 10 was claimed by the plain-
 tiffs tenth, eleventh and twelfth parties,
 the land of Sch II was claimed by the plain-
 tiff thirteenth party; and the land of sche-
 dule No. 12 was claimed by the plaintiff
 fourteenth party. The suit was instituted
 for a declaration and recovery of posses-
 sion, inasmuch as an order was passed
 against the plaintiffs by the Criminal
 Court in a proceeding under section 145
 of the Code of Criminal Procedure. The
 disputed lands, admittedly, were portions
 of cadastral survey plots Nos 29 to 43
 and 45. The plaintiffs claimed these
 schedule lands as aforesaid on the ground
 that they were portions of the lands held
 by them under the aforesaid plot num-
 bers comprised in thana No. 40 of vil-
 lage Harnathpur Barari known also as
 Harnathpur Gan Bharr.

According to the plaintiffs, the defen-
 dants' lands, of which they claimed the
 disputed lands to be portions, were
 situate in village Harnathpur Taufir. The
 two villages, although forming part of
 one tauzi, No. 1323, were separated from
 each other by a distance of two miles.
 The area of the village, bearing tauzi
 No. 40, was 1,046 bighas 2 kathas 13
 dhurs. Out of it, 289 bighas and odd
 were in possession of the tenants at the
 time of the cadastral survey, and the
 remaining area of 756 bighas and odd
 lay in the bed of the river Ganges, and
 was covered with sand. The area of
 Harnathpur taufir, tauzi No. 14, was
 949 84 acres, out of which 727 acres were
 in possession of the tenants, while the
 remaining 220 acres were recorded as
 gairmazrua. The areas claimed by each
 set of the plaintiffs have been set out
 in the schedules to the plaint, and these
 were recorded, in some cases, as occu-
 pancy but generally as gair dakhalkar or
 non-occupancy raiyati holdings of the
 ancestors of the plaintiffs. The plaintiff
 ninth party, however, claimed that he
 was entitled to Sch. 9 lands on the foot
 of a settlement by the maliks.

The rights of the parties were speci-
 fied in the manner that the names of the
 father of the plaintiff-first-party and
 the grandfather of the plaintiffs
 second party and third party and
 maternal grandfather of the plaintiff
 fourth party and father of the plaintiffs-
 fifth party and sixth party and an aunt
 of the plaintiff seventh party and the
 great grandfather of the plaintiff eighth
 party and father of the plaintiffs tenth
 to twelfth parties and maternal grand-
 father of the plaintiff thirteenth party
 and uncle of the plaintiff fourteenth party
 were recorded in the cadastral survey
 khatain as non-occupancy tenants. The
 ancestors of the plaintiffs first, second,
 third, fourth, eighth to twelfth and four-
 teenth parties were recorded as occupancy
 tenants for ten years standing, while the
 aunt of the plaintiff seventh party was
 recorded as a non-occupancy tenant for
 eight years, the maternal grandfather of
 the plaintiff fourteenth party was record-
 ed as a non-occupancy tenant for five
 years, and the fathers of the plaintiffs fifth
 and sixth parties were recorded as non-
 occupancy tenants for one year. The
 plaintiffs claimed to have acquired occu-
 pancy rights by continuous possession
 over the lands till the year 1913, the
 cadastral survey proceedings having
 taken place in 1902. The further case of
 the plaintiffs was that village Harnathpur
 Barari diluviated near about the year
 1913; but, before diluvion, the ancestors
 of the plaintiffs had already perfected
 their occupancy right over them.

The case in respect of the plaintiff ninth
 party was that the land claimed by him
 was originally recorded in the name of
 one Jagrup Lal. Jagrup Lal died issue-
 less, and hence his holding was abandon-
 ed. The landlord came into possession of
 the land, and, ultimately, settled it with
 different persons, including the plaintiff
 ninth party. It is not necessary to set
 out the exact area claimed by the plain-
 tiffs, which has been mentioned by the
 learned Subordinate Judge, who heard
 the appeal arising out of the judgment
 of the trial Court, in paragraph 5 of his
 judgment.

2. It was alleged by the plaintiffs
 that the lands emerged out of water in
 1946, and, at first, only, kash, jhauwa,
 etc. grew over the lands. The lands
 improved, however, with the deposit of
 further silt, and they became partially
 fit for cultivation in 1952 and 1953. In
 the latter year, the plaintiffs grew wheat
 and gram crops over them, and, when
 the crops were ready for harvesting, some
 of the plaintiffs harvested the crops but
 the crops were still standing on the
 lands of the plaintiffs second party and
 twelfth party, and, when they prepared
 to begin harvesting, the defendants
 lodged false information with the police

through Laldeo Jha dafadar, who was their man, alleging apprehension of a breach of the peace. Accordingly, a proceeding under section 144 of the Code of Criminal Procedure was started. In the course of the proceeding, the defendants first party claimed title and possession over the lands, and the defendant second party, who was a friend of the defendants first party, claimed to be bataidar in respect of the disputed lands. The plaintiffs also alleged that the defendant second party belonged to village Lagma within mufassil Police Station of Monghyr, which is at a distance of ten miles from the disputed lands.

3. After local inspection of the plots, the proceeding was converted into a proceeding under section 145 of the Code of Criminal Procedure. A pleader commissioner was appointed in the course of the proceeding under section 145 to report on the identity of the lands. The proceeding, however, terminated in favour of the defendants by the order of the Magistrate passed on the 21st June, 1956 and the defendants, taking advantage of the order, dispossessed the plaintiffs from the disputed lands on the 22nd June, 1956. In course of the proceeding, the defendants stated that the ancestors of the plaintiffs were temporary tenants, and they abandoned the lands soon after the survey. They had no concern with the lands of village Harnathpur, and the lands were settled by the Khas Mahal with different persons, and whatever was not settled remained as gairmazrua mallik land of the khas mahal. Plots Nos. 29 to 39 and other cadastral survey plots were amalgamated, and they form plot No. 4 of Khas Mahal survey of 1910. This plot was settled with a new tenant, Bidru Gope, who sold it to Deochand Tewari. A certificate proceeding, being case No. 77 of 1920-21, was started against Deochand Tewari, and Khas Mahal plot No. 4 was auction purchased by Nirgun Das, father of the defendants first party, on the 8th December, 1920.

The plaintiffs' case was that the defendants' statement was absolutely unfounded. The ancestors of the plaintiffs never abandoned the lands. Bidru Gope had no concern with cadastral survey plots Nos. 29 to 39, nor did he ever sell the lands to Deochand Tewari. Bidru Gope had 50 bighas of land which was, however, comprised in thana No. 14. This was purchased by Meghu Sah of Dalhatta at Court auction in the year 1918, and the auction-purchaser came into possession of the land. Bidru Gope had no land to sell to Deochand Tewari. In the plaint, the plaintiffs endeavoured to meet the defence case in the proceeding under section 145 of the Code of Criminal Procedure to the effect that the defendants took settlement of survey plots

Nos. 39 to 43 and 45 and other lands from the Khas Mahal under a patta, dated the 9th of March, 1927, saying that the alleged patta was a collusive document, and it was executed without any consideration. The defendants never came in possession over any of the disputed plots mentioned in the Patta. The lands covered by the patta were situated in thana No. 14 and not in thana No. 40. The lands of thana No. 14 were still in the bed of the river Ganges, and hence the defendants were making false claim to the lands of thana No. 40, which emerged out of water. It is not necessary to set out the other statements in the plaint as they are not relevant.

4. In setting out above the plaintiffs' case, in so far as they purported to meet the defendants' case in the proceeding under section 145 of the Code of Criminal Procedure, the substance of the defence case has been set out. It may be, therefore, briefly stated that, according to the defendants, the plaintiff could not claim occupancy right in the disputed plots as their ancestors, who were temporary tenants and immediately after their names were recorded in the cadastral survey, abandoned their lands, and the Khas Mahal settled the lands with different tenants. Plot No. 4 of the Khas Mahal survey of 1910 comprising part of the disputed plots, claimed by the plaintiffs was settled with Bidru Gope, and the same plot was measured as plot No. 6 of Khas Mahal survey of 1926-27. Thus, cadastral survey plots Nos. 29 to 39 were renumbered as Khas Mahal plot No. 4 in 1910 and plot No. 7 in 1927.

The defence case in regard to the sale of the land of Bidru Gope to Deochand Tewari and the sale of the land of Deochand Tewari in execution of a certificate for default of payment of rent was also pleaded by the defendants. It was further pleaded that, in the year 1927, the father of defendants first party, Nirgun Das, took settlement of 303 bighas 4 kathas 10 dhurs of land on the basis of the patta dated the 9th of March, 1927, from Shah Muhammad Zakaria, who was the thikadar of the Khas Mahal in respect of this village. This comprised plots Nos. 8, 9, 15, 17 and 19 of Khas Mahal survey of 1926-27. The disputed lands, according to the defendants, formed part of plots Nos. 6 and 8, to which the defendants first party were entitled. The thikadar of this plot originally was Shah Muhammad Yakub, father of Shaha Muhammad Zakaria, from whom the father of the defendants first party took settlement; but he did not like to continue as a lessee under the Khas Mahal, and hence the Khas Mahal came into khas possession over this land in 1909. At the time that the Khas Mahal came into possession, there were only,

ten occupancy tenants in the entire tauzi 1323. Hence 849 bighas 9 kathas 1 dhurs of land were settled at an annual rental of Rs. 218/8/- with 27 persons. The total area of the two thana Nos 14 and 40 was only 1,245 bighas 13 kathas 6 dhurs, out of which 849 bighas and odd were settled with 27 persons, including Bidru Gope.

Out of these 27 persons, 23 persons filed petitions for settlement of the lands which were already settled with them on the ground that their lands had diluviated in the year 1908, and they had preferential right to take settlement; but their prayers were rejected. Some of those persons whose prayers were rejected were ancestors of the plaintiffs.

According to the defendants, a fresh khatian was prepared by the Khas Mahal in 1921, and the names of the plaintiffs' ancestors did not find place in it. In 1922, tauzi No 1323 was once again settled temporarily with Shah Muhammad Zakaria who continued to be the landlord till the zamindari vested in the State of Bihar under the Land Reforms Act. According to them, Shah Muhammad Zakaria filed a jamabandi in the year 1925 concerning the entire estate with Government, but, in that Jamabandi also the names of the plaintiffs' ancestors did not appear; but the names of the defendants first party appeared. There was a further survey by the Khas Mahal in 1940, both in respect of the lands of thanas Nos 14 and 40. In that also, the name of Bibi Tahira was shown as a tenant of thana No. 14, while the name of the defendants first party was shown as a tenant in respect of the lands of thana No. 40. Some persons were shown as cosharer raiyats in respect of thana No 40, but the names of the plaintiffs or their ancestors were not there. The names of these persons did not appear also in the Khas Mahal Khatian of the year 1946 or in the rent schedule of the year 1949-50 and 1952-53. The distinct case of the defendants was that the entire lands of thana No. 40 never diluviated. The other allegations also made in the plaint were denied.

5. The trial Court came to the conclusion that the disputed lands, in fact, form part of the cadastral survey plots claimed by the plaintiffs, but their title to the lands came to an end before the year 1908, when the persons recorded in the cadastral survey as non-occupancy raiyats either abandoned the lands or they were dispossessed by the Khas Mahal, and the lands were settled with different raiyats in the year 1909. Hence, even if the plaintiffs were in possession between 1946 and 1953, they could not have acquired occupancy right, inasmuch as their possession was not of the requisite period of twelve years. They were, in

fact, out of possession for a period of more than twelve years before the filing of this suit. Hence their suit was barred by limitation under Article 142 of the Limitation Act. The learned Munsif held further that the disputed area was portion of plots Nos. 6 and 9 of the 13th Mahal survey of the year 1926-27, and the defendants first party had title to the lands as settlees from Shah Muhammad Zakaria in respect of plot No 9 and as auction-purchaser of Khas Mahal plot No 6 i. e. accepted the case of the defendants thus in toto in so far as the title of the defendants was concerned. The defendants' case with regard to the defendants second party being the bataidars of the first party was not accepted. Coming to the above conclusions, the learned Munsif dismissed the suit.

6. On appeal, however, the learned Subordinate Judge, 1st Court, Monghyr, reversed the findings of the learned Munsif. He came to the following findings:—

(i) The lands of the village Harnathpur Barari did diluviate in the year 1908 and not in 1913, and became fit for cultivation only in the year 1959-60, Fasli corresponding to 1952-53.

(ii) There was no dispute between the parties regarding the identity of the lands.

(iii) There was no satisfactory evidence on the record to show that the disputed plots, meaning thereby Plots Nos. 29 to 39, constituted Khas Mahal plot No. 4 of 1908 and 1909.

(iv) The lands, which the plaintiffs claimed to have acquired either on the basis of the settlement (exhibit K) or on the basis of the auction purchase (Exhibit N) were situated in thana No. 14 and not in thana No. 40 in which the disputed lands were admittedly situate.

(v) The recorded tenants of cadastral survey plots mentioned by the plaintiffs continued to be in possession over their lands which were in dispute till the time that the lands of village Harnathpur Barari, bearing thana No. 40, were diluviated by the river Ganges.

(vi) The alleged settlement and also the purchase was only a paper transaction.

(vii) By the time the lands were diluviated near about the year 1908, the father of P. W. 13 had already acquired occupancy right, and, as such, the title of the plaintiffs first party would be deemed to be continuing in respect of cadastral survey plot No. 34 from the year 1908 till the year 1952, when the lands became fit for cultivation.

The learned Subordinate Judge, accordingly, found that the plaintiffs first party, second party, third party, fourth party, fifth party, seventh party, eighth party, tenth party, eleventh party and

thirteenth party have got perfect title over the disputed lands claimed by them, and, as such, their claims were decreed for recovery of possession over their shares of the lands.

The claim of the plaintiffs sixth party was decreed only to the extent of three-fourth out of the lands claimed by the plaintiffs, in Schedule No. 6, and the claim of the plaintiffs ninth party, twelfth party and fourteenth party was disallowed in toto. The claim of the plaintiffs tenth party and eleventh party was allowed to the extent of two-thirds share out of Schedule No. 10 of the plaint. The plea of limitation was also negatived. The defendants have, accordingly, preferred this appeal from the judgment of the learned Subordinate Judge in so far as the suit of the plaintiffs was decreed, and the plaintiffs ninth, twelfth and fourteenth parties have filed cross-objection.

7. The case was heard by me sitting singly when it was referred to Division Bench. One of the points raised was whether a single co-owner could institute a suit for recovery of possession without impleading other co-owners. It appears that, on this matter, there was a conflict of pronouncement of this Court as between *Abdul Kabir v. Mt. Jamila Khatun*, AIR 1951 Pat 315 and *Johan Uraon v. Sitaram Sao*, 1963 B. L. J. R. 623 = (AIR 1964 Pat 31). The matter being considered by the Division Bench, an identical question was raised with regard to the suit of the plaintiff fourth party on the ground that the suit was not maintainable for eviction of the defendants as his mother and her two sons were necessary parties to the suit; but they had not been impleaded in the action. It may be stated that this point is confined to the claim of only some of the plaintiffs, being confined to the plaintiffs third, fourth and sixth parties and not to other sets of the plaintiffs. The Division Bench, in view of the general importance of this point, formulated the following questions for consideration by a larger Bench:—

“(i) Whether a suit by a co-sharer for eviction of a trespasser is maintainable in respect of the entire land without impleading the other co-sharers?

“(ii) Whether the cosharer in a suit of the nature described above is entitled to a decree against the trespassers for joint possession along with the trespasser in respect of his share only in the suit land?

8. Learned counsel for the appellants has contended that the first question should be answered in the negative, and then the second one will not arise, and, in case the first one is answered in the affirmative, the answers to the second one should be that the co-sharer plaintiff should be held entitled to a decree for

joint possession for his share along with the trespasser and not entitled to recovery of possession of the entire land. It may be stated that the decisions of this Court have generally proceeded upon the footing that a co-owner could institute a suit for recovery of possession of land held by him along with other persons against a trespasser who dispossessed all the co-owners, and that he could obtain a decree for recovery of possession of the entire area, the judgment of the suit, however, not affecting the rights of the other co-owners which would remain intact. Mr. Jagdish Chandra Sinha who has appeared for the respondents, has drawn our attention in this connection to *Raghu Raj Singh v. Bishen Tewary*, AIR 1916 Pat 26 *Sambhu Gosain v. Piyari Mian*, AIR 1941 Pat 351, *Raju Roy v. Kasinath Roy*, AIR 1956 Pat 308 and *Dossain Nonia v. Ramdeo Prasad*, AIR 1957 Pat 692. There can be no doubt, therefore, that the view held in this Court has generally been that a co-sharer's suit for recovery of possession of the entire area from a trespasser is maintainable.

Mr. Kailash Rai for the appellants has argued that the view adopted in this Court as laid down in the decisions aforesaid should not be accepted as they are not based on sound principle, and a person, who has no title to the entire area, cannot institute a suit for recovery of possession, if there is a trespasser who, at least, has got possessory right, and in any view, the decree to be passed in favour of such a cosharer should be confined to the quantum of his own share, and he should not be held to be entitled to recover possession from another person who may be a trespasser, but, in regard to whom, the co-sharer, who is suing alone, cannot be taken to have a better title. Support is sought for this contention from the decisions in AIR 1951 Pat 315, and *Naresh Chandra Basu v. Hayder Sheikh Khan*, AIR 1929 Cal 28. In my opinion, however, the argument of learned counsel cannot be accepted. It may be stated that the decisions of all the High Courts in India on this point are uniform.

Apart from the decisions of this Court, referred to above, learned counsel has also drawn our attention to *Currimbhoy & Co. Ltd. v. L. A. Creet*, AIR 1930 Cal 113, *Ram Charan v. Bansidhar*, AIR 1942 All 358, *Maganlal Dulabdas v. Bhudar Purshottam*, AIR 1927 Bom 192, *Ahmad Sahib v. Magnesite Syndicate Ltd.*, AIR 1915 Mad 1214, *Vinod Sagar v. Vishnu-bhai Shanker*, AIR 1947 Lah 388 and *Biharilal v. Wasundarabai*, AIR 1956 Madh Bha 35. All these decisions unambiguously lay down that the suit by a co-sharer is competent, if he sues for recovery of possession of land which is owned by him jointly with others, even with-

out impleading the other co-sharers. I see no reason to depart from the *cursus curiae* on this matter. Mr. Rai has endeavoured to support his contention further with reference to a decision of the Allahabad High Court in *Hira Lal v. Bhairon* (1889) ILR 5 All 602 and a decision of the Calcutta High Court in *Radha Proshad v. Esuf*, (1881) ILR 7 Cal 414. In my opinion however, none of these two cases is really relevant.

The decision of the Allahabad High Court in (1883) ILR 5 All 602, if anything, is against the appellants' contention, and the decision in (1881) ILR 7 Cal 414 is distinguishable. It lays down that, when a tenant has been put into possession of *ijmali* property with the consent of all the sharers, or what is the same thing, has been placed there by the managing shareholder, who has authority to act for the rest, no one or more of the co-sharers can turn the tenant out without the consent of the others; but no man has right to intrude upon *ijmali* property against the will of the co-sharers or any of them, and, if he does so, he may be ejected without notice either altogether, if all the co-sharers join in the suit, or partially, if only some of the co-shares wish to eject him. This observation was necessitated because, in that case, defendant No. 4, who was a co-sharer, supported the case of the trespasser, so that the plaintiffs could, in the circumstances, recover joint possession only of their share.

Learned counsel has endeavoured to take us to the judgment in *Doed Hellyer v. King*, (1831) 6 Ext. 791 for the proposition that a tenant in common is entitled to recover possession as against a trespasser only to the extent of his share. In my opinion, however, it is unnecessary to work up that point in view of the uniform decisions of all the High Courts in India which also appear to be based on sound principle in the sense that a co-sharer, with his title in equity, has a better claim to be in possession on behalf of all the co-sharers than a complete trespasser. It is true, no doubt that a trespasser, whose possession can be taken, in law, to be possessory title, cannot be disturbed in his possession by another trespasser, and, as against the latter, he has a right to recovery of possession. It is well settled that merely a possessory title when confronted with a better title, will yield place to the better title which must prevail over a trespasser's possessory title pure and simple. A co-sharer, having an interest in a property, jointly with others, is apparently a person with a better title than a trespasser. Following this principle there is no reason why his suit should not be decreed. It is relevant also to consider in this connection that it is a well settled

ed principle of law that one of the various co-owners of a property, if in possession, will be deemed to be in possession on behalf of all the co-owners, and it is for this reason that his possession, in law, therefore, is not regarded as adverse to other co-owners unless there is distinct proof of ouster. In that view of the matter also, the interest of an undivided co-owner or co-sharer must be taken to cover every inch of land which may be the subject-matter of dispute as belonging to the co-owners, and hence it is clear that there is no support for Mr. Kailash Rai's contention either in principle or in authority as to why a co-sharer's suit cannot be held to be maintainable without impleading other co-sharers, and why it should not be decreed in respect of the entire interest of the co-owners which of course, however, will not affect the rights of other co-owners vis a vis successful plaintiff in a suit against a trespasser.

9. Mr. Kailash Rai has endeavoured, however, to challenge the finding of fact recorded by the learned Subordinate Judge. His contention is that the conclusion arrived at by the learned Subordinate Judge that the lands of the defendants were comprised in thana No. 14 based primarily upon the cuttings in the certified copy of the *Khatian* which the learned Subordinate Judge had occasion to examine. The learned Munsif, however, examined the *Khas Mahal Khatian* in original which was called for and which did not contain the cuttings. Accordingly, a petition was filed in this Court on behalf of the appellants for calling for the original *Khatian* and to see whether the conclusion of the learned Subordinate Judge is well grounded. There is, however, difficulty in acceding to this contention of learned Counsel because, if the defendants felt a discrepancy between the original *Khatian* and the certified copy, they should have filed an application before the learned Subordinate Judge himself to refer to the original *Khatian* and not to the certified copy. Apart from that however, if the finding of fact recorded by the learned Subordinate Judge had rested only upon this, there might be some substance in the contention of learned counsel for the appellants. Accordingly, we were taken through the discussion in the judgment of the learned Subordinate Judge of the evidence bearing on this question, and it appears that, in a very very detailed examination of the evidence, the learned Subordinate Judge has scrutinised all the evidence and the circumstances, and the mark of cutting in the certified copy of the *Khatian* is only an item in the evidence examined. Even if this evidence were kept out of consideration, the finding of the learned

Subordinate Judge as a finding of fact cannot be challenged, and it is difficult for us in second appeal to interfere with the findings.

10. Learned counsel has also raised the question of limitation. In my opinion, however, since the lands came out of water in 1946, and the plaintiffs have been found by the learned Subordinate Judge to be in possession, the question of limitation does not arise. The only way in which this could be raised would be if the plaintiff's possession would be held to be abandoned before the disputed lands went under water. The finding upon this issue is also against the defendants.

11. Mr. Kailash Rai has, however, contended further that the right of the non-occupancy raiyat must be held to have discontinued after the lands went under water. The contention is not sound in law. Sections 44 and 66 of the Bihar Tenancy Act deal with the right of non-occupancy raiyat. Section 44 provides the several modes in which a non-occupancy raiyat's right can be terminated. None of the modes prescribed therein was resorted to by the Khas Mahal or its thikadar as against the plaintiffs' ancestors. Accordingly, the non-occupancy right recorded in Khatian must be taken to have continued even when the lands were under water, and that is more so since, in some of the rent receipts produced on behalf of the plaintiff which have been accepted as genuine by the learned Subordinate Judge, rent was claimed to have been paid on a remission basis because the lands were under water and not fit for cultivation.

Learned counsel has also referred to Section 180 of the Bihar Tenancy Act on the ground that the area in dispute is admittedly diara land and, as such, the non-occupancy raiyats cannot be taken to have acquired any occupancy right in the land when the land was under water. This contention, however, is not relevant because, apart from the fact that there was no specific pleading in regard to the diara character of the land which has to attract the operation of Section 180 of the Bihar Tenancy Act, the suit has been decreed by the learned Subordinate Judge on the ground that, in the absence of resort to the provisions of S. 44 of the Bihar Tenancy Act, the right of occupancy continued even if the lands in dispute were under water. The right of a non-occupancy raiyat cannot be equated with the right of a trespasser, in whose case adverse possession ceases with the land being under water so as to cut off the continuity of possession of the trespasser.

12. So far as the cross-objection is concerned, Mr. J. C. Sinha for the res-

pondents has contended that he will not press the cross-objection with regard to the plaintiffs ninth and fourteenth parties but only in regard to the plaintiff twelfth party. The claim of the plaintiff twelfth party has been disallowed by the learned Subordinate Judge on the ground that he put in a disclaimer in the proceeding under Section 145 of the Code of Criminal Procedure. The case made on behalf of the plaintiff twelfth party in the trial Court was that the alleged signature of the plaintiff on the disclaimer petition was forged and fabricated. That case has not been accepted by the Court of appeal below. In the circumstances, it must be held that he had filed a disclaimer petition, and he cannot be permitted to turn round now to take up a contrary attitude in the suit relating to the same property. In any view, the finding of the Court below, in substance, is that, in the circumstances of the case, he had no title to, or possession over, the disputed land, and the cross objection, in that view of the matter, cannot stand.

13. In the result, the judgment of the Court of appeal below must be upheld, and both the appeal and the cross-objection must be dismissed: but, in the circumstance, there will be no order as to costs of this Court.

14. CHOUDHARY, J.: I agree.

15. SINHA, J.: I agree.

Appeal and cross-objection dismissed.

AIR 1970 PATNA 7 (V 57 C 2)

N. L. UNTWALIA AND

M. P. VERMA JJ.

S. Gurdial Singh Bedi, Appellant v. Sunda Hire Purchase Corporation, Respondent.

A. F. O. D. No. 477 of 1964 D/- 3-2-1969, from decision of Sub-J. Ist Court, Dhanbad, D/- 12-8-1964.

(A) Specific Relief Act (1877), S. 42 — Police seizing truck from custody of plaintiff — Suit for declaration that plaintiff is owner of truck — It is not necessary to ask for recovery of possession of truck — Seizure of truck by police will be tantamount to truck being in custody of police for benefit of party who is declared by Civil Court to be entitled to its possession: AIR 1966 SC 359, Rel. on. (Para 5)

(B) Civil P. C. (1908), S. 21 — Objection to jurisdiction on ground that defendant did not reside within court's jurisdiction nor did arise therein any part of cause of action — No prejudice shown — Truck in question seized by police from plaintiff's custody at D — Suit filed in Court at D — Held on facts pleaded and

GM/HM/D/133/69/LGC/B

found, that the Court had jurisdiction to try it — Cause of action arose within its jurisdiction on the date when the truck was seized. (Para 6)

(C) Evidence Act (1872), S. 117 — Defendant in its proposal form dated 23-3-1960 stating that Telco with which there was a hire purchase agreement of Truck had released it — Accepting proposal form Hire-purchase agreement was entered into on the same day — Under conditions of agreement defendant admitted plaintiff to be owner of truck, characterising himself as a hailee of vehicle — Release of truck could only be obtained from Telco when payment, which was arranged to be paid through plaintiff, was made — Truck was released either on 25th March or 30th March 1960 — Held that the defendant could and did transfer ownership of vehicle to plaintiff on or before 23-3-1960 although technically and in law he became its owner a few days later — He could not deny either the transfer of ownership or fact that plaintiff was owner of vehicle on the day when he entered into Hire-purchase agreement — Facts in proposal form and agreement, held, indicated that ownership had been transferred by defendant by necessary implication and implied contract to plaintiff. Case law discussed. (Paras 19, 21)

Cases Referred: Chronological Paras

- (1986) AIR 1968 SC 359 (V 53) = 5
- 1965-3 SCR 655, Deo Kuer v. Sheo Prasad Singh
- (1932) AIR 1932 Cal 524 (V 19) = 20
- ILR 59 Cal 667, Co-operative Hindusthan Bank Ltd. v. Surendra Nath Dey
- (1923) AIR 1923 Cal 535 (V 10) = 21
- 76 Ind Cas 499, Rustam Ali Mia v. Abdul Jahhar
- (1918) AIR 1918 Cal 419 (V 5) = 21
- 27 Cal LJ 289, Surendranath Dey v. Rajindra Chandra
- (1908) 7 Cal LJ 387, Khohhari Singh v. Ram Prasad
- Basudeva Prasad, Kanhaiya Prasad, Devendra Prasad Sharma and Narendra Prasad and Mrs. Sudha Rani Jaiswal, for Appellant; R. S. Chatterji, Sushil Kumar Mazumdar and Yogendra Mishra, for Respondents.

UNTWALLIA, J. :— This is a defendant's first appeal from the judgment and decree of the Court of the 1st Subordinate Judge at Dhanbad in Title Suit 12 of 1961, whereby the suit of the plaintiff-respondent for a declaration that it is the owner of the truck described in the schedule appended to the plaint has been decreed.

2. The sole plaintiff in the case is Sunda Hire Purchase Corporation, a registered firm carrying on business at Dhanbad, and the sole defendant is Sardar Gurdial Singh Bedi carrying on business

at Jamshedpur. The plaintiff's case is that it is the owner of a Motor, Tata Mercedes Benz Truck No. BRT 5405. On 23-3-1960 the defendant entered into a hire-purchase agreement in respect of the said truck with the plaintiff. He duly executed the agreement on the said date, in which were incorporated the terms and conditions of the agreement.

A copy of the agreement was filed as annexure to the plaint and it was marked Ext. 7 at the trial. According to the agreement, the defendant was to make monthly payment of the hire money for the truck to the plaintiff. He made a few irregular payments, the total of which was Rs. 2,900 only. In spite of several demands by the plaintiff, the defendant neglected and failed to make any further payment. In pursuance of the term of the agreement, the plaintiff exercised its discretion as owner of the truck and repossessed the truck on 25-11-1960 at Joda in the district of Kenjore in Orissa. Thereafter the truck was brought back to Dhanbad, and an information was given to the Additional Superintendent of Police at Jamshedpur. At the time of the seizure of the truck and its repossession on behalf of the plaintiff, no objection was raised by the defendant. But subsequently he instituted a false criminal case against the plaintiff concealing the true state of affairs and got the truck seized by the Baghmara Police on 23-12-1960. The truck was in the custody of the Baghmara Police within the jurisdiction of Dhanbad Court on the date of the institution of the suit and hence the plaintiff instituted the suit for a declaration as already stated.

3. The appellant took various pleas in his written statement. To state briefly only those which are relevant for the purposes of deciding the points urged in appeal, mention may be made of the following pleas—

(i) The defendant did not enter into any Hire-purchase agreement on 23-3-60 or at any time with the plaintiff in respect of Motor Truck No. BRT 5405; the alleged agreement is forged and fabricated.

(ii) The plaintiff's case that the defendant made some irregular payments of Rs. 2,900 to it and thereafter failed to make any payment is false and frivolous.

(iii) In February, 1959 the defendant entered into a Hire-purchase agreement with Messrs. Tata Engineering and Locomotive Co. Ltd. (hereinafter, for the sake of brevity, to be referred to as Telco Ltd) with respect to the truck in question on payment of certain sums of money agreeing to pay the balance in eleven equal monthly instalments of Rs. 1,700 each. Thereafter the defendant paid on different dates Rs. 9,200 to Telco Ltd. In March, 1960 the defendant received

Rs. 9,508 from Messrs. Tewary Bechar and Co. Private Ltd., which took the signature of the defendant on a handnote which was in favour of Sunda Credit Corporation. On receipt of the said loan, the defendant paid the amount to Telco Ltd. through Tewary Bechar and Co. Private Ltd., on 25-3-1960 in full satisfaction of the claim of the Telco Ltd. On 12-12-1960 the said company issued a Hire-purchase termination letter in favour of the defendant terminating the Hire-purchase agreement and thereafter transferring the complete ownership of the truck in favour of the defendant.

(iv) Out of the aforesaid loan of Rs. 9,508 the defendant claimed to have paid Rs. 7,050.

(v) After the defendant had become the owner of the truck, he was plying it for his business and while it was in the custody of his driver Ram Prasad in the night of 25/26-11-1960, Rashid and Anand of Dhanbad along with three others, by misrepresentation, befuddled Ram Prasad and took away the truck from Sini within Seraikella Sub-division in Singhbhum District. Information was lodged against the aforesaid persons on the next day at Seraikella and the Seraikella Police with the help of Baghmara Police seized the truck which was kept concealed by the aforesaid persons.

(vi) The defendant filed an application before the Sub-divisional Magistrate, Seraikella, for release of the truck in favour of the defendant. The plaintiff objected to it. The learned Sub-divisional Magistrate, however, by his order dated 5-1-1961, after hearing the parties, directed release of the truck in favour of the defendant. As against the aforesaid order, the plaintiff filed a revision petition in the court of the Sessions Judge of Singhbhum at Chaibassa. The learned Sessions Judge rejected the petition of the plaintiff by his order dated 8-4-1961.

(vii) The suit is barred under Section 42 of the Specific Relief Act.

(viii) The Dhanbad Court had no jurisdiction to try the suit.

4. The learned Subordinate Judge accepting the plaintiff's case and overruling all the pleas raised by the defendant has decreed the suit. The defendant has come up in appeal. Mr. Basudeva Prasad Learned counsel for the defendant, has urged the following points—

(I) The suit is barred under Section 42 of the Specific Relief Act.

(II) The Dhanbad Court had no jurisdiction to try the suit as the defendant did not reside within its jurisdiction nor did arise therein any part of the cause of action.

(III) The finding of the court below that the defendant had entered into a Hire-purchase agreement with the plaintiff is wrong; it ought to have been held

that the alleged agreement is a forged and fabricated document.

(IV) In any view of the matter, the agreement was not valid in law as on the date of the agreement the truck did not belong to the plaintiff.

5. The first point urged on behalf of the appellant is covered by the decision of the court below on issue No. 3 in relation to that point. In paragraph 12 of the judgment, the court below has rightly pointed out that the Police had seized the truck from the custody of the plaintiff and the truck being in Police custody, it was not necessary for the plaintiff to ask for recovery of possession of the truck. The truck was bound to be released to the person in whose favour the decision of the civil court could go. I may in this connection refer to the decision of the Supreme Court in Deo Kuer v. Sheo Prasad Singh, AIR 1966 SC 359 wherein Sarkar, J., as he then was, delivering the judgment of the Court, pointed out that ".....In a suit for declaration of title to property filed when it stands attached under Section 145 of the Code, it is not necessary to ask for the further relief of delivery of possession".

Applying the same principle, the seizure of the truck by the Police will be tantamount to the truck being in the custody of the Police for the benefit of the party who is declared by the civil court to be entitled to its possession.

6. Apart from the fact that under Section 21 of the Code of Civil Procedure the appellant had to show prejudice which he has utterly failed to show even if it were to be held that the Dhanbad Court had no jurisdiction to try the suit, on the facts pleaded and found, it is manifest that the said court had jurisdiction to try it. The truck was seized from the plaintiff's custody at Dhanbad by the Baghmara Police. The cause of action, as rightly pleaded in paragraph 12 of the plaint, arose within the jurisdiction of the Dhanbad Court on 23-12-1960, the date when the truck was seized. The defendant does not deny this fact as it was so obviously true a fact. I, therefore, held that the Dhanbad Court had jurisdiction to try the suit.

7. On the main question of fact, the evidence adduced on behalf of the plaintiff is so overwhelming and reliable that it is surprising that the defendant not only took a false and dishonest plea in his written statement and at the trial of the suit in the court below but he persisted to pursue it even in this court, although Mr. Basudeva Prasad, learned counsel for the appellant, found it difficult almost impossible to attack any finding of fact recorded by the court below by advancing any argument of substance. The argument advanced in this regard was of

such a flimsy character that we did not think it necessary to call upon the plaintiff respondent to reply to it. Nor was the said respondent asked to reply to any of the first two points stated earlier. The only point on which it was called upon to reply was the fourth one, which will be discussed hereinafter.

8. The circumstances under which the defendant changed the Hire-purchase agreement and entered into one with the plaintiff are these. In the first instance the defendant had entered into a Hire-purchase agreement with Telco Ltd. But he committed defaults in payment of the amounts of instalments due, which led the said company to write a letter dated 11th of March, 1960, a copy of which is Ext. 2/h, to the defendant. This copy was sent along with letter (Ext. 2/g) of the same date to Tewary Bechar and Co., Jamshedpur. In Ext. 2/h it is stated—

"We have been hearing from you one excuse after another for non-payment of the instalments. Your account has been carried in a very unsatisfactory manner right from its inception We are not agreeable to give you any further latitude and unless the above instalments are remitted by return, we shall have no alternative but to arrange further action in the matter."

While forwarding Ext. 2/h to Tewary Bechar and Co., Telco Ltd. wrote in Ext. 2/g.

"The Hirer has been giving trouble right from the beginning. If his vehicle has come to you with a broken housing, kindly arrange to seize the same".

It is then that Tewary Bechar and Co., arranged with the plaintiff for advance of Rs. 18,000 or Rs. 19,000 to the defendant on the condition that he would execute the Hire-purchase agreement in favour of the plaintiff in respect of the truck in question. To this effect is the clear evidence of Ajab Lal Anand (P.W. 11) who was at the relevant time in service of the plaintiff firm. He is supported in this regard by the Branch Manager of Tewary Bechar and Co., Shri Onkar Prasad Dubey (P. W. 12). On instructions from the General Manager of the Company at Jamshedpur, P. W. 12 contacted Shri A. L. Anand, the Manager of the plaintiff corporation and arranged the deal. The learned Subordinate Judge has referred to numerous pieces of documentary evidence on the point of the deal between the parties. As I have said above, no argument of any substance could be advanced to attack the substantial finding of fact recorded by the court below on the overwhelming evidence adduced by the plaintiff, supported as it was by some of the documents filed and/or exhibited by the defendant himself. It is not necessary for me to deal with all that evidence

in any detail. I am afraid, however, I shall have to repeat or paraphrase some of the observations of the court below with reference to some pieces of evidence.

9. On receipt of the bank draft for Rs. 18,000 from the plaintiff Corporation, Sri S. C. Sarkar, Secretary of Tewary Bechar and Co., Jamshedpur, wrote the letter (Ext. 2/k) on the 21st March, 1960 to the plaintiff Corporation stating therein—

"This is to inform you that Sardar Gurdial Singh Bedi has paid in full (out of the money paid by you) the instalments due to M/s Telco Ltd., under hire-purchase agreement covering Tata Mercedes Benz truck No. BRT 5405. You may, therefore, enter into a hire-purchase agreement with him covering the said truck."

The proposal form (Ext. 13) was filled up by the defendant on the 23rd March, 1960. In this proposal form against the various columns, he stated that Telco Ltd., with which there was a Hire-purchase agreement earlier, had released the vehicle which was Tata Mercedes Benz Truck bearing No. BRT 5405. Accepting this proposal form, the Hire-purchase agreement (Ext. 7) was entered into on the same day, i.e., 23-3-1960. This also bears the signature of the defendant and Jiwanlal Sunda, partner of the plaintiff Corporation, besides the signature of the guarantor. The defendant has falsely and dishonestly denied his signatures on those documents and on some others, as remarked by the court below.

10. The defendant has admitted, as stated in the 17th paragraph of the judgment of the court below under issue No. 9, that he had given Rs. 9,508 to Telco Ltd. as the balance of the amount due under the Hire purchase agreement and that he was short of fund; therefore, he had requested Tewary Bechar and Co. to arrange for the money in order to pay off the dues of Telco Ltd. His case that the said amount was arranged from Sunda Credit Corporation on the basis of a hand-note has not been substantiated at all. Jawanlal Sunda was a partner of both the Corporations. Ext. 2/f is a letter from the defendant to Tewary Bechar and Co., Jamshedpur, requesting the latter to pay to Telco Ltd. Rs. 9,508 being the balance due to it towards Hire-purchase contract of the said Company out of the amount of Rs. 18,000 received from Messrs. Sunda Hire-purchase Corporation on the defendant's account. The defendant denied his signature on this letter. But it is manifest that all his denials were shamelessly dishonest as a reputed firm like Tewary Bechar and Company which was a big Company, as admitted by the defendant himself, could not have forged such large number of documents to support an allegedly false case of the plaintiff. P. Ws.

7 and 12 on behalf of Tewary Bechar and Co. have come to support the case of the plaintiff. The fact of the deal finds further support from Ext. C, entries in the ledger book of Tewary Bechar and Co., which was used by the defendant. The ledger stood in the name of G. S. Bedi, the defendant. The entry in the ledger shows that a sum of Rs. 18,000 was credited to the account of the defendant on March 25, 1960 as having been received by a demand draft from Sunda H. P. Corporation.

The entry on the 25th March indicates that it was so made on encashment of the draft, although on receipt of it Tewary Bechar and Co. informed Messrs. Sunda Hire-purchase Corporation earlier in its letter (Ext. 2/k) on 21st March 1960 that the instalment money due to Telco Ltd. had been paid, meaning thereby that it can be taken for granted that that had been paid. Ext. C further shows that a sum of Rs. 9,511 including bank charges was debited to the account of Bedi on March 25 when it was sent to Telco Ltd. The balance of Rs. 8,458.25 was refunded to Bedi as evidenced by Ext. C. Ext. D is the account in respect of the Hire-purchase agreement between the defendant and Telco Ltd. It shows receipt of the sum of Rs. 9,508 on 25-3-1960, the date of Telco's receipt being 30-3-1960. Exts. 4 series are the entries in the cash book of Tewary Bechar and Co., supporting the case as just stated. Ext. 8 is the receipt granted by the defendant to Tewary Bechar and Co. for having got the refund of Rs. 8,458.25. Mr. Basudeva Prasad stated before us that there was no receipt granted by the defendant for the said amount. When his attention was drawn to the original of Ext. 8, he stated that it was a voucher prepared in the office of Tewary Bechar and Co. But surprisingly enough this contained the stamped receipt of G. S. Bedi also in token of the receipt of payment of the sum of Rs. 8,458.25. The defendant had the hardihood to deny his signature on Ext. 8 also, suggesting thereby that Tewary Bechar and Co. has colluded with the plaintiff in forging his signature on Ext. 8. The stand of the defendant is too obviously false to merit any detailed consideration.

11. On receipt of the balance of the dues, Telco Ltd. addressed a letter (Ext. A) that its interest in the ownership of the vehicle covered by the Hire-purchase agreement had ceased as from March, 30, 1960. A copy of this letter was sent to the plaintiff Corporation as also to the defendant. This letter was meant to be handed over to the hirer after recovering from him Telco's previous letter addressed to the registering authority. Exts. A/1 and A/2 referred to in the 18th paragraph of the judgment of the court below also

lend support to the facts aforesaid. In the 19th and 20th paragraphs of the judgment is discussed the payment of a further sum of Rs. 1,000 by the plaintiff to the defendant, and the final finding is recorded in paragraph 21 regarding the payment of Rs. 18,000 in March, 1960 and Rs. 1,000 in May, 1960.

12. Ext. 2/n is the letter dated 10-9-60 by G. S. Bedi to the plaintiff in which he accepts the fact that he made a Hire-purchase agreement in March, 1960 through O. P. Dubey of Messrs. Tewary Bechar and Co. Very unfortunately for the defendant, in his chain of denial of his signatures on so many documents, he forgot to deny his signature on, and the genuineness of, the letter (Ext. 2/n). In this letter he pleaded for more time for payment of the instalments due to the plaintiff. Ext. 2/q is the letter from the defendant to the Superintendent of Police, Jamshedpur, written on 23-3-60 accepting that he had taken the truck—BRT 5405—on hire from Sunda Hire-purchase Corporation, Dhanbad. He authorised the registering authority to transfer the vehicle at the request of the Corporation at any time. Ext. A/3, a document filed by the defendant, shows that Tewary Bechar and Co. had informed the Additional Superintendent of Police, Jamshedpur, on 10-1-61 that the interest of Telco Ltd. had ceased in this truck and the plaintiff had got a Hire-purchase agreement in its favour by G. S. Bedi.

13. In the 24th paragraph of the judgment of the court below have been discussed the facts and evidence relating to the part payment of the instalments by the defendant. The evidence is so overwhelming that no part of it could be attacked. Some of the payments were made through bank drafts (Exts. 11 series) which bore the endorsements (Ext. 10 series) under the signature of the defendant. The defendant did not hesitate in denying his signature even on Exts. 11 series, suggesting thereby that the State Bank of India had also colluded with the plaintiff in the alleged act of forging many documents. I do not find it necessary to refer in detail to the various other documents referred to in paragraphs 24 to 26 of the judgment of the court below. They all irresistibly lend to the conclusion that the case of the plaintiff is true and that of the defendant is false.

14. Learned counsel for the appellant submitted that the signature was not sent to any handwriting expert for comparison. On the facts of this case, it was not at all necessary to do so. On a bare comparison of some of the disputed signatures of the defendant with those of his admitted ones, it was even clear to us on a visual test that his signatures were

genuine. Counsel then submitted that Jiwanlal Sunda, the partner of the plaintiff Corporation, has not examined himself. It was not necessary for him to do so. Ample evidence was there to prove the case of the plaintiff corporation.

15. I, therefore, hold in agreement with the finding of the court below that the defendant had entered into a Hire-purchase agreement with the plaintiff and that the agreement (Ext. 7) is a genuine document. I also hold that the defendant committed breach of the terms and conditions of the agreement, did not pay the instalment amounts in time and, therefore, the plaintiff became entitled to take possession of the truck under the terms of the agreement. The plaintiff did take possession of the truck accordingly and the criminal case started by the defendant was unwarranted and unjustified.

16. The agreement (Ext. 7) recites that the plaintiff Corporation is entering into it as the owner, and the defendant as the hirer, of the vehicle in question. It further recites in the 4th clause that on payment of the entire instalment money due,

"the hiring shall come to an end and the vehicle shall at the option of the Hirer become his property and the Owners will assign and make over all their right, title and interest in the name of the Hirer, but until such payments as aforesaid have been made the vehicle shall remain the absolute property of the owners"

The 4th condition in the agreement is—"The Hirer acknowledges that he holds the vehicle as a bailee of the Owners and shall not have any proprietary right or interest as purchaser therein until he shall have exercised his option of purchase as herein provided and shall have paid the whole amount due under this agreement or under any term thereof".

The 5th condition reads as follows:—

"The owner may terminate with or without notice the contract of hiring and forthwith retake and recover possession of the vehicle:—

(a) If any monthly hire or part thereof is in arrear and left unpaid for a period of seven days after the date fixed for its payment for any reason whatsoever and particularly notwithstanding any claim which the Hirer may have in respect of insurance hereinafter mentioned.

(b) If the Hirer commits or suffers any breach of the conditions and obligations herein stipulated to be observed and performed by him or does anything or suffers any act to be done which in the opinion of the Owners may prejudice their title to the Vehicle".

In pursuance of the conditions aforesaid, it is manifest, the plaintiff became entitled to retake and recover possession

of the vehicle and the Police had no power to seize it from its custody. The vehicle, namely, truck No. BRT 5405 must be released and handed over to the plaintiff Corporation by the authority in whose custody the truck may be.

17. Ext. 1 is the order of the Sub-divisional Magistrate, Seraikella, directing the release of the truck in favour of the defendant. Ext. J is the certified copy of the order of the learned Sessions Judge of Chaibassa refusing to make a reference to the High Court in Criminal Revision 1 of 1961 to quash the order of the learned Sub-divisional Magistrate contained in Ext. 1. The orders in those proceedings cannot help the defendant at all. I may also add that the learned Sessions Judge referring to the various papers which were relied on before him observed in his order (Ext. 9).—

"All these papers are letters of correspondence and relate to the question of title and unless there is a thorough enquiry concerning this aspect of the case by a Court of competent jurisdiction by looking into the originals of these papers as well as the connecting registers of the Corporation and Tewary Bechar & Co., it would be rather a difficult task for a criminal court to give any considered opinion on these papers."

All the papers have now been duly considered by the Civil Court and a correct finding has been recorded by it, which is being affirmed by me.

18. Now coming to the 4th and the last point urged on behalf of the appellant, it would be noticed that till the truck was released by Telco Ltd., in the eye of law, technically that company was the owner of the truck. The truck was released either on the 25th March, 1960, as observed by the learned Subordinate Judge, or on the 30th of March, 1960, as mentioned in some of the documents exhibited, which have already been referred to including the letter (Ext. A). The facts clearly show, however, that release could only be obtained from Telco Ltd. when the payment of Rs. 9,508 which was arranged to be paid through the plaintiff Corporation, was made. The defendant wanted some more money to run his business and he got it to the tune of Rs. 8,000 to Rs. 9,000 from the plaintiff Corporation. On the date, i.e., the 23rd March, 1960 when the Hire-purchase agreement was entered into neither the plaintiff was the owner of the truck in the eye of law nor was the defendant as the ownership on that date vested in Telco Ltd. Two questions were canvassed in this regard—(i) that there was nothing to indicate that the defendant had transferred his ownership of the truck to the plaintiff on or before the 23rd of March, 1960 and (ii) that he had

no right to transfer the ownership as on that date he was not the owner.

19. In my opinion, there is no substance in the argument advanced on behalf of the appellant even in this regard. The truck was a movable property. No registered document was necessary for the transfer of ownership in it. The facts recited in the proposal form (Ext. 13) and more specifically in the agreement (Ext. 7) unmistakably show that the ownership had been transferred by the defendant by necessary implication and implied contract to the plaintiff. He admitted the plaintiff to be the owner of the truck, characterising himself as a bailee of the vehicle in the 4th Condition of the agreement quoted above. He cannot now turn round and say that the plaintiff is not the owner of the truck in view of the provision of law contained in Section 117 of the Evidence Act. A principle of estoppel codified therein states—

"...nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license".

20. On release of the truck by Telco Ltd. either on the 25th or 30th March, 1960 undoubtedly the defendant became its owner. In that view of the matter, the principle of law decided in the case of Co-operative Hindustan Bank Ltd. v. Surendra Nath Dey, AIR 1932 Cal 524, referred to in the judgment of the court below would be attracted. The principle is based upon certain decisions of the English Courts, the gist of which can better be stated by a quotation from Article 1002 of Halsbury's Laws of England, volume 14 (3rd Edition), at page 532, which is as follows:

"Upon the same principle is based the efficacy of an assignment of after-acquired property. Neither in equity nor at law can there be an assignment of what has no existence.

The assignment operates as a contract, and if it is for value then when the property comes into existence equity, treating that as done which ought to be done, fastens upon the property and then contract to assign becomes in equity a complete assignment".

A few lines may also be quoted with advantage from Article 418 of the 15th Volume of Halsbury's Laws of England, 3rd Edition, at pages 220 and 221.—

"where the grantor or lessor subsequently acquires a legal title to the premises which he has purported to demise, the legal estate or interest is said to feed the estoppel; and the grant or the lease then takes effect in interest and not by estoppel; but the grantor or the lessor is

estopped from saying that he had no interest at the time of the grant or lease.

Where a person who has no legal interest in premises purports to grant a tenancy and subsequently acquires the legal estate, the acquisition feeds the estoppel and the tenancy by estoppel becomes a legal estate and takes priority over a mortgage created after the acquisition."

21. I may also refer to another Bench decision of the Calcutta High Court in Rustam Ali Mia v. Abdul Jabbar, AIR 1923 Cal 535. One Asgar Ali had executed a hibanama in favour of his wife. He was the owner to the extent of two-third only in respect of one of the properties conveyed under the hibanama, the remaining one-third share being owned by his sister. The sister (defendant No. 3) sold that share to defendant No. 2 who, in his turn, sold it to Asgar Ali. Holding that the hibanama operated upon the entire property, a Bench of the Calcutta High Court said—

"We think the decree of the lower appellate court can be supported on the ground that the conveyance of a non-existent property though inoperative as a conveyance, is operative as an executory agreement which would attach to the property the moment it is acquired by the grantor and which in equity would transfer the beneficial interest to the vendee without any new act being done by the vendor to confirm the conveyance. This doctrine is elaborated at length in the cases reported in (1908) 7 Cal LJ 387 and in 27 Cal LJ 289=(AIR 1918 Cal 419)".

Applying the principles of law as stated above, I have no difficulty in holding that the defendant could and did transfer the ownership of the vehicle to the plaintiff on or before the 23rd of March, 1960 although technically and in the eye of law he became its owner a few days later—either on the 25th or 30th March, 1960. It's not open to him to deny either the transfer of ownership or the fact that the plaintiff was the owner of the vehicle in question on the day when he entered into Hire-purchase agreement with it.

22. For the reasons stated above, the appeal is devoid of any substance and it is accordingly dismissed with costs.

23. M. P. VARMA, J.:— I agree.

Appeal dismissed.

AIR 1970 PATNA 13 (V 57 C 3)
TARKESHWAR NATH AND
K. K. DUTTA JJ.

Tribeni Mishra and others, Appellants
v. Rampujan Mishra and others, Respondents.

A. F. O. D. Nos. 379 and 380 of 1963,
D/-26-2-1969 against judgment of 4th
Addl. Sub. J., Chapra, D/- 1-5-1963.

IM/IM/B885/69/YPB/B

(A) Hindu Law — Joint family — Acquisition of separate property by member — Property whether self-acquired or joint — Presumption — Burden of proof — (Evidence Act (1872), Ss. 101 to 104 and 114).

In case of members of a joint Hindu family, there is no bar to the acquisition of separate properties by individual members. But in such a case if it is found that the joint family had a sufficient nucleus which left sufficient surplus income from which subsequent acquisitions could be made, there would be a presumption that the subsequently acquired properties are also joint family properties and the onus would shift on the member claiming any such acquisition as his separate property to prove that it is so. This presumption is after all a rebuttable one and it is for the Court to decide on consideration of all the materials on the record, whether the property in question is a joint family property or a separate property. The mere existence of some nucleus is not the sole criterion to impress subsequent acquisition a family character and what is to be shown is that the family had, as a result of nucleus, sufficient income from which the subsequent acquisition could be made. AIR 1954 SC 379, Rel. on. (Para 7)

(B) Evidence Act (1872), S. 44 — Right under, is independent of right to get judgment or decree set aside by regular suit — (Limitation Act (1908), Art. 95).

The right as given by Section 44 has not been fettered by any limitation whatsoever and it is manifest that such a right is quite independent of the right to get a judgment or decree etc. set aside by bringing regular suit for the purpose. A decree or order can be challenged on ground of fraud in a collateral proceedings without any suit for setting aside the decree, irrespective of the time when the judgment was delivered or order or decree was passed. AIR 1955 Pat 66, Foll

(Para 13)

Cases Referred: Chronological Paras

(1955) AIR 1955 Pat 66 (V 42),
Bishnunath Tewari v. Mst. Mirchi 13
(1954) AIR 1954 SC 379 (V 41) =
1955-1 SCR 1. Shrinivas Krishna
Rao v. Narayan 7

In F. A. 379/63

Umesh Chandra Prasad Sinha, Tara Kant Jha and Suresh Chandra Prasad Sinha, for Appellants; Kailash Roy and Sheokumar Singh and J. N. P. Varma (for M. R. 8), for Respondents 1 (a) & 1 (b).

In F. A. 380/63

Shreenath Singh and Padmanand Jha, for Appellants; Kailash Roy and Sheo Kumar Singh; Lakshmi Narain Mishra, (for M. R. 8) for Respondents 1 (a) & 1 (b).

DUTTA J.:— Both these appeals have been taken up together for hearing as these arise out of the judgment and decree in one and the same suit, namely, Partition Suit No. 95/20 of 1961-63 of the Court of the Additional Subordinate Judge, Chapra.

2. This suit for partition was instituted by original Respondent No. 1 Ramdeyal Mishra, who has since expired and has been substituted by his heirs, namely, his sons and daughters. The parties are descendants of a common ancestor. According to the admitted genealogy Ramdeyal Mishra's father Ratan Mishra had one brother Hikayat Mishra. Defendants 1 to 3 Rambilas Mishra, Brahma Mishra and Anesa Mishra are sons of Hikayat Mishra. Ratan Mishra had four sons, two of whom are dead and the remaining two are defendants 4 & 5 Tribeni Mishra and Kauleshwar Mishra. Defendants 6, 7 & 8, Gopi Mishra, Gautam Mishra and Mosst. Rajapati Kuer are the two sons and widow of Bishun Dayal Mishra, one of the deceased brothers of Ramdeyal Mishra, while defendants 9, 10 and 11 are the sons and widow of the other deceased brother Kishuni Mishra. It appears that there was a previous partition suit between the parties namely Partition Suit No. 31 of 1958 in which a compromise petition was filed and the suit was decreed in terms thereof. According to the terms of the compromise, some of the lands of the family were left joint between all the members of the family, that is, the descendants of both Ratan Mishra and Hikayat Mishra, while some other lands were left joint as between the descendants of Ratan Mishra alone, that is, plaintiffs Ramdeyal Mishra and his brothers and brothers' sons. The present suit for partition was instituted for partition of the properties alleged to have been left joint in the previous title suit.

3. The suit was contested by defendants 1 to 3, that is, the sons of Hikayat Mishra, who filed written statement jointly and by defendants 4, 6 and 7, that is, Tribeni Mishra (who, as already mentioned is one of the brothers of plaintiff Ramdeyal Mishra), Gopi Mishra and Gautam Mishra the two of the sons of the plaintiff's deceased brother Bishun Dayal Mishra. These defendants have also filed a joint written statement. Defendants 5, 9 and 10, that is, the remaining brother of Ramdeyal Mishra and the sons of the remaining deceased brother Kishuni Mishra, filed a joint written statement supporting the plaintiff. The case of both sets of the contesting defendants, that is, defendants 1 to 3 and defendants 4, 6 and 7, was that the suit was bad for non-inclusion of some of the joint lands of the family namely an area of 5 bighas-19 kathas and 8 dhurs, situated in Mohamad Patti, which originally belonged to

one Kesho Misra and which was alleged to have been acquired out of the joint family funds. According to the case of defendants 1 to 3, these lands are still joint as between the parties and they are in joint possession thereof while the case of defendants 4, 6 and 7 was that there has been a partition of these lands as between the plaintiff and other descendants of Ratan Mishra through a Panchayati and, according to the award of the Panches, which was accepted by the parties, 2 bighas out of this area were allotted to the plaintiff and the remaining area was allotted to the two surviving brothers of the plaintiff, and the sons of the two deceased brothers. Further, according to the case of both sets of the contesting defendants, in the compromise petition which had been filed in the previous title suit, the plaintiff, who according to them, was looking after the family affairs and the litigations of the family, had fraudulently inserted a recital to the effect that the lands of Mohammad Patti belonged exclusively to the plaintiff. Defendants 1 to 3's version in connection with the compromise petition was that although they had signed the compromise petition, they had done so without going through the contents thereof and they were accordingly not aware of the incorporation of this recital in the compromise petition. On the other hand, the case of the defendants 4, 6 and 7 was that the plaintiff had taken their signatures on a blank paper at their village home and he had thereafter gone to Chapra and got the compromise petition scribed out there and had filed the same thereafter and, as such, they had no knowledge of the incorporation of the above recital in the compromise petition.

4. The learned Subordinate Judge rejected the version of the contesting defendants about the aforesaid recital in the compromise petition having been fraudulently inserted therein by the plaintiff without any knowledge of these defendants and held that there was no fraud whatsoever in connection with the compromise and the defendants had signed the compromise petition with the knowledge of its contents. He further held that the contesting defendants had failed to prove that there was any such nucleus of joint family from the income of which the aforesaid lands could have been acquired. He also held that the plaintiff had produced satisfactory evidence to prove that he had some money with his wife with which he could purchase the aforesaid lands and the joint family had no common fund for the purchase of the same. The version of defendants 4, 6 and 7 about partition of Mohammad Patti lands between the plaintiff No. 1 and his brothers and brother's sons through Panchayati was rejected. On these find-

ings, the contention about the suit being bad for partial partition on account of non-inclusion of Mohammad Patti lands was rejected and a preliminary decree for partition with respect to the lands, as embodied in the plaint, was passed. The present appeals out of which F. A. 379 has been preferred by the aforesaid defendants 4, 6 and 7 and F. A. 380 by defendants 1 to 3, arise out of this decision.

5. It may, however, be mentioned that at the time of hearing of these appeals, the learned Advocate for the appellants in F. A. 379 did not press the plea of these appellants about the alleged partition of Mohammad Patti lands as between the plaintiff and these defendants and the remaining descendants of Ratan Mishra and he adopted the arguments advanced on behalf of the appellants in the other appeal as to the Mohammad Patti lands being still joint lands of the parties and about the suit being not maintainable unless these lands are also included as the subject-matter of partition.

6. The only point for determination which arises in these appeals is, therefore, whether Mohammad Patti lands, namely, the area of 5 bighas 19 kathas and 8 dhurs originally belonging to Kesho Mishra, are the joint lands of the parties and if the suit is bad for non-inclusion of these lands as the subject-matter of partition.

7. According to the admitted case of the parties, all the descendants of Ratan Mishra and Hikayat Mishra were members of a joint Hindu family till the time of the institution of the previous title suit, namely, T. S. 31 of 1958 which as shown by the ordersheet (Ext. 15) was instituted on 12-3-1958. In this connection reference may also be made to the evidence of plaintiff Ramdeyal Mishra (P. W. 3) who stated as follows during his cross-examination:

"Till before the previous suit, we were all joint."

So far as Mohammad Patti lands are concerned, as already stated, the admitted case of the parties is that these lands belonged originally to one Kesho Mishra and, as shown by the sale Certificate (Ext. 7), these lands were sold in Court sale in execution of a decree obtained by Lt. Kumar Madhawe Surendra Sahi and others as against Kesho Mishra and others, this Court sale having taken place on 8-10-31 for a sum of Rs. 255 and the purchase therein was made by Ramdeyal Mishra, that is, the plaintiff of the suit out of which these appeals, have arisen. As this purchase was made in the year 1931, there cannot be the slightest doubt that the purchase was made at a time when all the parties were members of a joint Hindu family. It is well settled that even in case of members of a joint Hindu family, there is no bar to the acquisition

of separate properties by individual members. But in such a case if it is found that the joint family had a sufficient nucleus which left sufficient surplus income from which subsequent acquisitions could be made, there would be a presumption that the subsequently acquired properties are also joint family properties and the onus would shift on the member claiming any such acquisition as his separate property to prove that it is so.

In this connection, it may be mentioned that as held by the Supreme Court in the case of Shrinivas Kishna Rao v. Narayan, 1955-1 SCR 1 = (AIR 1954 SC 379) and as also pointed out in the Mulla's Principles of Hindu Law at Page 261 (13th Edition), the mere existence of some nucleus is not the sole criterion to impress subsequent acquisition a family character and what is to be shown is that the family had as a result of nucleus, sufficient income from which the subsequent acquisition could be made. It appears that in the present case, there is nothing either in the pleadings or in the oral evidence, as adduced by the parties, to show what was the extent of the joint family property or the income thereof or what was the extent of the surplus out of the income of the joint family at the time when the acquisition in question took place in the year 1931. The only material on the record to which our attention was drawn by learned counsel for the appellants in F. A. 380 are certain statements as made in the plaint of the previous partition suit, namely, partition Suit No. 31 of 1958 (Ext. A-1) instituted by the present plaintiff.

In paragraph 4 of this plaint, there is a statement to the effect that the family of the parties had sufficient properties out of the income of which different properties were acquired in the names of different members of the family and all the family members were in joint possession thereof. There is a further recital in paragraph 5 that all ancestral and acquired properties and the 'dih basgit' land in joint possession of the parties are mentioned in Schedule 1 of the plaint while the zarpeshgi properties are mentioned in Schedule 2. There is, however, no specification either in Schedule 1 or in any other part of the plaint as to which of the properties mentioned in Schedule 1 were the ancestral properties of the family and which were acquired subsequently nor is there any specification as to when or in which year those acquisitions took place. The dates of the zarpeshgi deeds, referred to in Schedule 2, have been specified in that schedule, but it appears that only one of the zarpeshgi deeds, namely, a deed for Rs 300 is of the year 1933 and the rest are of the years 1950 and 1957. As such, these deeds do not give us any help

in determining whether the income of the joint family left any surplus from which the acquisition in question could have been made in the year 1931.

Further, in view of the absence of any material to show that the acquisition of any of the properties subsequently acquired took place prior to 1931 and the absence of any material to show the extent of the joint lands or the income thereof in or about 1931, when the acquisition in question took place, the aforesaid broad statement in the plaint of the previous suit to the effect that the family had sufficient properties from the income of which acquisitions were made in the names of different members is hardly sufficient for holding that at the time when the acquisition in question took place, in the year 1931, the joint family had a sufficient nucleus from the surplus income of which the acquisition in question could have taken place. In face of these facts, it is not possible to accept the contention of the appellants that it must be presumed in this case on the materials on record that the joint family had sufficient nucleus out of the surplus income of which the acquisition in question could have taken place and that, as such, there is a presumption that the property in question was a joint family property.

Moreover, even if it is held that there is any such presumption, this presumption is after all a rebuttable one and it is for the Court to decide on consideration of all the materials on the record, whether the property in question is a joint family property or a separate property of the plaintiff in whose name the acquisition admittedly took place.

8. Turning now to the evidence adduced by the respective parties in support of their versions as to from what source the acquisition in question took place, it appears that the only evidence adduced on behalf of the defendant's on this point is the oral testimony of defendant No. 1 Ram Bilas Misra (D. W. 1) who has stated that his father that is Hukayat Mishra, had given Rs. 500 to the plaintiff and had asked him to offer a bid at the Court. He added that the acquisition was made for a sum of Rs. 255 only. During his cross-examination, this witness admitted that there is no witness to the effect that his father had given Rs. 500 to the plaintiff. Thus apart from the uncorroborated testimony of defendant No. 1, there is no other evidence to show that the acquisition had actually been made out of any joint family funds. The case of the plaintiff, on the other hand, was that this acquisition had been made by him out of some money belonging to his wife which she had obtained by sale of certain land belonging to her own father which she had inherited. The sale deed (Ext. 13) shows that Radhika Kuer, wife of Plain-

tiff Ramdeyal Mishra, had actually sold certain lands which she had inherited from her father for a consideration of Rs. 1300 on 25-8-1920. It transpires from the recitals in the document itself that out of the total consideration money of Rs. 1300, Rs. 691 was left with the vendee for prepayment of the dues of an earlier zarpeshgidar.

The document, no doubt, shows that certain amounts were due to the landlord on account of a decree for arrears of rent and also on account of subsequent arrears of rent, but the document itself recites that as the liability for payment of the rent was on the zarpeshgidar, the amounts due to the landlord on account of the decree for arrears of rent and the subsequent arrears of rent were to be set off by the vendee against zarpeshgi money while redeeming the zarpeshgi. The recitals in the document show that out of the balance of Rs. 609, that is, the balance which remained after setting off the zarpeshgi money, the executant had received Rs. 100 in cash earlier and Rs. 509 was paid to her in cash at the time of execution of the document. Thus, there cannot be any doubt that a cash amount of Rs. 609 had actually been received by the wife of the plaintiff Ramdeyal Mishra by virtue of the sale by her and it is manifest that this was her personal money with which the members of the joint family had no concern. It is, no doubt, true that the acquisition of the disputed land in village Mohammad Patti took place more than 11 years after execution of the aforesaid sale-deed, but there is nothing to show that the amount which was realised by the wife of the plaintiff as a result of the execution of the sale-deed had been spent by her before the date of the acquisition of the property in question in the year 1931. As such, there is nothing improbable in the version of the plaintiff that the acquisition of the disputed property which was made for a sum of Rs. 255 only had been made by him out of the money belonging to his wife which his wife had got as consideration money for the aforesaid sale-deed of 1920. It would thus follow that while there is no reliable evidence on the one hand to show that the acquisition was actually made out of any joint family funds, there is some reliable evidence which gives support to the case of the plaintiff that the acquisition had actually been made out of sum which belonged to his wife.

9. Turning now to the allegation regarding fraud by the plaintiff in connection with the compromise petition, the only evidence adduced on behalf of defendants 4, 6 and 7 in support of their version that their signature had been ob-

tained on blank papers and the compromise petition had been subsequently prepared on such papers, is the oral testimony of defendants 4 and 6. Tribeni Mishra and Gopi Mishra (D. Ws. 9 and 10), both of whom have deposed that their signatures had been taken by the plaintiff at their house on blank papers. During his cross-examination, Tribeni Mishra stated that he put his left thumb impression on the compromise petition and his son had signed for him. The son of Tribeni Mishra has, however, not been examined, although as would appear from the further statements made by Tribeni Mishra in cross-examination, that his son had come to Court on the day on which he was examined. Further, according to him his other brothers and nephews were also present when he put his thumb (sic) other persons signing on that paper, Defendants 1 to 3, according to him, were also present at that time and then he added that Anesa Mishra and Brahma Mishra (Defendants 3 and 2) put their signature in his presence and Brahma Mishra had put his thumb mark also. On the other hand, the version of Gopi Mishra in cross-examination was that nobody excepting him and the plaintiff was present when he put his signatures on the compromise petition and he further stated that this had already been signed by Anesa Mishra, Bageshri Mishra, Tribeni Mishra, Kauleshar Mishra and Brahma Mishra (that is, Defendant 3, 9, 4, 5 and 2 respectively) before him.

As already mentioned, defendants 1 to 3 do not claim to have put their signatures on any blank paper, but their version is that they signed the petition without going through its contents and the only witness examined in support of this version is defendant No. 1 Rambilas Mishra (D. W. 1), who has stated that he had signed this petition in Court without reading its contents. According to him further, none of the other defendants was present when he put his signature. This statement as made by him does not give any support to the version about defendants 2 and 3 also having put their signatures without going through the document and these two defendants have not been examined to show that they had actually put their signatures without going through the contents of the documents and there is no other evidence also to that effect. On looking to the compromise petition itself, however, it would appear that it purports to have been signed by defendants No. 4 Tribeni Mishra through his son Lachhman Mishra as well as by defendants 6 and 7, Gopi Mishra and Gautam Mishra personally and so far as defendants 4 and 6 are concerned, there are endorsements above the signatures as follows "Executed compromise petition. It is correct. "Similarly, so far as defendants No. 1 is concerned,

he has put his signature with the endorsement "Executed compromise petition".

There are similar endorsements about the compromise petition having been executed and it being correct above the signatures of some other defendants as well. In face of the above endorsement as made above the signature it is difficult to accept the version of defendants 4 to 6 about their signatures having been put on blank papers. As for the allegation by defendant No 1 that he had signed the compromise petition without reading its contents, it appears from his own statement in cross-examination that he took a copy of the compromise petition 4 or 5 months after the compromise and he further stated that he thereon came to know the details of the lands which were allotted to him and which were left ijmāl. It is quite apparent that had he been unaware about the insertion of the recitals in the compromise petition to the effect that Mohammad Patti lands were the exclusive properties of the plaintiffs on account of his having signed the compromise petition without going through its contents, he could not have failed to notice these recitals in the compromise petition after he took the certified copy of the document. His own statement is that at the time of the talk of compromise, he had demanded partition of Mohammad Patti lands also and he had been told by the plaintiff that the same would be left ijmāl.

Hence in view of his own statement that on taking the copy of the compromise petition, he came to know the details of the lands which were allotted to him and which were left ijmāl, he would not have failed to notice that the lands which had been left ijmāl did not include the Mohammad Patti lands. It is very significant that although the Mohammad Patti lands had not been left ijmāl, no objection was ever made by him in this connection prior to the institution of the present suit. It was contended before us on behalf of the appellants in F. A. 380, that is, defendants 1 to 3, that as the recitals in the compromise petition about Mohammad Patti lands being the exclusive properties of the plaintiff were made in the midst of a number of other recitals, these might have escaped the notice of the defendants when they put their signatures on the document. This contention is, however, quite unacceptable in view of the fact that these recitals as embodied in the earlier portion of the compromise petition are coupled with the fact that Mohammad Patti lands were not mentioned in the schedules of the compromise petition which fully described the lands which were left ijmāl between all the co-sharers and also the lands which were left ijmāl among the descendants of Ratan Mishra.

The very fact that these lands were not included in the schedules of the properties left joint clearly give ample support to the earlier recitals in the compromise petition about these lands being the exclusive properties of the plaintiff.

10. Some evidence was adduced by the plaintiff and two of his witnesses in support of the version that the compromise petition was signed by the parties after its contents had been duly read over. Our attention was drawn to the fact that there are some discrepancies in the statements of the witnesses on the point as to who prepared the draft of the compromise petition and who read out its contents.

11. The witnesses who have been examined on this point on behalf of the plaintiff or the plaintiff himself, who has been examined as P. W. 3, P. W. 1 Treta Prasad Singh, who is a Pleader's clerk and claimed to have scribed the compromise petition and P. W. 2 Rajendra Kishore Mishra. As would appear from the evidence of these witnesses, Shri Inderdeo Singh was a pleader for the plaintiff in the aforesaid partition suit while the defendants were represented by his son Shri Dinanath Singh. The mere fact that the father and son represented the two parties is hardly of any importance in view of the fact that it is the admitted case of the parties that they had actually agreed to divide the properties amicably before the suit was filed and the object of filing the suit was merely to get the partition recorded through Court. That this was the actual position would also appear from the fact that as shown by the order sheet (Ext. B/1), the suit was filed on 12-3-1958 and the compromise petition was filed only two days later on 14-3-1958. P. W. 1 who claimed to be the clerk of Shri Dinanath Singh has stated that the compromise petition had been drafted by Shri Dinanath Singh and he (the witness) thereafter scribed it out and it was then signed by the parties in his presence and at that time Rambilash Mishra (defendant No. 1) read it loudly and the others heard its contents.

During his cross-examination, he admitted that the petition does not bear his signature but there was no suggestion that it bore the signature of anybody else as the scribe thereof. As such, the mere fact that the signature of this witness does not appear on the petition is no ground whatsoever for disbelieving his version about having scribed the petition in view of the fact that his statement that Shri Inderdeo Singh and Shri Dinanath Singh were the two lawyers who were engaged by the two parties and that the witness was the clerk of Shri Dinanath Singh has not been challenged. It appears, however, that the next witness P. W. 2 stated that the draft of the petition had been prepared by

Inderdeo Singh and Inderdeo Singh had read it over to the parties. The version of the plaintiff himself was that Inderdeo Singh had written the draft and then asked P. W. 1 to make the fair copy of it and further according to him the petition was read over to the parties by the two lawyers and also by defendant No. 1. As the two lawyers engaged in the case were father and son and were living in the same house, the aforesaid discrepancy in the evidence of the witness as to whether the father or the son prepared the draft of the compromise petition is hardly of any importance and such discrepancy might be merely due to the fact that both of them might have taken part in preparing the draft.

Similarly, the aforesaid discrepancy as to who read out the petition might be merely due to the fact that the petition might have been read out by both the lawyers after the fair copy was prepared and it might have been read out by defendant No. 1 himself also before he put his signature. Such discrepancies are, therefore, no ground for disbelieving the version about the document having been duly signed by the parties after its contents had been read out. In this connection, it may also be mentioned that the aforesaid witnesses had deposed in the Court below after a lapse of more than five years and, as such, the discrepancies in their statements might be due merely to the lapse of memory on the part of one witness or the other.

12. It would appear on consideration of all the above aspects that the version that the recital in the compromise petition to the effect that the Mohammad Patti belonged exclusively to the plaintiff had been made fraudulently by the plaintiff without the knowledge of the defendants is quite unacceptable and I accordingly fully agree with the finding of the learned Subordinate Judge that there was no fraud whatsoever in connection with the compromise. The above recitals in the document thus give further support to the plaintiff's case about the Mohammad Patti lands being the exclusive property of the plaintiff and, as already, the omission of these lands in the schedules wherein the lands left joint between the different co-sharers were specifically mentioned, also gives support to the plaintiff's case. On consideration of all the materials, there cannot be the least doubt that these lands are not the joint lands of the parties and, as such the suit for partition was not defective for non-inclusion of the same as the subject-matter of partition.

13. It may be mentioned here that Shri Kailash Roy, appearing for the defendant-respondents, has contended that the question as to whether there was any fraud in connection with the compromise

could not be gone into in the present litigation in view of the fact that the previous suit had been decreed on basis of the compromise and the defendants had not brought any suit for setting aside the decree within the prescribed time limit under Art. 95 of the Limitation Act, 1908, the prescribed period of time limit for institution of a suit for setting aside a decree obtained by fraud or for other relief on the ground of fraud was three years from the date when the fraud became known to the party and the same period of limitation has been prescribed under Art. 59 of the new Limitation Act also. Hence, there cannot be any doubt that a suit by the defendants for setting aside the decree on basis of the compromise on the ground of fraud would have been barred by limitation unless filed within the prescribed time limit of three years from the date of knowledge of the fraud. Section 44 of the Evidence Act, however, provides as follows:

"Any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under Section 40, 41 or 42 and which has been proved by adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

The question as to whether in view of these provisions, a decree or order can be challenged on the ground of fraud in a collateral proceeding without any suit for setting aside the decree came up for consideration before a Division Bench of this Court in the case of Bishnunath Tewari v. Mst. Mirchi, AIR 1955 Pat 66. In this case, there was a divergence of opinion between the two Judges of this Court, namely, Lakshmikanata Jha, C. J. and Reuben, J. who initially heard the case, on which there was a reference to a third Judge, namely, Ramaswami, J. (as he then was) and the latter agreed with the views expressed by Lakshmikanata Jha, C. J. and observed as follows:—

"It is important to remember that fraud does not make a judicial act or transaction void but only voidable at the instance of the party defrauded. The judicial act may be impeached on the ground of fraud or collusion in an active proceeding for rescission by way of suit. The defrauded party may also apply for review of the judgment to the Court which pronounced it. But the judgment may also be impeached in a collateral proceeding in which fraud may be set up as a defence to an action on the judgment or as an answer to a plea of estoppel or *res judicata* found upon the judgment."

It was further held in this case that the provision relating to limitation as provided in Art. 95 of the Limitation Act has no bearing in relation to S. 44 of the Evidence Act. As would appear from the terms of Section 44 of the Evidence Act,

already quoted above, this section lays down that any party to a suit or other proceeding may show that a judgment, order or decree referred to in the section, which has been proved by the adverse party, was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. The right as given by this section has not been fettered by any limitation whatsoever and it is manifest that such a right is quite independent of the right to get a judgment or decree etc set aside by bringing regular suit for the purpose. I, therefore, fully agree with the views expressed in the earlier decision of this Court referred to above and hold that such a plea can be raised under Section 44 of the Evidence Act in a collateral proceeding irrespective of the time when the judgment was delivered or decree or order was passed. The aforesaid contention of Shri Kailash Roy is accordingly rejected as being quite untenable. This, however, makes no difference so far as the result of this appeal is concerned in view of the findings above that there was no fraud in connection with the compromise in question.

14. In the result, both the appeals are dismissed with costs in favour of the contesting Respondents 1 (a) and 1 (b), but there will be one set of hearing fee to be paid half and half by the appellants in each of the two appeals, and the judgment and decree of the Court below are hereby affirmed.

15. T. NATH J.:— I agree.
Appeals dismissed.

AIR 1970 PATNA 20 (V 57 C 4)

B. D. SINGH, J.

Bageshwar Misser, Petitioner v. Mt. Khandari Kuer and the State, Opposite Party.

Criminal Revn. No. 223 of 1968 D/- 12-2-1969 against decision of S. J., Chapra, D/- 13-1-1968.

(A) Evidence Act (1872), S. 3 — Appreciation of evidence — Prosecution story disbelieved as to its material part — As a rule of prudence it is not safe to rely on one part of story for convicting the accused — (Criminal P. C. (1898), S. 367).

Though it cannot be laid down, as a law of general application, that, in no case, a judge can accept a part of the prosecution story when he has disbelieved its other part, as a rule of prudence, it will not be safe to rely on the evidence of witnesses on one part of the prosecution story when it has been disbelieved as to its material part. It is elementary that where the prosecution has a defi-

nite or positive case it must prove the whole of the case. AIR 1954 Pat 483, Foll.

(Para 5)

(B) Penal Code (1860), S. 420 — Prosecution under — Criminal intention of accused, at the time the offence is said to have been committed must be established — Mere breach of contract cannot give rise to criminal prosecution — Complainant having alternative remedy in civil court — Conviction, held, could not be sustained.

For a conviction for an offence under Section 420 of the Code, it is essential to establish the criminal intention of the accused at the time the offence is said to have been committed.

(Para 6)

Mere breach of a contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act, but of which the subsequent act is not the sole criterion. Where there is no clear and conclusive evidence of the criminal intention of the accused at the time the offence is said to have been committed, and where the party said to be aggrieved has an alternative remedy in the civil court, the matter should not be allowed to be fought in the Criminal Courts. (1930) 37 Cr LJ 38 (Pat), Rel. on.

(Para 8)

Held, that on the facts and circumstances of the case it could not be said with certainty that the accused had criminal intention to cheat complainant at the time the offence was said to have been committed. Besides the complainant had alternative remedy in civil court. Hence conviction under Section 420 could not be sustained.

(Para 4)

Cases Referred: Chronological Paras (1954) AIR 1954 Pat 483 (V 41) =

1954 Cri LJ 1546, Awadh Singh v. The State 5

(1936) 37 Cri LJ 38 = 16 Pat LT 553, Sheosagar Pandey v. Emperor 8

Janardan Prasad Singh and Kailash Roy, for Petitioner; Ram Nandan Sahaya Sinha and Lala Sachindra Kumar, for Opposite Party.

ORDER:— This criminal revision has been preferred by the sole petitioner who was convicted for an offence under Section 420 of the Indian Penal Code (hereinafter referred to as 'the Code') and was sentenced to suffer six months' rigorous imprisonment and a fine of Rs 200/- was also imposed upon him for the said offence. In default of payment of the fine, he was ordered to undergo further rigorous imprisonment for two months, by the trial court. On appeal his conviction and sentence were maintained. It may be noted that the trial court had convicted also his two brothers, namely, Nag Narain Misser

and Saligram Misser for the offence under the aforesaid section, and the same sentences were imposed upon them. The appellate court, however, gave benefit of doubt to Nag Narain Misser and Saligram Misser and acquitted them.

2. Facts, in brief, which have given rise to this application are: The prosecution was initiated on a complaint dated 4-1-1965 (Ext. 1) lodged by Mosammat Khandari Kuer (P. W. 4) widow of Dhorai Pandey. According to the complainant, on 14-12-1964 the petitioner along with his two brothers, who have been acquitted by the Sessions Judge, came from their village Bankata to the complainant who was living then at village Dhamnagar which is 16 miles from the village of the petitioner, and requested her to execute a zerpeshgi deed in respect of her 19 kathas 16 dhurs of land after taking a loan of Rs. 1,000/- from the accused. To this she agreed. On 15-12-1964 she was taken to Gopalganj Sub-Registry Office, and was made to execute a document (Ext. 2) by obtaining her thumb impression, which she took to be a zerpeshgi deed, as according to her, the contents thereof were not read out or explained to her. The accused also promised to pay the consideration at her home after the registration. After the deed was registered the registration slip was also taken from her after obtaining her thumb impression thereon, but even later no money was paid to her. Thereafter, on enquiry she learnt that fraud was committed by the accused as in fact it was not a zerpeshgi deed but it was an out and out sale, and for that also no consideration was paid to her. Then she filed the said complaint on 4-1-1965.

3. The defence, in short, was that she had knowingly sold her lands after receiving Rs. 920/- by way of adjustment of prior loans before the execution and the balance of Rs. 80/- in cash, was paid to her after the registration. The trial court after considering the evidence on record, however, convicted the petitioner along with his two brothers as mentioned earlier. On appeal the conviction and sentence passed upon the petitioner were maintained whereas his two brothers were acquitted. Hence this revision.

4. Learned counsel appearing on behalf of the petitioner has raised the following points for consideration by this Court:

(i) The prosecution story about misrepresentation to the complainant regarding the zerpeshgi nature of the deed having been disbelieved by the appellate court, the petitioner cannot be convicted under Section 420 of the Code.

(ii) The appellate court has erred in convicting the petitioner solely on the ground that no consideration was paid to

her contrary to the promise made by the petitioner. For the payment of consideration the court ought to have examined the terms mentioned in the document (Ext. 2) itself, specially when there is no finding that the document was not read over and explained to her. Even if consideration had not passed the court below ought not to have gone into the matter as it was a civil right.

5. I will take up for consideration points Nos. (i) & (ii) together. Learned counsel appearing on behalf of the petitioner has contended that the prosecution examined 4 witnesses, namely, P. Ws. 1 to 4, to prove the prosecution story. The appellate court discarded the evidence of P. Ws. 1 to 3 and based the conviction solely on the testimony of P. W. 4, the complainant; even P. W. 4 has not been relied regarding her story that the accused had approached her for zerpeshgi and not for sale. The learned Judge held that her story regarding the zerpeshgi was false, and he gave the accused benefit of doubt for that part of the prosecution story. The learned Judge, however, convicted the petitioner on the ground that P. W. 4 did not receive any consideration for the sale deed (Ext. 2) and she was made to part with the registration slip on the pretext of paying the consideration later at home.

Learned counsel submitted that the appellate court erred in holding that the recital of the deed (Ext. 2) clearly showed that such an intention was present from the very beginning. He has drawn my attention to Ext. 2, wherein it is stated that Rs. 920/- was paid to her by adjustment of a prior loan, and the balance of Rs. 80/- was paid to her at the time of execution. Therefore, he urged that there was neither intention of cheating from the very beginning, nor there was existence of such intention at any subsequent stage. In fact, the balance of Rs. 80/- was paid to P. W. 4 on the same date after the registration of the document and before she parted with its receipt. The deed was scribed by one Jagannath, who has written in the deed that he read it out and explained it to her. There is no finding by the court below that Jagannath, the scribe, did not explain or read over the deed to her. In that view of the matter it cannot be said that Rs. 920/- was not paid to her by way of adjustment. She put the thumb impression on the deed after it was fully explained to her. If she would not have received Rs. 920/- she would not have put her thumb impression on it. The balance of Rs. 80/- was also paid to her before she parted with the registration receipt (receipt for the exchange of the deed). At one stage I wanted to see this receipt in order to find out what was written on her behalf or by her on this receipt. Hence, I called

for the receipt from the office of the Sub-registry Office, Gopalganj, but it was reported that the same had been destroyed. The case of the prosecution is as mentioned earlier that she put her thumb impression on the receipt and parted with it on the assurance that the consideration money will be paid to her at her home but that was not paid. In examination under Section 342 of the Code of Criminal Procedure, the petitioner has stated that he paid the consideration money, and he further stated that he would file written-statement. In the written-statement also it was stated that Rs 920/- was paid to her, before the execution of the sale deed and the balance of Rs. 80 was paid to her after the registration and she put her thumb impression on the receipt after the payment of the balance amount. Learned counsel further contended that once she parted with the registration receipt, the presumption would be that the entire amount was paid to her. The complainant (P W 4) is the only witness on the point that no consideration was paid to her and the court below has disbelieved her so far as the story regarding the *zerpeshgi* is concerned. According to him, the learned Judge ought not to have convicted the petitioner on her evidence when she was disbelieved on material particulars. In this connection reference may be made to a decision of this court in *Awadh Singh v. The State*, AIR 1954 Pat 483 where Choudhary, J. (as he then was) at page 486 observed that, of course, it is true that where the prosecution story is disbelieved as to its essential details, it is still open to the court to rely on a part of the story for the purpose of convicting the accused persons, but at the same time it is elementary that where the prosecution has a definite or positive case it must prove the whole of the case. His Lordship further observed that, though it cannot be laid down, as a law of general application, that, in no case, a Judge can accept a part of the prosecution story when he has disbelieved its other part, as a rule of prudence it will not be safe to rely on the evidence of witnesses on one part of the prosecution story when it has been disbelieved as to its material part.

6. Learned counsel further submitted that even assuming that no consideration money was paid to her, the definite case of the prosecution was that the petitioner misrepresented to the complainant to execute the *zerpeshgi* deed although in fact it was a sale deed. The learned Judge disbelieved this part of the prosecution story. Therefore, learned counsel has urged that when the deed was executed, petitioner had no intention to cheat her. It is well established that for a conviction for an offence under Section 420 of the Code, it is essential to

establish the criminal intention of the accused, at the time the offence is said to have been committed. In that view of the matter, the conviction of the petitioner, according to him, cannot be sustained.

7. On the other hand, Mr. Ram Nandan Sahaya Sinha, appearing on behalf of the complainant-opposite party, submitted that the prosecution made out two distinct grounds of cheating, namely,

(i) the complainant was given to understand by the petitioner that she was executing a *zerpeshgi* deed whereas, in fact, it was a sale deed;

(ii) the recital in the sale deed regarding the payment of Rs. 920/- to the complainant before the execution by adjustment of prior loans and the balance of Rs. 80/- at the time of registration of the deed was false and fraudulent. The petitioner got the thumb impression of the complainant affixed on the registration receipt on the false promise that the consideration money would be paid to her later on at her home, but did not pay at all, contrary to his promise, which amounted to a clear case of cheating.

Learned counsel further submitted that it is true that on the first ground, she has been disbelieved by the learned Judge, but she has been relied so far ground No. (ii) is concerned and the conviction of the petitioner is based upon ground No. (ii). The learned Judge observed that the recital in the deed that Rs. 920/- had been paid to her by way of adjustments towards prior loans at the time of execution of the deed, and the balance of Rs. 80/- at the time of registration of the deed, clearly indicated that the petitioner had criminal intention to cheat her from the very beginning. He further held that, admittedly no amount had been paid to her at the time of the execution of the deed.

8. In order to repel this argument, Mr. Kailash Ray, appearing on behalf of the petitioner, contended that the finding of the learned Judge that "admittedly no amount had been paid to her at the time of the execution of this deed" is an error of record; and drew my attention to the examination of the petitioner under Section 342 of the Code of Criminal Procedure, which I have already mentioned in the earlier part of my judgment; and also referred to the written statement which was filed on behalf of the petitioner, the relevant portion whereof reads as follows-

"That the real story is that the complainant received Rs 920/- before the execution of the sale deed and she willingly and voluntarily executed the sale deed and incorporated Rs 920/- in the sale deed which she had taken and after registration, she executed the receipt duly thumb impressed by her on receipt of

Rs. 80/- the balance of the consideration money of the deed. The complainant was later manoeuvred by Manu Pandey and filed the complaint with false allegations."

Hence, he urged that it was not an admitted case of the petitioner. On the contrary, the case of the petitioner was and is that the entire consideration money was paid to her. Besides, before she executed the deed, the scribe Jagannath read it out to her and explained it to her, as it is mentioned in the deed itself, and there is no finding of the court below that the document was not read over and explained to her. If the deed clearly mentioned that Rs. 920/- was paid to her by way of adjustment, it cannot be said that the petitioner had criminal intention from the very beginning. In that view of the matter also, his conviction cannot be upheld. In order to substantiate his point, he has relied on a decision of this Court in Sheosagar Pandey v. Emperor (1936) 37 Cri LJ 38 (Pat), where Fazl Ali, J. (as he then was) observed that mere breach of a contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act, but of which the subsequent act is not the sole criterion. Where there is no clear and conclusive evidence of the criminal intention of the accused at the time the offence is said to have been committed, and where the party said to be aggrieved has an alternative remedy in the civil court the matter should not be allowed to be fought in the Criminal Courts.

9. In view of the above discussions, I am inclined to agree with the contentions of learned Counsel for the petitioner. On the facts and in the circumstances of the instant case, it cannot be said with certainty that the petitioner had criminal intention to cheat her at the time the offence is said to have been committed. Besides, in the present case also, she has alternative remedy in civil court. The judgment of the court below convicting the petitioner cannot be upheld.

10. In the result, I allow this application and set aside the conviction and sentence imposed upon the petitioner.

Application allowed.

AIR 1970 PATNA 23 (V 57 C 5)

S. C. MISRA, C. J.
AND B. D. SINGH, J.

Kamta Pandey, Petitioner v. State of Bihar and others, Opposite Party.

Civil Writ Jurisdiction Case No. 566 of 1967, D/- 13-12-1968.

CM/DM/B322/69/UVJ/D

Constitution of India, Art. 311 (2) — Reasonable opportunity to defend — Delinquent charged for receiving illegal gratification — Failure to supply copy of complaint forming basis of departmental enquiry to the delinquent in spite of his request — His dismissal is illegal.

Where a police officer who was charged with having extorted illegal gratification from the complainant, was dismissed from service as a result of a departmental enquiry instituted against him, on report of the Anti-Corruption officer made in sequel to the complaint lodged with him by the complainant, but the copy of the complaint was not supplied to him in spite of his request, the dismissal was liable to be quashed.

Copy of complaint was a necessary document which should have been supplied, so that the falsity of the statement made by the complainant in the course of the proceeding might have been established by proper cross-examination by him. The request was reasonable and necessary in the interests of justice. The failure to supply copy resulted in denial of reasonable opportunity to defend, guaranteed under Art. 311 (2). M. J. C. No. 811 of 1964 D/- 16-8-1966 (Pat) and AIR 1961 SC 1623 Rel. on. (Para 4)

Cases Referred: Chronological Paras
(1967) AIR 1967 Madh Pra 284

(V 54) = 1967-2 Lab LJ 531, Lal

Audhraj Singh v. State of Madhya Pradesh 3

(1966) MJC No. 811 of 1964 D/-
16-8-1966 (Pat), Ramjanam Singh
v. State 4

(1961) AIR 1961 SC 1623 (V 48) =
1961 Jab LJ 702, State of Madhya
Pradesh v. Chintaman Sadashiva 4

Lala Deokinandan Prasad and Lakshmi
Narayan Misra, for Petitioner; K. P.
Verma, S. C., for Opposite Party.

ORDER: The petitioner was a confirmed Assistant Sub-Inspector of Police and posted at Garkha in the district of Saran. His services were, however, terminated by the Deputy Inspector General of Police, Northern Range, by his order dated the 8th of September, 1966 (Annexure 9), in the following circumstances. On the 23rd of October, 1961, while the petitioner was still posted at Garkha Police Station, a first information report was lodged to the effect that a cow belonging to the informant Asargi Rai was stolen and that one of the thieves was apprehended by the complainant and some other persons. The cow was taken away from the custody of the thieves and the matter was reported at the police station and the cow was also brought to the police station by the informant. The Officer-in-charge of the Police Station Nandji Singh was away at the time when

the information was lodged and, accordingly, it was recorded by the petitioner. The Officer-in-charge returned to the Police Station at 9 P.M. that night. On the next day, 24th October, 1961, the petitioner left the Police Station for investigation of some other case and returned at 5 P.M.

The charge against the petitioner was that on the 23rd of October, 1961 itself, when Asarfi Rai requested him that the cow should be released as she was pregnant, and some harm might come to her if she was not released in time, the petitioner told the informant Asarfi Rai that if he wanted to have the cow back without any security, he would have to pay Rs 100/-, and in case he was prepared to furnish security, he would have to pay a reduced sum of Rs. 50/-. The informant expressed his inability to oblige the petitioner and hence the cow was sent to the pound. There she died after 2½ months.

2. The complainant Asarfi Rai addressed certain letters to the Superintendent of Police, Saran; the Chief Minister of Bihar and the District Magistrate, Saran, complaining of the conduct of the petitioner in trying to extort illegal gratification from the complainant. An enquiry was ordered to be made by the Superintendent of Police through the Circle Inspector, A. Masih. The Inspector held an enquiry and reported that the charge against the petitioner was groundless. The complainant himself had the reputation of being a thief and since the petitioner refused to release the cow to him, he made a grievance of it and, being dissatisfied with the Assistant Sub-Inspector, sent letters to various authorities in order to put him in trouble. The report was dated the 7th of March, 1962. The letters were written by Asarfi Rai on the 28th of October, 1961. According to the petitioner, the report of the Circle Inspector was considered by the Superintendent of Police, Saran, and being satisfied with the result of the enquiry, he did not proceed further in the matter.

On the 26th of November, 1963, however, it appears that the complainant Asarfi Rai wrote to the Anti-Corruption Department and an enquiry was started by the department which was entrusted to Thakur Ram Chandra Singh, Sub-Inspector of the Anti-Corruption Department. He was annoyed with the petitioner and accordingly he submitted an incorrect report as to the petitioner having really demanded the amount alleged by Asarfi Rai and then a proceeding against the petitioner and an enquiry was held by the Additional Superintendent of Police, Saran, B. Mahton, who came to the conclusion that the petitioner

did demand the amount. Acting upon this enquiry report, the Deputy Inspector General, Northern Range, ordered the dismissal of the petitioner.

3. A number of questions have been raised by learned Counsel for the petitioner in support of the application. He has referred to the record of service of the petitioner which is exceptionally good as he received a large number of rewards for fearless discharge of duties as a police officer and was actually considered fit for promotion to the rank of Sub-Inspector of Police. It has also been urged that the report of A. Masih having once been accepted by the Superintendent of Police, Saran, as mentioned above, another proceeding against him was incompetent as has been held by the High Court of Madhya Pradesh in *Lal Audhraj Singh v State of Madhya Pradesh*, 1967-2 Lab LJ 531 = (AIR 1967 Madh Pra 284). Mr K. P. Verma has drawn our attention in this connection to the order passed by the Superintendent of Police, Saran, in which, on the 31st of May, 1962, he said on the report being presented to him "file". It is not clear as to what is intended by that. Mr. Verma's suggestion is that it may not necessarily imply that the Superintendent of Police accepted the report of the Circle Inspector A. Masih.

Learned Counsel for the petitioner has, however, contended that if he were not satisfied by the report, it was open to the Superintendent of Police either to order further enquiry or to start a proceeding. On the contrary, nothing was done about it at least till the 26th of November, 1963, which means that when he used the word "file", he intended to say that no further action was to be taken in the matter. This would amount to acceptance of the report of A. Masih by the Superintendent of Police. In this connection, a question has been raised before us as to whether acceptance of the report by the Superintendent of Police would amount to condonation of the offence, if any, committed by the petitioner, by the department, because the appointing authority in the case of the Assistant Sub-Inspector of Police is the Deputy Inspector General of Police and condonation, if any, should have been done by him before it could be regarded as effective condonation.

Learned Counsel for the petitioner has, however, drawn our attention to the Police Manual, Volume I, page 327, rule 825 (d) of which lays down what punishment could be awarded by the Superintendent of Police upon a police officer below the rank of Inspector of Police. The petitioner was merely an Assistant Sub-Inspector and short of termination or dismissal of service any other

punishment could have been awarded by the Superintendent of Police himself. In that view of the matter, it cannot be regarded that acceptance of the report by him would not amount to condonation of the acts alleged to have perpetrated by the petitioner or, at any rate, it must be taken as clear satisfaction on the part of the Superintendent of Police that no ground was made out for further proceeding against the petitioner. In our opinion, however, it is not necessary to deal with this point more elaborately because the matter can be disposed of on a shorter ground on the facts of this case.

4. Learned Counsel raised certain questions as to the persons being examined in course of the proceeding, Jogenra Rai, Bishwanath Rai and Munilal Sah, whose names were not specifically mentioned in the first information report as persons who accompanied the informant when he went to the Police Station with the cow and in whose presence the petitioner was alleged to have demanded an illegal gratification of the sum of Rs. 50/-. The first information report (annexure 1), however, shows that a general statement was made that apart from the names of the persons mentioned therein, others also arrived. It is difficult to say if the persons mentioned above were the other persons who came to the place of occurrence and accompanied the petitioner to the police station. Learned Counsel, however, raised a shorter question to the effect that on the 27th of March, 1964, the petitioner filed an application before the presiding officer holding the proceeding that he should be supplied copy of the statement made by Asarfi Rai before Thakur Ram Chandra Singh, Sub Inspector of Anti-Corruption Department, on foot of which he started the investigation and gave a report against the petitioner.

That document, however, was never supplied to him. It is a case, therefore, which is covered by the decision of the Supreme Court in State of Madhya Pradesh v. Chintaman Sadashiva, AIR 1961 SC 1623. This document was necessary to enable the petitioner to cross-examine Asarfi Rai properly in course of the proceeding with reference to the statement he might have made to the Anti-Corruption Sub-Inspector, which was his statement at an early stage. It was necessary that this document should have been supplied so that the falsity of the statement made by Asarfi Rai in course of the proceeding might be established by proper cross-examination on behalf of the petitioner. In our opinion, this is a reasonable request and necessary in the interest of justice so that the petitioner might cross-examine Asarfi Rai. This is

more so because it was brought to the notice of the officer-in-charge of the enquiry, Shri B. Mahton, that the case of Asarfi Rai before the Criminal Court ended in acquittal, the learned Magistrate holding that the complainant was not able to establish that the cow belonged to him.

In any view of the matter, the statement made by Asarfi Rai at the earlier stage was a very necessary material to enable the petitioner to cross-examine him in course of the proceeding. The same not having been done, the case is fully covered by the decision of the Supreme Court in the above case followed by another decision of this Court in Ramjanam Singh v. State, M. J. C. No. 811 of 1964 decided by Hon'ble the Chief Justice and K. K. Dutta, J., on the 16th of August, 1966 (Pat). That being the position, it must be held that the order of dismissal of the petitioner (annexures 9 and 10) as also the report (annexure 7) must be quashed.

5. The application is allowed accordingly.

Petition allowed.

AIR 1970 PATNA 25 (V 57 C 6)

S. C. MISRA, C. J.
AND B. D. SINGH, J.

M. G. Sharan and others, Petitioners
v. State of Bihar and others, Respondents.

Civil Writ Jurisdiction case Nos. 572, 591 and 681 of 1967 and 535 of 1968 along with C. W. J. Case Nos. 706, 716 and 774 of 1967, D/- 5-12-1968.

(A) Constitution of India, Arts. 162, 166, 309 and 311 — Right to promotion in a cadre — Creation of separate cadre is essential.

In order to confer legal right upon a Government servant it is essential that cadre should also be legally constituted under Article 309 of the Constitution. It cannot be assumed that due to the notifications by which the new department is constituted under Article 162 read with Article 166 of the Constitution a separate cadre is created. A cadre has to be expressly created as it is of vital importance for conferring fundamental rights upon the employees. It may be under Article 309 of the Constitution, or it can be created by the State Government under the executive power conferred under Article 162 of the Constitution. But even under Article 162 of the Constitution, it is essential that the cadre should be formally constituted. AIR 1967 SC 1910 and AIR 1968 Andh Pra 350 Rel. on. AIR 1958 SC 113 Dist. (Para 32)

GM/HM/D140/69/GGM/P.

(B) Constitution of India, Arts. 14 and 16 — Expression "matters relating to employment or appointment" to any office in Art. 16 include matter of promotion.

It may be that matters relating to employment or appointment to any office, in Art 16 (1) are wide enough to include the matter of promotion. Inequality of opportunity for promotion as between citizens holding different posts in the same grade may, therefore, be an infringement of Art. 16. Article 16 does not forbid the creation of different grades in the Government service. But the concept of equality in the matter of promotion can be predicated only when the promotees are drawn from the same source, and they are similarly circumstanced. But where they have not been drawn from the same sources and they are not similarly circumstanced, the principle cannot be invoked. AIR 1966 SC 1044 and AIR 1962 SC 36 and AIR 1967 SC 1427 and AIR 1962 SC 1139 and AIR 1968 SC 349 and AIR 1965 Punj 401 Dist. (Paras 34 and 35)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 349 (V 55) =
(1968) 1 SCR 407, State of Mysore
v. P. Narasinga Rao 34
- (1968) AIR 1968 Andh Pra 350
(V 55) = (1987) 1 Andh WR 445,
Radhakrishna v. State of Andhra
Pradesh 32
- (1967) AIR 1967 SC 52 (V 54) =
(1966) 3 SCR 600, Mervyn Continho
v. Collector of Customs, Bombay 47
- (1967) AIR 1967 SC 122 (V 54) =
(1966) Supp SCR 401, State of
Jammu & Kashmir v. Bakshi
Gulam Mohammad 38
- (1967) AIR 1967 SC 839 (V 54) =
(1967) 2 SCR 29, Govind Datta-
tray v. Chief Controller of Imports
and Exports 23
- (1967) AIR 1967 SC 903 (V 54) =
(1967) 1 SCR 454, State of Assam
v. Ranga Muhammad 41
- (1967) AIR 1967 SC 1269 (V 54) =
(1967) 2 SC WR 442, State of
Orissa v. Dr. Miss Binapani Dei 36
- (1967) AIR 1967 SC 1427 (V 54) =
(1967) 2 SCJ 102, S. G. Jaisinghani
v. Union of India 34
- (1967) AIR 1967 SC 1910 (V 54) =
(1967) 2 SCA 574, Sant Ram v.
State of Rajasthan 22, 32, 34
- (1967) W. P. No. 233 of 1966 D/-
22-8-1967 (SC), Parkash Chand
Sharma v. Oil and Natural Gas
Commission 33
- (1966) AIR 1966 SC 1044 (V 53) =
(1967) 1 SCJ 52, Probhudas
Morarjee v. Union of India 33, 48
- (1966) AIR 1966 SC 1942 (V 53) =
(1966) 3 SCR 682, B. N. Nagarajan
v. State of Mysore 22, 27

- (1966) AIR 1966 SC 1987 (V 53) =
(1967) 1 SCR 77, Chandra Mohan
v. State of Uttar Pradesh 41
- (1966) AIR 1966 Pat 97 (V 53) =
ILR 45 Pat 1019, Ramanugraha Jha
v. State of Bihar 16
- (1965) AIR 1965 Punj 401 (V 52) =
ILR (1965) 1 Punj 423 (FB), Brij
Lal Goswami v. State of Punjab 34
- (1964) AIR 1964 SC 423 (V 51) =
1964-4 SCR 598, P. C. Wadhwa v.
Union of India 17
- (1964) AIR 1964 SC 506 (V 51) =
(1964) 1 SC WR 7, State of Mysore
v. K. Manche Gowda 36
- (1963) AIR 1963 SC 913 (V 50) =
(1963) Supp 2 SCR 169, State of
Punjab v. Joginder Singh 23
- (1963) AIR 1963 Bom 13 (V 50) =
ILR (1962) Bom 532, State of
Bombay v. Dr. N. T. Advani 42
- (1962) AIR 1962 SC 36 (V 49) =
(1962) 2 SCR 586, General Manager
Southern Ry. v. Rangachari 33, 34
- (1962) AIR 1962 SC 1139 (V 49) =
(1962) 44 ITR 532, Kishori Mohan-
lal v. Union of India 33, 34
- (1962) AIR 1962 SC 1344 (V 49) =
(1962) 1 Lab LJ 656, U. R. Bhatt
v. Union of India 40
- (1962) AIR 1962 SC 1704 (V 49) =
(1963) 1 SCR 437, High Court,
Calcutta v. Amal Kumar Roy 25, 35
- (1961) AIR 1961 SC 751 (V 48) =
1961 (1) Cri LJ 773, State of
Uttar Pradesh v. Babu Ram
Upadhyaya 36
- (1958) AIR 1958 SC 36 (V 45) =
1958 SCR 828, Parshotam Lal
Dhingra v. Union of India 43
- (1958) AIR 1958 SC 113 (V 45) =
1958 SCR 922, Nohria Ram v.
Director General of Health Ser-
vices, Govt. of India 16, 30
- (1957) AIR 1957 SC 912 (V 44) =
1958 SCR 533, State of U. P. v.
Manbodhan Lal 39, 40, 41, 42, 51
- (1957) AIR 1957 Pat 617 (V 44) =
ILR 35 Pat 1, Sukhmandan
Thukur v. State of Bihar 33
- (1954) AIR 1954 Nag 90 (V 41) =
ILR (1954) Nag 90, Gopalrao
Damodarji v. State Govt. of
Madhya Pradesh 36

C. K. Raman, J. N. P. Verma, Vasudeo Prasad, Tarkeshwar Deyal and Ramesh Chandra Sinha, for Petitioners; (in all the cases); Lal Narain Sinha, Advocate General, S. Sarwar Ali and K. P. Verma (Standing Counsel), for Respondents (in all the cases).

B. D. SINGH, J.: All these seven writ petitions were heard together on the request of the parties as they chiefly arise out of the notifications appointing officers from the Irrigation Department to River Valley Project Department (here-

inafter referred to as 'R. V. P. D.') and placing them senior to the petitioners.

2. C. W. J. C. Nos. 572 and 681 of 1967 were filed by M. G. Sharan impleading the State of Bihar as respondent No. 1 and S. K. Banerji as respondent No. 2. C. W. J. C. 572 was admitted on 14-9-67 and in this petition the petitioner has challenged the validity of the notification dated the 26th August, 1967 (Annexure A to the main application) placing the services of respondent No. 2, who belonged to the cadre of the Irrigation Department, at the disposal of R. V. P. D., and he has asked this court to quash the said notification, and to command respondent no. 1 by a writ of mandamus to fill up the vacancy of the post of Chief Engineer in Gandak and Sone Barrage Project after considering the rightful claim of the petitioner over the said post. Subsequently it appears that the State Government by notification dated the 27th of September, 1967 appointed respondent no. 2 as Chief Engineer of Gandak and Sone Barrage Projects. Hence the petitioner filed another petition bearing C. W. J. C. No. 681 of 1967, which was admitted on 2-11-67 wherein he has marked the said notification as Annexure C challenging the same and has asked this Court for an appropriate writ as in the case of C. W. J. C. 572.

3. This very petitioner filed a third petition bearing C. W. J. C. No. 591 of 1967, which was admitted on 21-9-67, impleading the State of Bihar as respondent no. 1 and U. K. Verma as respondent no. 2. In this petition he has challenged the notification dated the 23rd of February, 1966 (Annexure A thereof) by which the State Government in the R. V. P. D. promoted U. K. Verma, Superintending Engineer, Sone Barrage Circle, R. V. P. D., to officiate as Chief Engineer in the same department, and posted him as Chief Engineer incharge of Tenughat Dam Project. In this petition the petitioner claims to be senior to respondent no. 2 and he has asked this Court to quash the said notification contained under Annexure A and to command respondent no. 1 by a writ of mandamus to act in accordance with law and to give the petitioner his rightful claim, to be appointed in place of respondent no. 2.

4. G. P. Vimal and 25 others filed a petition bearing C. W. J. C. No. 706 of 1967 which was admitted on 7-11-67. In this petition petitioners 1 to 5, 10 to 13 and 17 to 24 are Assistant Engineers whereas petitioners 3, 6 to 8, 16, 25 and 26 are Executive Engineers, and the remaining petitioners 9, 14 and 15 are Superintending Engineers of R. V. P. D. They have impleaded the State of Bihar as respondent No. 1 and S. K.

Banerji as respondent No. 2. In this petition they have challenged the placing of services of respondent No. 2, who belonged to the Irrigation Department, at the disposal of R. V. P. D. by the same notification dated 26th August, 1967 and have made it Annexure C thereto. They have also challenged the appointment of S. K. Banerji to the same department as Chief Engineer by the notification dated the 27th of September, 1967 which they have marked as Annexure C/1 thereto. They have asked this Court to quash the said two notifications. Similarly, their grievance is that the officers of the Irrigation Department, who have their own cadre should not be appointed to the R. V. P. D., which has its own separate cadre.

5. A. Hayat and 47 others have filed petition bearing C. W. J. C. No. 716 of 1967. They all belong to R. V. P. D. in one capacity or the other. They have impleaded the State of Bihar as respondent no. 1, Narayan Thakur, Executive Engineer, Canal Division, Kosi Project as respondent no. 2, Gurudco Saran Singh, Executive Engineer, Canal Division, Kosi Project as respondent no. 3, Kaushal Kishore Srivastava, Executive Engineer, Canal Division, Kosi Project as respondent no. 4, Sukhdeo Narain Verma, Executive Engineer, Canal Division, Kosi Project as respondent no. 5, S. K. Banerji, Chief Engineer, Electricity Board as respondent no. 6 and Sarju Saran Singh, Superintending Engineer, Canal Circle 1, Kosi Project as respondent no. 7. They have challenged the notification dated the 1st November, 1965 of the Government of Bihar in the R. V. P. D., by which respondent nos. 2 to 5 have been promoted to officiate as Executive Engineer in the R. V. P. D.

They have also challenged notification dated 27th September, 1967 (Annexure C/1) by which the Government of Bihar in the R. V. P. D. has appointed respondent no. 6 as its Chief Engineer and the notification of the Government of Bihar in the R. V. P. D. dated 21-9-67 by which respondent no. 7 was placed at the disposal of the R. V. P. D. They have asked this Court to quash these notifications contained under Annexures C, C/1, and C/2 because according to the petitioners all these respondents, originally belonged to the irrigation department, and they had no claim over the cadre post of the R. V. P. D. and because by their appointments the future chances of promotion of these petitioners are unjustly marred. They have also asked this Court for appropriate order in this application.

6. B. H. V. Krishnaiah and 85 others have filed application bearing C. W. J. C. No. 774 of 1967 which was admitted on

6-12-67. Petitioners 2, 24, to 26, 45, 52 and 56 are Executive Engineers and the remaining petitioners are Assistant Engineers in the R. V. P. D. In this application they have impleaded the State of Bihar as respondent no 1 and Sarju Narain Singh, Superintending Engineer, Canal Circle No. 1, as respondent no. 2. The petitioners have challenged the notification of the State of Bihar dated 21-9-67 (Annexure C thereto) by which respondent no 2, who belonged to the Irrigation Department was appointed as Superintending Engineer in the Kosi Project. The petitioners' grievance similarly is that the officers of the Irrigation Department have no claim over the cadre post of the R. V. P. D. and because of the appointment of respondent no 2 their future chances of promotions have been marred. Therefore, they have asked this Court to quash the said notification (Annexure C) or to pass appropriate order.

7. Lastly we come to the application bearing C. W. J. C. No 535 of 1968 which was admitted on the 22nd of July, 1968. In this case the sole petitioner is R. S. Pathak who has impleaded the State of Bihar through the Chief Administrator-cum-Secretary, R. V. P. D., as respondent No. 1 and S. K. Banerji, Chief Engineer, Gandak and Sone Barrage Projects, as respondent No. 2. The petitioner in this case has stated that he is at present Assistant Engineer in the R. V. P. D. with long years of service; the employees of the Irrigation Department have no claim over the R. V. P. D. which has a separate cadre and, therefore, he has challenged the notification dated the 26th August, 1967 by which the Government of Bihar in the Irrigation Department has placed the services of respondent No. 2 at the disposal of the R. V. P. D. and he has marked this as Annexure 1 to his application. He has also challenged the appointment of respondent No. 2 as Chief Engineer of the same department by notification dated the 27th September, 1967, which he has marked as Annexure 2 and he has asked this Court to quash the said two notifications and has also prayed for issue of a writ of quo warranto ousting respondent No. 2 from the office of the Chief Engineer, Gandak and Sone Barrage Project or to pass any other appropriate order or orders.

8. From all these petitions it appears that the main point to be decided is as to whether the Irrigation Department and the R. V. P. D. each have separate cadre or not and whether the petitioners have better claim over the respective respondents. Therefore, the points involved in all these applications are more or less common.

9. For the sake of convenience I wish to take up first the petitions in C. W. J.

C. Nos. 572 and 681. The claim of the petitioner in the petitions is that at present he is Superintending Engineer, Tenughat Dam, Circle No. 2, Tenughat in the District of Hazaribagh and he is the senior-most officer in the cadre of the R. V. P. D. and he has put in twenty-seven years of specialised service in engineering and construction works. He has further stated that the R. V. P. D. has been created with an object of executing big projects and it came into existence in the year 1954 when it was known as the Kosi Project Department. Subsequently, works of (1) Kosi Project, (2) Gandak and Sone Project, and (3) Tenughat Project were all assigned to R. V. P. D. and they were treated as the three wings of the same department. For each of the three wings separate Chief Engineer is appointed with the strength of other cadre officers such as, Superintending Engineers, Executive Engineers and Assistant Engineers.

There are permanent posts for one Chief Engineer, 4 Superintending Engineers, 17 Executive Engineers and 67 Assistant Engineers. According to him, Irrigation Department and R. V. P. D. have separate cadres. R. V. P. D. Schemes are very big in magnitude and are concerned with the execution of major river valley projects, dams, barrages and hydraulic structures which require special technique and experience for their execution; whereas the Irrigation Department is concerned with running of canal and construction of minor irrigation schemes.

Prior to the present appointment, respondent no. 2 was the Chief Engineer, Gandak & Sone and was officiating as Chief Engineer (civil), State Electricity Board, but even then he was holding only the substantive post of Executive Engineer of Irrigation Department. He was promoted as a temporary Engineer in the Irrigation Department and then again promoted to officiate as Chief Engineer (Civil) in the Electricity Board, which was going to return the services of respondent no. 2 to his substantive post. In that event he would have been only a Superintending Engineer. Therefore, according to the petitioner the present appointment of respondent no. 2 as Chief Engineer of Gandak and Sone Project amounts to transfer as well as promotion in a different cadre.

10. The main grievance of the petitioner is that according to the Civil list respondent no 2 is junior to him even as Superintending Engineer. The petitioner claims that he has better service record than respondent no. 2 which will be evident from the statement of quali-

fication and experience of the petitioner contained in Annexure F to the reply filed on behalf of the petitioner to the counter-affidavit of respondent no. 1.

11. How the respondent no. 2 was appointed as Chief Engineer in R. V. P. D. will be evident from paragraph 14 of the counter-affidavit filed on behalf of respondent no. 1. Shri B. L. Singh who was the Chief Engineer of Gandak & Sone Project was to retire from September, 1967. Therefore, a question arose for filling up the vacancy. The Council of Ministers in the cabinet discussed the proposal for the appointment of Shri Banerji (respondent no. 2), The Chief Engineer of Irrigation Department, to the post of Chief Engineer, Kosi Project and it was further ordered by the Cabinet that Shri B. D. Pandey, the Chief Secretary should examine the matter thoroughly and then give his recommendation. Accordingly, the Chief Secretary discussed the matter with the Chief Administrator, R. V. P. D., the Secretary, Appointment Department and the Secretary, Irrigation Department and after discussion they have given their unanimous opinion the substance of which is given in paragraph 14 of the counter-affidavit and their unanimous opinion is contained in Annexure Q to the said counter-affidavit. It will be beneficial to quote here the English version of Annexure Q in extenso because this has been referred frequently by both the parties in most of these cases:

"Appointment of Chief Engineer in the River Valley Project Department. The Cabinet discussed the proposal for appointment of Sri Banerji, the Chief Engineer of the Irrigation Department to the post of the Chief Engineer, Kosi Project, and it was ordered that the Chief Secretary should examine the matter thoroughly and then give his recommendation. Accordingly the Chief Secretary discussed the matter with the Chief Administrator, River Valley Project Department, the Secretary, Appointment Department and the Secretary, Irrigation Department. After discussion they gave the following unanimous opinion.

2. The task of executing big river valley projects was entrusted, from the beginning, to River Valley Project Department. Hence it was deemed necessary that very experienced and successful Chief Engineers be appointed and placed incharge of these projects. In the beginning, therefore, for several years, able, successful and experienced Chief Engineers were appointed. Direct appointments were made against the following posts and side by side experienced Engineers of the Irrigation Department were deputed thereto. Meanwhile it was being considered that the cadre of Ir-

rigation Department should be amalgamated with the cadre of the River Valley Project Department; but due to several difficulties, it was not found possible. The present state of affair is that several Engineers appointed by the River Valley Project Department are on different posts, and about 20 or 25 Engineers of the Irrigation Department are deputed to several posts. Of the three posts of Chief Engineers, Senior Chief Engineers viz. Sri B. L. Singh and Sri Akhouri Parmeshwari Prasad of the Irrigation Department were deputed to the two posts, and Sri U. K. Verma the Engineer of the cadre of River Valley Project Department was promoted to the post of Chief Engineer, Tenughat. Sri Akhouri Parmeshwari Prasad went on leave preparatory to retirement. Hence the appointment to the post of the Chief Engineer of the project became necessary. The Department selected Sri Banerji, the Chief Engineer of the Irrigation Department for this post. In this context the question arises whether any senior Engineer of the River Valley Project Department is fit for this post or not. The opinion of the River Valley Project Department is that the post of Chief Engineer is a selection grade post. Therefore the most experienced person should alone be appointed for the successful working of the project works, no matter, whether he belongs to the cadre or is beyond the cadre. This opinion is proper for successful working also. Although the cadre of the River Valley Project Department is separate (though it is not duly constituted), and although an officer of the cadre has been promoted to the post of Chief Engineer, it is necessary for the satisfaction of the cadre that enquiries be made in respect of the fact whether or not there is any such officer, as is capable for being appointed to the post of Chief Engineer, and in case there is such a person, why should he not be appointed. Sri Rameshwar Dutt is the senior-most among the Superintending Engineers of of the River Valley Project Department. He was at first appointed as an Assistant Engineer of Damodar Valley Corporation and from there he was directly appointed in the River Valley Project. He continued to remain on the post of Executive Engineer for several years and for about five years he is on the post of Superintending Engineer. In his character roll, it has been separately mentioned that his honesty is beyond doubt and his aptitude and inclination to work is also praiseworthy, but side by side, it is also mentioned therein that he is a bit slow and the quality of his work is average. Even then considering his aptitude, inclination and honesty, and the experience in the River Valley Project Works it

cannot be said that he is not fit for promotion to the post of the Chief Engineer.

3. Two Superintending Engineers viz. Sri Saran and Sri Prasad, Junior to him, are not fit for appointment to the post of Chief Engineer since their service records are not good

4. Secondly, Sri B. N. Chatterji and Sri S. N. Rai, the senior most officers in the Irrigation Department are working as Chief Engineers of the Irrigation Department and Agriculture (Minor Irrigation) Department, and it is not proper to disturb them in the interest of the work. Thereafter comes Sri Banerji. He is also posted to the rank equal to the post of Chief Engineer, since September, 1963 and at present he is deputed to the Electricity Board. His service record is very good, and he is in every way fit for appointment to the post of the Chief Engineer.

5. Now the question arises whether to the post vacated by Sri Akhauri Parmeshwari Prasad, Sri Dutt of the cadre, be promoted or Sri Banerji, the most experienced Chief Engineer of the Irrigation Department be deputed thereto. To come to the final conclusion in this connection, it was enquired into whether any other post of Chief Engineer of the River Valley Project Department is going to fall vacant in the near future. It transpired that the post held by Sri B. L. Singh will be vacant in September, since Sri Singh would attain the age of 58 years by then. Although the Chief Administrator, River Valley Project Department is of opinion that even after Sri B. L. Singh's attaining the age of 58 years, he be reemployed for the good of the work, but according to the decision of the Government, it is not possible on principle. Therefore, it has been arrived at that the proposal which stand in the record of River Valley Project Department be accepted and Sri Banerji be deputed to post of the Chief Engineer of the River Valley Project Department. Side by side it may also be held that when another post of Chief Engineer falls vacant in September Sri Dutt may be promoted to that post

Sd Bhairav Dutt Pandey
Sd. A. F. Abbas
Sd N. Nagamani
Sd M. N. Rai."

12. It is further stated in the said paragraph 14 that the Council of Ministers while making the appointment of respondent no. 2, gave due consideration to the claims of officers working in the R. V. P. D. including that of the petitioner and the said appointment was made after the opinion contained in Annexure Q was obtained. It is further stated that

the Gandak Project is the largest irrigation project under execution in India, the estimated cost of which is 140 crores of rupees including the cost to be incurred in the portion lying in Uttar Pradesh. Therefore, according to the State the very best available Chief Engineer has to be selected for the said assignment.

13. The decision of these cases will mainly rest upon the finding as to whether there were two separate cadres in the R. V. P. D. and the Irrigation Department and whether the petitioner had a right to be considered for appointment as Chief Engineer of the R. V. P. D. in place of respondent no. 2.

14. Mr. C. K. Raman, learned counsel appearing on behalf of the petitioner has challenged the impugned notifications mainly on the following grounds:

(i) Both R. V. P. D. and Irrigation Department have separate cadres of their own. Therefore, according to him, a person from one cadre cannot be appointed to the other because a non-cadre or ex-cadre man has no claim over a cadre post.

(ii) In the instant case, in the appointment of respondent no. 2, the Bihar Public Service Commission was not consulted in violation of the provisions of Article 320 (b) of the Constitution of India.

(iii) Employees of the Irrigation Department are appointed in the R. V. P. D. but none of the officers belonging to R. V. P. D. is appointed in the Irrigation Department. He describes this as a one-way traffic. According to him, this principle laid down by the State Government bars the future chance of promotion of the employees in the R. V. P. D. and is violative of Article 311 (2) of the Constitution of India.

(iv) The impugned notifications are violative of Articles 14 and 16 of the Constitution of India.

(v) Adverse remark against the petitioner in his character roll was not communicated to the petitioner;

(vi) The opinion of the Committee headed by Shri B. D. Pandey contained in Annexure Q, quoted above, is mala fide. According to him, this Committee cannot take the place of the Bihar Public Service Commission.

15. I take up first the ground no. (i) (iii) for consideration. These points have assumed importance, because the contention on behalf of the petitioner is that the persons working in the R. V. P. D. constitute a separate Cadre, and any appointment in the department to a higher post must be confined to those, who are working in the department. There is acute controversy between the parties whether a separate cadre exists in the R. V. P. D. According to the petitioner

it has a separate cadre of its own. All the formalities which are required for establishment of a cadre in other departments have been observed in this department also. Mr. C. K. Raman, learned Counsel for the petitioner has referred to paragraph 18 of the petition in C. W. J. C. 572 wherein it is specifically stated that the R. V. P. D. has its own cadre and as a rule, a cadre officer satisfying the minimum criterion of suitability will have precedence over outsiders. According to him, this fact regarding the existence of cadre can also be gathered from the various annexures and the counter-affidavits filed on behalf of the State of Bihar, respondent no. 1. In this connection he has referred to Annexure Q which has been quoted earlier, wherein it is mentioned that sometime before it was being considered that the cadre of Irrigation Department should be amalgamated with the cadre of the R. V. P. D., but due to several difficulties it was not found possible. He has further invited our attention to another passage occurring therein, wherein it is mentioned:

"The opinion of the River Valley project Department is that the post of Chief Engineers is a selection grade post. Therefore the most experienced person should alone be appointed for the successful working of the project works, no matter, whether he belongs to the cadre or is beyond the cadre. This opinion is proper for successful working also. Although the cadre of the River Valley Project Department is separate (though it is not duly constituted)..."

He has drawn my attention to rule 12 of the Bihar Service Code, Chapter II, wherein "cadre" has been defined as follows:

"Cadre means the strength of the service or a part of a service sanctioned as a separate unit."

He has urged that the fact that the R. V. P. D. is a part of service sanctioned as a separate unit cannot be disputed in view of the Government notifications issued by the Governor under Articles 162 and 166 of the Constitution of India (vide Notification dated 30-9-54 issued by the Government of Bihar, Appointment Department; Government orders dated 22-9-60 and 22-9-60 (sic) Annexures C, C/1 and C/2 respectively, to the reply to the counter-affidavit of respondent no. 1, filed by the petitioner). He has contended that R. V. P. D. has a separate cadre is also established from the fact that in the Civil List Irrigation Department officers and R. V. P. D. Officers have been shown separately. He has invited our attention to the Government's own admission in different letters, true copies of which he has filed along with the supplementary affidavit dated 28-10-68. The letter dated

25-9-68 issued by Shri R. C. Prasad, Joint Secretary to the Government in the Irrigation Department addressed to all Secretaries, R. V. P. D., has been marked as Annexure G, the relevant portion of which reads as follows:

"I am directed to enclose a copy of memo no. I/C-I-1026/67-A-11575 dated 17-8-68 together with a copy of its enclosure and that of I/CI/1026/67-A-12664 dated 6-9-68 from the Appointment Department and to request you kindly to send the requisite information in the prescribed proforma in respect of engineers, who were initially appointed in the cadre of R. V. P. Department/B. S. E. Board and are working under them." Similarly, Annexure G/1, which is a letter from Shri A. R. Sarangi, Under-secretary to the Government of Bihar, R. V. P. D., addressed to all Superintending Engineers, R. V. P. D., mentions that certain information was required in the prescribed form in respect of Engineers who were initially appointed in the cadre of the R. V. P. D. This fact is also corroborated from the fact that there is separate budget head of Irrigation Department and R. V. P. D. in the budgets of the Government of Bihar for the years 1964-65 and 1966-67. He has further submitted that even in the counter-affidavit dated 4-11-67, the respondent no. 1, State of Bihar, has not specifically denied about the separate cadre of R. V. P. D. and he has invited our attention to paragraph 8 thereof which reads as follows:

"That with reference to paragraph 8 of the petition I say that it is a fact that at present Shri M. G. Sharan is the senior-most Superintending Engineer among those who were appointed directly in the River Valley Projects Department as Shri U. K. Verma and Sri R. Dutta who are seniors to the petitioner are now Chief Engineers. However, no formal constitution of a cadre has yet been made and there are three Superintending Engineers on deputation to River Valley Projects Department who are senior to Shri Sharan."

Likewise, in paragraph 17 of the said counter-affidavit it is stated:

"That with reference to paragraphs 17 and 18 of the petition I say that the circumstances relating to the appointment of Shri Banerjee have already been explained in previous paragraphs. I further say that there has been no formal constitution of a cadre in the River Valley Projects Department."

16. That petitioner in reply to the said counter-affidavit has reiterated about the R. V. P. D. having separate cadre, in paragraph 4 of his affidavit dated 4-12-67. Learned counsel has submitted that

for creation of a cadre no formal resolution or rules are required. Even assuming that there has been no de jure formation of cadre in the R. V. P. D. it is clear, according to him, from the facts mentioned above that de facto cadre exists in the R. V. P. D., and it is the substance rather than the form which would be taken into account while deciding whether a cadre exists in this department or not. In this connection he has contended that the State Government having conceded in the various letters, circulars and Annexure Q mentioned above, cannot resile from its own admission and set up a different case on a plea that there has been no formal creation of the cadre, and he has relied on a Bench decision of this Court in Ramnugrah Jha v. State of Bihar, AIR 1966 Pat 97 where their Lordships at page 101 in paragraph 7 observed

"In the written statement the defendants made it clear in paragraph 38 that the Government were empowered to retire him under Note 1 to Rule 465A of the Civil Service Regulations. Learned Government Advocate appearing for the defendants wanted to resile from that position and attempted to argue that Rule 465A was not the empowering provision under which the order was valid but Rule 4 published in the India Gazette on the 15th of November, 1919, under Government Resolution No. 1085-E. A. was the real source of authority to compulsorily retire a Civil servant after he completed 25 years' service without necessity to give reasons and without any claim for compensation in addition to pension. The material part of that rule was

"Government will have an absolute right to retire any officer after he has completed twenty-five years' service without necessity to give reasons and without any claim for compensation."

This change of front cannot be permitted in view of the specific case pleaded in defence in the written statement. Besides, the note of the Chief Secretary of the 14th December, 1947 on which the Prime Minister (the Chief Minister was then so known) recorded his minutes and the Council of Ministers passed the order of compulsory retirement. (Ext. D) clearly shows that action was taken against the plaintiff under Rule 465A, Note 1 which was fully quoted in that note. There are many other notings on the file with reference to this compulsory retirement, at later stages, when it was discovered that the order was defective and in all of them it was noted that the order had been passed under Note 1 to Rule 465A (see Ext. 9 (d) dated 9th to 13th November 1948, Ext. 9 (e) dated 19th March 1949 and Ext. 9 (f), note of defendant

No. 2, dated 22nd March 1949). There cannot be the least doubt that the State Government took action under Note 1 to Rule 465A, and when the Government did so, it cannot be open to them to say that they had taken action under some other provision of law. No party can be allowed to depart from his definite case stated in his pleading. During trial the defendants also did not contend a different position. We have, therefore, to examine the validity of the order with reference to Note 1 to Rule 465A." He has further developed his argument by submitting that no doubt people from outside could be brought by direct appointment by open advertisement, but if it is a case of promotion, the cadre officers have right to be considered for the same. Wherever there are rules, as in All India Service Rules, the appointments have been kept restricted to the cadre only. Even when no rule has been framed regarding the appointments in the R. V. P. D., rules regulating conditions of employment of analogous services should apply as a general fundamental principle, and in such circumstance he urged that the rules relating to the Bihar Engineering Service class I rules, 1939 should apply and he has made particular reference to rules 24 and 27 of the said Rules which read as follows:

Rule 24 — "Promotion to the posts of Superintending Engineer and Chief Engineer shall be made by selection and seniority alone shall confer no claim."

Rule 27 — "Seniority in the service shall be determined by the date of the officer's substantive appointment to the service irrespective of the pay drawn by him provided that a member of the service who holds a superior post substantively shall always be deemed senior to an officer who holds an inferior post substantively. The seniority of officers appointed on the same date shall be determined according to the order of merit in which they were placed at the time of their selection for appointment."

He has further emphasised that the appointments should normally remain confined to cadre officers if the appointments are not to be made by open advertisement. A non-cadre or ex cadre man has no claim over a cadre post. When a post in the cadre is to be filled up cadre employees must be considered and their rightful claim must be taken into account. According to him, it is evident that the petitioner was the senior most officer in R. V. P. D. which fact is evident from paragraph 8 of the counter-affidavit filed on behalf of respondent no. 1 quoted earlier as well as from the opinion of the Committee regarding the appointment of the Chief Engineer contained in Annexure Q. In order to fortify

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Punjab & Haryana High Court

AIR 1970 PUNJAB & HARYANA 1
(V. 57 C 1)

FULL BENCH

**D. K. MAHAJAN, SHAMSHER
BAHADUR AND R. S. NARULA, JJ.**

The Printers House Private Ltd., Appellant v. Misri Lal Dalip Singh and others, Respondents.

Letters Patent Appeals Nos. 20 and 29 of 1966 and Civil Writ No. 917 of 1967 D/- 18-4-1969 decided by Full Bench on order of reference made by Mehar Singh C. J. and Harbans Singh, J., D/- 25-4-1967.

(A) Land Acquisition Act (1894), S. 17 (4) — Opinion of State Government — Is justiciable, if it can be shown that State Government never applied its mind to the matter or that its action is mala fide. 68 Pun LR 503, Reversed — (Civil P. C. (1908), S. 9).

The opinion to be formed by the Government in their mind of the existence of urgency is a matter purely for the subjective satisfaction of the Government, but if the question of urgency has been decided on grounds which are non-existent or irrelevant, or on material on which it would be an impossible conclusion to reach, it could legitimately be inferred that the mind has not been applied at all. Even the proved mala fides would alter the complexion of the conclusion reached on subjective satisfaction on the question about the existence of urgent importance or urgency. The question must be examined by Court before it could be found that the decision was reasonable. The question is not such which could be declared non-justiciable outright. AIR 1964 Punj 477, Approved; AIR 1967 SC 1081 & AIR 1963 SC 151, Foll.; AIR 1966 Punj 59 (FB), Explained. (Para 13)

Per Narula J. :— Whether the declaration has been made without any basis or mala fide or without the authority concerned applying its mind to the facts of the case or not must, in the nature of things, depend on the facts and circumstances of each case and also depend on the material which the State chooses to place before the Court in which the legality of the declaration is questioned. (Para 30)

The land was acquired for setting up a factory for the manufacture of printing machinery and it was pleaded by the State Government that the factory will not only supply national requirements of the said machinery but will also help to save foreign exchange. The Director of the Company, at whose instance the acquisition was made, stated that the foreign exchange position was unsatisfactory and the Company was advised to stop, by Government of India, importing the machines and to manufacture the same within the country.

Held, that the matter was undoubtedly of urgent importance and the invocation of the provisions of Section 17 of the Act was clearly justifiable. In face of pleadings and testimony, there could be no doubt on the question that the Government had reached its conclusion in a reasonable and bona fide manner. There can be no manner of doubt that the establishment of the factory for the manufacture of printing machinery which hitherto has been imported from abroad is a public purpose of undoubted national importance. 68 PLR 503, Reversed. (Para 25)

(B) Land Acquisition Act (1894), Section 17 (2), Cl. (c) (Punj) — Construction of—Rule of ejusdem generis does not apply. AIR 1964 Punj 477, Overruled — (Civil P. C. (1908), Pre. — Interpretation of Statutes — Rule of construction) —

(Words and Phrases — Words "ejusdem generis").

Clause (c) of sub-section (2) of Section 17 deals with an independent situation and is a category by itself. There is no common thread running between clause (c) and the previous clauses (a) and (b) and there are no specified categories or classes in clauses (a) or (b) which might be coupled with what is required in clause (c). There is no room or scope for the application of the doctrine of ejusdem generis in the construction of clause (c) of Section 17(2) AIR 1964 Punj 477, Overruled (Para 25)

The phrase 'ejusdem generis' is merely a rule of construction and not a rule of substantive law and is hardly applicable where the intention of the Act is otherwise clear. It literally means "of the same kind or species". If a general word, in other words, is added to specific words, the general word would take its colour from the specific words, and obviously when there are no specific words in clause (c) the rule of ejusdem generis will not be applicable. Moreover, the essential prerequisite of the doctrine is that there must be coupling of words together to show that they are to be understood in the same sense. Case law discussed (Paras 18, 20)

From whatever perspective the contents of clauses (a), (b) and (c) are viewed, they deal not only with separate and distinct matters and situations but in fact each of the clauses constitutes a different category altogether. It may be that clause (b) can be grouped in a single category of public utility, but the appropriate Government is not bound to see under clause (c) that the acquisition which in its opinion is of urgent importance, fulfils also the prerequisite of being required for a public utility.

(Para 20)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 1081 (V 54)=
(1967) 1 SCR 373, Raja Anand Brahma Shah v. State of Uttar Pradesh 12
- (1967) AIR 1967 SC 1857 (V 54)=
(1967) 3 SCR 377, Rajasthan State Electricity Board, Jaipur v. Mohan Lal 24
- (1966) AIR 1966 Punj 59 (V 53)=
1965-68 Pun LR 1 (FB), Murari Lal Gupta v. State of Punjab 8, 11
- (1965) 1LR (1965) 1 Punj 532=1965 Cur LJ 32, Gurbachan Singh v. Ichhar Singh 17
- (1964) AIR 1964 Punj 477 (V 51)=
1LR (1964) 2 Punj 405 Murari Lal Gupta v. State of Punjab 4, 6
- 7, 8, 9, 10, 14, 25, 29
- (1963) AIR 1963 SC 151 (V 50)=
(1963) 2 SCR 774, Smt. Somawanti v. State of Punjab 12

- (1963) AIR 1963 SC 274 (V 50)=
1963 (1) SCR 721, Dr. Indramani v. W. R. Natu 23
- (1963) AIR 1963 Mys 318 (V 50),
Kashappa Shivappa v. Chief Secy. to the Govt. of Mysore 11
- (1960) AIR 1960 SC 1080 (V 47)=
(1960) 2 SCA 412, K. Kottarathil Kochuni v. States of Madras and Kerala 22
- (1958) 1958-1 WLR 546=(1958) 2 All ER 23, Ross Clunis v. Papadopoulos 12
- (1957) AIR 1957 SC 521 (V 44)=
1957 SCJ 557, Lila Vatu Bai v. State of Bombay 21
- (1955) AIR 1955 SC 810 (V 42)=
1955-2 SCR 867, State of Bombay v. Ali Gulshan 21
- (1955) AIR 1955 Andh 184 (V 42)=
1955 Andh LT (Civil) 185, Harihara Prasad v. K. Jagannadham 11
- (1954) AIR 1954 Mad 481 (V 41)=
(1953) 2 Mad LJ 684, Natesa Asari v. State of Madras 11
- (1908) 1908-2 KB 385=77 LJ KB 778
Tillmanns & Co. v. S. S. Knutsford Ltd 16
- J N Kaushal, Senior Advocate with Ashok Bhan, for Appellant; H. L. Sarin Senior Advocate with H. S. Awasthy, A. L. Bahl and D. S. Tewatia, for Advocate General, (Haryana), for Respondents.

SHAMSHER BAHADUR, J. :— Two Letters Patent appeals, The Printers House (Private) Limited v. Misri Lal etc. (L. P. A. No. 20 of 1966) and State of Punjab v. Misri Lal etc. (L. P. A. No. 29 of 1966) arising out of the same judgment of Grover J. of 28th October, 1965 in Misri Lal v. Punjab State, (R. S. A. No. 1536 of 1964) referred to a Full Bench by the order of the Division Bench of Chief Justice Mehar Singh and Harbans Singh J. of 25th April, 1967, would be disposed of by this judgment. The question of law which has arisen in these appeals is common to Civil Writ No. 917 of 1967 which in consequence of the referring order of Mahajan J. of 28th November, 1967, is also before us. Mahajan J. directed this writ petition to be heard along with the letters patent appeals, the question of law being the same. As this writ petition will have to be decided on its own facts, it would go before a learned Single Judge for disposal in accordance with the decision of this Full Bench on the legal questions. The direction which is being given towards the close of this judgment with regard to this writ petition is that it should be listed for hearing next week before a learned Single Judge.

2. It would be necessary to reiterate the facts set out in detail both by the learned Single Judge in the judgment under appeal and Harbans Singh J. in the referring order as it is eventually on these that the decision would turn after

the Full Bench has formulated its opinion on the questions of law referred to it.

3. Land measuring 113 Kanals and 17 Marlas in village Ranhera in Ballabgarh tehsil, out of which an area of 12 Kanals and 1 Marla is in possession of the respondent Misri Lal for carrying on the business of running an electric wooden saw mill and chaff-cutting machine, came to be acquired by two notifications issued by the State of Punjab on 28th March, 1961, the first under Section 4 of the Land Acquisition Act, 1894 (hereinafter called the Act) and the second under the provisions of Section 17. It is interesting to observe in retrospect that the object of urgency has been frustrated altogether by a resort to the special provisions of Section 17, the validity of which has been the primary concern of the litigation giving rise to these Letters Patent appeals. The case is not a solitary illustration of its kind and might usefully provide the State Government with an object lesson that acquisition of land for public purposes can be effectuated more speedily by taking the ordinary recourse of notification under Section 4, instead of coupling it with a simultaneous notification under Sec. 17 — a procedure which not infrequently generates discussion and controversy.

The only advantage to be gained by invoking the urgency provisions of Section 17 of the Act is to get over the time-consuming process of hearing objections to acquisition under Section 5-A and in many cases one is left to wonder whether out of the two choices the hearing of objections would not in the long run have been a process involving a shorter period which elapses between the issue of intention (sic: impugned) notification under Section 4 and the actual possession of the land to be acquired.

4. In the second notification it was mentioned that in view of the urgency of the acquisition, the Governor of the Punjab in exercise of the powers vested in him under Section 17(2)(c) of the Act directed the Land Acquisition Officer, Palwal, to proceed to take possession at once. The threat of immediate possession stirred Misri Lal, the occupier of a portion of the acquired land, to come first to this Court in writ proceedings. While Grover, J., declined to interfere in view of the disputed questions of fact raised in the petition, it was mentioned in his order of 16th August, 1962, in Civil Writ No. 709 of 1961, that the matters agitated could more appropriately be decided in a suit. The suit giving rise to these appeals was then filed by Misri Lal under Section 54 of the Specific Relief Act on 13th November, 1962, in the Court of the Senior Subordinate Judge, Gurgaon. The

relevant issues which arose from the pleadings are these :—

"5. Whether the notifications under sections 4 and 6, read with Section 17, of the Land Acquisition Act were illegal and ultra vires?

6. Could not the Government take possession of the land in suit under Section 17 of the Land Acquisition Act?"

It would be rightly observed that the real issue in the case related to the validity of the power exercised by the Governor under Section 17 of the Act. The suit was dismissed by the trial Judge on 28th November, 1963 and the appeal of the plaintiff was dismissed on 7th November, 1964. The second appeal to the High Court met with success and Grover J. relying on the Division Bench judgment of Mahajan J. and myself in *Murari Lal Gupta v. State of Punjab*, ILR (1964) 2 Punj 405 = (AIR 1964 Punj 477), quashed the impugned notification under Section 17 and allowed the appeal on 28th October, 1965. As the whole legal controversy revolves on the scope and content of Section 17, more particularly clause (c) of its sub-section (2), the entire section, as amended in its application to the State of Punjab by Punjab Act 2 of 1954, Punjab Act 17 of 1956 and Punjab Act 47 of 1956, may be reproduced:—

"17(1) In cases of urgency whenever, the appropriate Government so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in Section 9, sub-section (1) take possession of any waste or arable land needed for public purposes or for a Company. Such land shall thereupon vest absolutely in the Government, free from all encumbrances.

Explanation:— * * * *

(2) In the following cases, that is to say, —

(a) Whenever owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway Administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or ghat, station or of providing convenient connection with or access to any such station;

(b) Whenever in the opinion of the Collector it becomes necessary to acquire the immediate possession of any land for the purpose of any library or educational institution or for the construction, extension or improvement of any building or other structure in any village for the common use of the inhabitants of such village, or any godown for any society registered under the Co-operative Societies Act, 1912 (Act II of 1912), or any dwelling-house for the poor, or the construction of labour colonies or houses for any

other class of people under a Government-sponsored Housing Scheme or any irrigation tank, irrigation or drainage channel, or any well, or any public road;

(c) Whenever land is required for a public purpose which in the opinion of the appropriate Government is of urgent importance:

the Collector may, immediately after the publication of the notice mentioned in sub-section (1) and with the previous sanction of the appropriate Government enter upon and take possession of such land, which shall thereupon vest absolutely in the Government free from all encumbrances;

Provided, that the Collector shall not take possession of any building or part of a building under this sub-section without giving to the occupier thereof at least forty-eight hour's notice of his intention so to do

(3) In every case under either of the preceding sub-sections the Collector shall at the time of taking possession offer to the persons interested compensation for the standing crop and trees (if any) on such land and for any other damage sustained by them caused by sudden dis-possession.. . .

(4) In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable, the appropriate Government may direct that the provisions of section 5-A shall not apply.

5. The pith and substance of the urgency provisions reproduced above is that waste or arable land needed for a public purpose or a Company may be taken possession of after 15 days of the publication of the notice under sub-section (1) of Section 9 in case of emergency, while under sub-section (2) the Railway Administration under clause (a), the Collector under Cl. (b) in specified cases and the State Government under clause (c), wherever it considers the public purpose to be of urgent importance may through a Collector acquire immediate possession of the land without resort to the provisions of Section 5-A of the Act.

6. In *Murari Lal Gupta's case*, ILR (1964) 2 Punj 405=(AIR 1964 Punj 477) the acquisition of petitioner's land in village Bohar was notified under Section 4 for the construction of 'Text Books Sales Depot' at Rohtak and under the urgency provisions of Section 17 without resort to the intervening processes of Sections 5-A and 6 of the Act. It was stated by the counsel for the State that the action had been taken under clause (c) as the appropriate Government considered the purpose to be of urgent importance. It was said by the Division Bench that in certain emergent situation the Government is empowered to take possession of the land

on the ground of its urgent requirement. If the land is waste or arable, it may be acquired under sub-section (1). Even if the land is neither waste nor arable, it can still be acquired under clauses (a) and (b) of sub-section (2) for certain specified purposes. Clause (a) of sub-section (2) deals with a situation which does not brook of any delay and manifestly the purpose of acquisition would be defeated altogether if the usual formalities prescribed in the various sections of the Act are not dispensed with.

Clause (b) of sub-section (2) sets out further special purposes for which acquisition under Section 17 may be resorted to. Being of the opinion that the construction of a Text Books Sales Depot did not fall under any of the purposes mentioned in clauses (a) and (b), it was observed by the Bench that —

"Clause (c) of sub-section (2) introduced by the Punjab Amending Act no doubt enlarges the scope of acquisition but it has to be read ejusdem generis with clauses (a) and (b) where specific purposes for which acquisition can be made under Section 17 are definitely set out. Clearly, the construction of a depot for sale of text books is not in line with the purposes specified in clauses (a) and (b) of sub-section (2) of Section 17 and it cannot be defended on the specious ground that the Government considers the purpose to be of urgent importance."

In other words, the purpose does not become of urgent importance by the Government merely calling it so.

7. Two distinct propositions of law can be spelled out from the decision in *Murari Lal Gupta's case*, ILR (1964) 2 Punj 405=(AIR 1964 Punj 477). First, that the Court is entitled to examine the question whether there is *prima facie* ground for urgency, and secondly, that clause (c) has to be read ejusdem generis for the purposes enumerated in clauses (a) and (b).

8. The notification issued under clause (c) of sub-section (2) of Section 17 having been set aside by the Bench in *Murari Lal's case*, ILR (1964) 2 Punj 405=(AIR 1964 Punj 477) a fresh notification was issued on 11th June, 1964 under Section 4 of the Act, and this time it was made clear that the acquisition was made under the provisions of sub-section (1) of Section 17 of the Act and that the Text Books Sales Depot at Rohtak was required to be set up urgently. Again, it was mentioned that the provisions of section 5-A would not apply in regard to this acquisition. *Murari Lal Gupta* again challenged this notification and the case was eventually heard by a Full Bench of Capoor, Dua and Pandit JJ. in *Murari Lal Gupta v. State of Punjab*, 1966-68 Pun LR 1=(AIR 1966 Punj 59) (FB). The petition, which was dismissed

by the Full Bench, also considered the earlier judgment of Mahajan J. and myself in ILR (1964) 2 Punj 405=(AIR 1964 Punj 477), and as observed by Grover J. in the judgment under appeal, the learned Judges of the Full Bench did not differ from the conclusions reached by Mahajan J. and myself.

Grover J. after considering the impact of the Full Bench decision on the earlier decision in ILR (1964) 2 Punj 405=(AIR 1964 Punj 477), allowed the appeal and quashed the notification in question. Two Letters Patent appeals were preferred, one by the Printers House (Private) Limited, at whose instance and for whom the acquisition had been made by the State Government, and the second by the State of Punjab (now the successor State of Haryana), these being L. P. As Nos. 20 and 29 of 1966.

9. Before the Letters Patent Bench, a point was taken that the observations made by the Division Bench in Murari Lal Gupta's case, ILR (1964) 2 Punj 405=(AIR 1964 Punj 477) regarding the applicability of the doctrine of ejusdem generis were open to question and being of the opinion that the matter required reconsideration on this score reference has been made for decision by a Full Bench.

10. Besides the two propositions of law, decided by the Division Bench in ILR (1964) 2 Punj 405=(AIR 1964 Punj 477) to which reference has just been made, there is yet a third question which arises for determination, that being whether on the facts established in this case there is ground for the opinion of the appropriate Government that the acquisition is of urgent importance under clause (c) of sub-section (2) of Section 17 of the Act?

11. The first question, to which we must now turn, is concerned with the question whether at all the ground of urgency of a public purpose is justifiable? It has been very vehemently urged by Mr. Jagan Nath Kaushal, the learned counsel for the appellant, that the Full Bench of this Court in Murari Lal Gupta v. State of Punjab, 1966-68 Pun LR I=(AIR 1966 Punj 59) (FB), has taken the view that the existence of urgency is a matter purely for the subjective satisfaction of the Government and is not debatable in a Court of law. There is no doubt that some of the observations made in the Full Bench case support this contention. The question is dealt with at page 7 in these words:—

"The question now arises as to whether this Court can go into the matter at all or is it solely for the Government to decide whether in a particular case an urgency exists or not. This question came up for consideration before a Bench of

the Madras High Court consisting of Rajamannar C. J. and Venkatarama Aiyer J. in Natesa Asari v. State of Madras, AIR 1954 Mad 481, where it was held that whether an urgency existed or not was a matter solely for the determination of the Government and it was not a matter for judicial review. This decision was followed by the Andhra Pradesh High Court in Harihara Prasad v. K. Jagannadham, AIR 1955 Andhra 184."

The Full Bench, however, noted that it is possible to envision cases where the Government may act under Section 17 without there being any real urgency in the matter and such a notification would be open to the criticism that it has been issued without the authority of law. The Full Bench also noted the following observation in the Mysore case of Kashappa Shivappa v. Chief Secretary to the Govt. of Mysore, AIR 1963 Mys 318:—

"...The opinion formed by the Government in their mind of the existence of urgency may be above judicial review; but there may be a case in which High Court may yet find it possible to say that that opinion is an impossible opinion either by reason of the fact that it rests upon no ground at all or rests on grounds which are demonstrated to be thoroughly irrelevant".

The conclusion of the Full Bench in 1966-68 Pun LR I=(AIR 1966 Punj 59) (FB) is as follows:—

"Thus it would be seen that all the authorities, referred to above, have taken the view that the question whether an urgency exists or not is a matter solely for the determination of the Government and it is not a matter for judicial review. The learned Judges of the Mysore High Court, however, have put a rider to this broad proposition, when they stated that there might be a case in which High Court might yet find it possible to say that the opinion formed by the Government was an impossible opinion either by reason of the fact that it rested upon no ground at all or rested on grounds which were demonstrated to be thoroughly irrelevant. They are, however, of the view that the opinion clearly formed by the Government in their mind of the existence of urgency was above judicial review and the High Court could not substitute its own opinion for the opinion of the Government that the case was, undoubtedly, one of urgency."

The learned Judges of the Full Bench seem to have recognised the cogency of the argument of the Mysore Court in the observation made by Pandit J., speaking for the Court, at page 10:—

"Thus, the opinion about the urgency formed by the Government in the present case was not an unreasonable one."

12. The language in which this conclusion is clothed makes it clear to us that the Court may determine the question whether the decision reached about the subjective satisfaction of the Government on the question of urgency is the one which could have been so reached reasonably. It is unnecessary to discuss the authorities to which reference has been made in the Full Bench of this Court in view of the latest pronouncement of the Supreme Court in *Raja Anand Brahma Shah v. State of Uttar Pradesh*, AIR 1967 SC 1081. Emphasising that the declaration made by the State Government in a notification that the land is required for a public purpose is conclusive on the point regarding the existence of the public purpose, as was also decided in an earlier Supreme Court judgment in *Smt Somawanti v State of Punjab*, AIR 1963 SC 151, it was further held that a notification under Section 17 of the Act directing that the provisions of Section 5A shall not apply may in certain cases be declared *ultra vires*. Speaking for the Court, Mr Justice Ramaswami observed at page 1086 —

"If therefore in a case the land under acquisition is not actually waste or arable land but the State Government has formed the opinion that the provisions of sub-section (1) of Section 17 are applicable, the Court may legitimately draw an inference that the State Government did not honestly form that opinion or that in forming that opinion the State Government did not apply its mind to the relevant facts bearing on the question at issue. It follows, therefore, that the notification of the State Government under Section 17(4) of the Act directing that the provisions of Section 5A shall not apply to the land is *ultra vires*."

What is said of sub-section (4) of Section 17 applies with full force to sub-section (2) with which we are concerned in these appeals. In reaching this conclusion the Supreme Court was influenced by the following observation made by the Judicial Committee of the Privy Council in *Ross Clunis v. Papadopoulos*, 1958-1 WLR 546.—

"Their Lordships feel the force of this argument, but they think that if it could be shown that there were no grounds upon which the Commissioner could be so satisfied, a Court might infer either that he did not honestly form that view or that in forming it he could not have applied his mind to the relevant facts"

13. We think, therefore, that if the question of urgency has been decided on grounds which are non-existent or irrelevant, or on material on which it would be an impossible conclusion to reach, it could legitimately be inferred that the

mind has not been applied at all. Even Mr. Kaushal conceded that the proved mala fides would alter the complexion of the conclusion reached on subjective satisfaction on the question about the existence of urgent importance or urgency. It seems manifest to us that the question must be examined by Court before it could be found that the decision was reasonable. In other words, the question is not such which could be declared non-justiciable outright.

14. Turning now to the second question about the reasoning employed by the Division Bench in *Murari Lal Gupta's case*, ILR (1964) 2 Punj 405 = (AIR 1964 Punj 477), regarding the rule of *ejusdem generis*, it may first be observed that clauses (a), (b) and (c) of sub-section (2) of Section 17 provide for three separate and distinct situations. Clause (a) deals with an emergency which requires an immediate solution without any possible delay. A sudden change in the channel of any navigable river or other unforeseen situation may compel the Railway Administration to acquire immediate possession of any land for the maintenance of any railway traffic or for the purpose of making thereon a river-side or ghat, or a station. Manifestly, the sole judge of the situation in such a case is the Railway Administration and as was observed by the Division Bench, the problem posed before the concerned authority does not brook of any delay in its solution.

15. Clause (b) is concerned with six purposes for which in the opinion of the Collector, land is urgently required, such enumerated purposes being for —

(i) any library or educational institution,

(ii) construction, extension or improvement of any building or other structure in any village for the common use of the inhabitants of such village,

(iii) any godown for any society registered under the Co-operative Societies Act, 1912,

(iv) any dwelling house for the poor, or the construction of labour colonies or houses for any other class of people under a Government-sponsored Housing Scheme,

(v) irrigation tank, irrigation or drainage channel, or any well, and

(vi) any public road."

The purposes differ in their range and variety and it may be possible to categorise them under the head of 'public utility.'

16. Clause (c), in the construction of which the rule of *ejusdem generis* has been invoked, deals with a single class of cases where land is required for a public purpose which in the opinion of the appropriate Government is of urgent importance. Now, '*ejusdem generis*' as a

maxim of construction, as opposed to a rule of law, literally means "of the same kind or species." The rule of ejusdem generis in Halsbury's Laws of England (Simonds edition) Volume 36, at page 397, has been described thus :—

"As a rule, where in a statute there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified, although this, as a rule of construction, must be applied with caution, and subject to the primary rule that statutes are to be construed in accordance with the intention of Parliament. For the ejusdem generis rule to apply, the specific words must constitute a category, class or genus: if they do constitute such a category, class of genus then only things which belong to that category, class or genus fall within the general words"

A simple exposition of the rule extracted from an old judgment of Lord Campbell in *R. v. Edmundson*, is thus worded at page 179 of Craies on Statute Law (Sixth edition):—

"I accede to the principle laid down in all the cases which have been cited, that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified."

At page 181 of the same treatise, there is a quotation of Lord Justice Farwell that "unless you can find a category, there is no room for the application of the ejusdem generis doctrine." (*Tillmanns & Co. v. S. S. Knutsford Ltd.*, (1908) 2 KB 385).

17. In Sutherland's Statutory Construction (third edition) Volume 2, at page 395, there is a further elaboration of the doctrine:— "A variation of the doctrine of *noscitur a sociis* is that of ejusdem generis. Where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words" and at page 400 it is said that "the doctrine applies when the following conditions exist:—

(1) the statute contains an enumeration by specific words;

(2) the members of the enumeration constitute a class,

(3) the class is not exhausted by the enumeration;

(4) a general term follows the enumeration, and

(5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires."

This statement of the law is incorporated in the judgment of Dua J. in *Gur-*

bachan Singh v. Ichhar Singh, ILR 1965 (1) Punj 532, of which mention has been made by Harbans Singh J. in the referring order.

18. Applying these principles to the instant case, it will be seen that as clause (c) mentions only one situation and one alone, there obviously cannot be any category to which the doctrine of ejusdem generis may apply. The phrase 'ejusdem generis' is merely a rule of construction and not a rule of substantive law and is hardly applicable where the intention of the Act is otherwise clear. If a general word, in other words, is added to specific words, the general word would take its colour from the specific words, and obviously when there are no specific words in clause (c) the rule of ejusdem generis will not be applicable.

19. Can it be said that the six situations mentioned in clause (b) even if they constitute a category, can be pressed into service for invoking the aid of the rule of ejusdem generis? The answer is not left in any doubt when we find that clause (c) like clause (a) deals with a single independent situation where the general or specific terms do not occur. It would hardly be reasonable to tack clause (c) with the specific words of clause (b) and not with clause (a) which deals with a situation which is not at all comparable to the contents of the subsequent clauses.

20. Moreover, the essential prerequisite of the doctrine is that there must be coupling of words together to show that they are to be understood in the same sense. Now, clause (b), to repeat, deals with six situations which in the opinion of the Collector require immediate possession. Clause (c) deals with the acquisition of land which in the opinion of the appropriate Government, and not of the Collector, is of urgent importance. It seems to us that from whatever perspective the contents of clauses (a), (b) and (c) are viewed, they deal not only with separate and distinct matters and situations but in fact each of the clauses constitutes a different category altogether. It may be that clause (b) can be grouped in a single category of public utility, but the appropriate Government is not bound to see under Cl. (c) that the acquisition which in its opinion is of urgent importance, fulfils also the prerequisite of being required for a public utility.

21. It is necessary only to refer to Supreme Court decisions on this aspect of the case. In *State of Bombay v. Ali Gulshan*, AIR 1955 SC 810, it was observed by Mr. Justice Chandrasekhara Aiyar at page 812 that the ejusdem generis rule must be confined within narrow limits, and general or comprehensive words should receive their full and natural meaning unless they are clearly

restrictive in their intendment. It is requisite that there must be a distinct genus, which must comprise more than one species before the rule can apply. In *Lila Vatu Bai v. State of Bombay*, AIR 1957 SC 521, the words 'or otherwise' had to be construed with other specified words, and Mr Justice Sinha at page 529 said:—

"The rule of ejusdem generis is intended to be applied where general words have been used following particular and specific words of the same nature on the established rule of construction that the Legislature presumed to use the general words in a restricted sense; that is to say, as belonging to the same genus as the particular and specific words"

22. In *Kottarathil Kochuri v States of Madras and Kerala*, AIR 1960 SC 1080, it was observed by their Lordships at page 1103 with regard to the word "otherwise" used in the statute "The word 'otherwise' in the context, it is contended, must be construed by applying the rule of ejusdem generis. The rule is that when general words follow particular and specific words of the same nature, the general words must be confined to the things of the same kind as those specified. But it is clearly laid down by decided cases that the specific words must form a distinct genus or category. It is not an inviolable rule of law, but is only permissible inference in the absence of an indication to the contrary."

23. In *Dr. Indramani v. W. R. Natu*, 1963 (1) SCR 721=(AIR 1963 SC 274) the words 'such other duties' came to be discussed regarding the functions of the Commission on Forward Markets. In the earlier clauses the functions of the Commission were so described and in clause (f) it was said that the Commission was to perform "such other duties and exercise such other powers as may be assigned to the Commission by or under this Act, or as may be prescribed". It was held in this case that the other duties or other powers which were to be assigned to the Commission were either to be ejusdem generis with advisory or recommendatory powers or of a nature similar to those enumerated in the previous sub-clauses. According to the Supreme Court, if there is no common positive thread running through previous clauses, the doctrine would not be attracted.

24. That there must be a distinct genus or category before the rule of ejusdem generis is applied was affirmed by the Supreme Court in *Rajasthan State Electricity Board, Jaipur v. Mohan Lal*, AIR 1967 SC 1857.

25. To conclude, Clause (c) of sub-section (2) of Section 17 of the Act deals with an independent situation and is a category by itself. There is no common

thread running between clause (c) and the previous cls. (a) and (b) and there are no specified categories or classes in cls (a) or (b) which might be coupled with what is required in clause (c). We are of the opinion, therefore, that the observation made in the Division Bench judgment in *Murari Lal Gupta's case*, ILR (1964) 2 Punj 405 at p. 413=(AIR 1964 Punj 477 at p. 479) that "clause (c) of sub-section (2) introduced by the Punjab Amending Act no doubt enlarges the scope of acquisition but it has to be read ejusdem generis with clauses (a) and (b) where specific purposes for which acquisition can be made under Section 17 are definitely set out" is too widely worded for acceptance. Indeed, there is no room or scope for the application of the doctrine of ejusdem generis in the construction of clause (c) of Section 17 (2) of the Act. The validity and integrity of the judgment on the main question that the construction of a depot for sale of text books did not fall within the mischief of clause (c) of sub-section (2) of Section 17 of the Act is not, however, affected in any way.

26. We now finally come to the question of fact concerning the existence of urgency for the acquisition. While we are in agreement with the opinion of Grover J. about the defective pleadings in this case, there is in our view sufficient material to hold that the State Government reached a reasonable conclusion regarding the existence of urgency. What was actually brought in the limelight by the plaintiff in his plaint was that the saw mill factory was working since January, 1956, and a large amount had been spent on building, machinery and material. At best, the plaintiff had set up a plea that his own saw mill was of importance both from his personal and public point of view and this is all that Mr. Sarin, his learned counsel, has been able to urge before us. In the written statement it was pleaded that the Punjab Government had acquired a considerable factory site for a venture which is "the first of its type in the country".

"Printing machinery and accessories have to be imported from abroad. The factory will not only supply national requirements of the said machinery but will also provide work for thousands of workers. It will also help to save foreign exchange." It was pleaded that the State Government had agreed to acquire 113 Kanals and 17 Marlas of land for public purpose at public expense. There can be no manner of doubt that the establishment of the factory for the manufacture of printing machinery which hitherto has been imported from abroad is a public purpose of undoubted national importance. There is the un rebutted statement of Bishan Dass Kohli D. W. 2 who is the Director

of the appellant company. According to this evidence, the foreign exchange position had become unsatisfactory in 1957-58 and the company was advised by the Government of India to stop importing the machines from abroad and to manufacture the same within the country. In face of these pleadings and testimony, we feel not the slightest doubt on the question that the Government had reached its conclusion in a reasonable and bona fide manner. The matter was undoubtedly of urgent importance and the invocation of the provisions of Section 17 of the Act was clearly justifiable.

26-A. In this view of the matter, the appeals must be allowed, the order of the learned Single Judge set aside and the suit of the plaintiff dismissed. In the circumstances, we would make no order as to costs of this litigation.

27. So far as Civil Writ No. 917 of 1967 is concerned, it will now be sent back to the learned Single Judge for decision in accordance with the views expressed aforesaid on the legal questions referred to us. We further direct that this petition be listed for hearing before a learned Single Judge next week.

28. MAHAJAN J. :— I agree.

29. NARULA, J.:— In view of the reasons recorded in the judgment of the Full Bench prepared by my Lord Shamsheer Bahadur, J., it is clear that clause (c) of sub-section (2) of Section 17 of the Act is not required to be read ejusdem generis with clauses (a) and (b) of that sub-section. Observations to the contrary in the Division Bench judgment in Murari Lal's case, ILR (1964) 2 Punj 405 = (AIR 1964 Punj 477) do not, therefore, lay down correct law. Each of the three clauses of sub-section (2) of Section 17 of the Act forms a separate class by itself and the different classes of urgency named in clauses (a), (b) and (c) of Section 17(2) form an independent genus by themselves and are not mere species of one common genus.

30. Regarding the scope of the jurisdiction of the Civil Courts to adjudicate upon the correctness or validity of a declaration of urgency made by the Collector under Section 17(4) of the Act, I am of the opinion that the said issue is not justiciable in view of the fact that the requisite declaration has to be made on the basis of the subjective satisfaction of the appropriate authority. This Court cannot, in any circumstances, substitute its own opinion for that of the appropriate authority regarding the question of urgency. At the same time I wish to make it abundantly clear that when the Court finds:—

(i) that the appropriate authority was in fact never satisfied about the urgency

either because it had no opportunity of being so satisfied or because there can be no possible two opinions on the admitted or proved facts of a given case and on the material placed before the Court, about there being no urgency whatever; or

(ii) that the basic facts on which the opinion as to urgency is stated to have been formed were admittedly non-existing; or

(iii) that the declaration in question has been made mala fide or for wholly extraneous reasons,

the Court does not substitute its own opinion for that of the statutory authority, but merely holds, in effect, that in the eyes of law no declaration of urgency has ever been made. Whenever the Court comes to a finding of this type, it never hesitates in striking down the impugned notification, whereby the citizen is sought to be deprived of his valuable statutory right under Section 5-A of the Act. Whether the declaration has been made without any basis or mala fide or without the authority concerned applying its mind to the facts of the case or not must, in the nature of things, depend on the facts and circumstances of each case and also depend on the material which the State chooses to place before the Court in which the legality of the declaration is questioned.

31. With these observations I concur in the order proposed by my learned brother Shamsheer Bahadur, J.

Appeals allowed.

AIR 1970 PUNJAB & HARYANA 9
(V 57 C 2)

FULL BENCH

MEHAR SINGH C. J., HARBANS SINGH,

D. K. MAHAJAN, RANJIT SINGH
SARKARIA AND B. R. TULI, JJ.

The State of Punjab, Appellant v. Bhagat Ram Patanga, Respondent.

Letters Patent Appeal No. 70 of 1964, D/- 10-4-1969, against judgment of A. N. Grover J., D/- 18-9-1963 reported in ILR (1964) 1 Punj 500.

Municipalities — Punjab Municipal Act (3 of 1911), S. 16(1)(e) — Order of removal from membership of committee passed by State Government—Order is quasi-judicial — Government is expected to give reasons for its decision — Executive file of Government giving a broad outline of process of reasoning in arriving at decision — Held sufficient compliance — ILR (1964) 1 Punj 500, Reversed — (Constitution of India, Art. 226 — Quasi-judicial order — Speaking order).

EM/FM/C327/69/KSB/D

The order of removal of a municipal Commissioner under Sec. 16(1)(e) of the Act is a quasi-judicial order, proceeding as it does on quasi-judicial proceedings of the nature as provided in the proviso to that provision, and the State Government while removing a Municipal Commissioner under Sec. 16(1) may be expected to give an outline of the process of reasoning by which it reached its decision AIR 1963 SC 395 & AIR 1964 SC 364 & AIR 1967 SC 1606 & AIR 1963 Punj 127 (FB), Rel on (Para 6)

Held, on facts that while passing the orders under S. 16(1)(e) against the two Municipal members removing them from membership and imposing a disqualification to stand for election for a period of three years the State Government had not proceeded merely on the recommendation of the Deputy Commissioner but had applied its mind to their cases. The executive files of the Government in these cases contained a broad outline of the process of reasoning by which the State Government reached its decisions. In these matters the executive files do not contain judgments in the manner in which the same are prepared in a court of law Civil Writ No 2189 of 1963, D/- 26-5-1967 (DB) (Punj) Dist Decision in ILR (1964) 1 Punj 500, Reversed, but on a different ground (Para 7)

Cases Referred: Chronological Paras

- (1968) AIR 1968 Punj 127 (V 55)=
ILR (1967) 1 Punj 260 (FB), Sahela
Ram v. State of Punjab 4, 5, 6
(1968) 70 Pun LR 244=1967 Cur LJ
828, Panna Lal v. Secretary to
Govt. Harvana Local Govt. Deptt. 4
(1967) AIR 1967 SC 1606 (V 54)=
(1967) 2 SCWR 598, Bhagat Raja
v. Union of India 4, 6, 7
(1967) Civil Writ No. 2189 of 1963,
D/- 26 5-1967 (DB) (Punj), Sahela
Ram v. State of Punjab 4, 7
(1966) AIR 1966 SC 671 (V 53)=
1966-1 SCR 466, Madhya Pradesh
Industries Ltd. v. Union of India 4
(1964) AIR 1964 SC 364 (V 51)=
(1964) 1 SCWR 28, Union of India
v. H. C. Goel 5, 6
(1963) AIR 1963 SC 395 (V 50)=
1962 All WR (HC) 746, Bachhittar
Singh v. State of Punjab 6
(1963) AIR 1963 Punj 280 (V 50)=
65 Pun LR 267 (FB), Joginder
Singh v. State of Punjab 3
(1961) AIR 1961 SC 1669 (V 58)=
(1961) 2 SCA 384, Harinagar Sugar
Mills v. Sham Sunder 6
(1959) Civil Writ No. 1243 of 1958
D/- 7-8-1959 (Punj), Chander Par-
kash Angrish v. State of Punjab 4
(1957) AIR 1957 SC 882 (V 44)=
1958 SCJ 142, Union of India v.
T. R. Verma 4

(1947) 1947-2 All ER 395=1947 WN
251, B Johnson & Co. (Builders)
Ltd v Minister of Health 5

M R Sharma, Deputy Advocate General Punjab and R. L. Sharma, for Appellant, Anand Swarup and R. S. Mittal with him, for Respondent.

MEHAR SINGH C. J. :— A meeting of the Phagwara Municipal Committee took place on June 20, 1960, for the election of the President and the Vice-President of the Committee. It was presided over by the Sub-Divisional Officer (Civil) In consequence of the behaviour of the respondents in that meeting the appellant proceeded against each under Section 16(1)(e) of the Punjab Municipal Act, 1911 (Punjab Act 3 of 1911), hereinafter referred to as 'the Act', by issuing a show-cause notice, Annexure 'A' with each of the two petitions by the respondents, Bhagat Ram Patanga and Om Parkash Agnihotri, on December 5, 1960, why action be not taken against the particular respondent under that provision

In the case of Bhagat Ram Patanga respondent, the show-cause notice read —
"It has been brought to the notice of the Government that on the 20th June, 1960, the Sub-Divisional Officer (Civil), Phagwara, convened a meeting of the newly elected members of the Municipal Committee, Phagwara, after the elections of the Committee, held on the 17-10-1959 in order to administer oath of allegiance and to conduct the election of the President of the Committee to enable the new Committee to take over the charge. You also attended that meeting at the time of the election of the office of the President. You were supporter of the group headed by Shri Om Parkash Agnihotri, member of the Committee whose candidature was proposed for this office. During the course of the meeting when Shri Om Parkash Agnihotri became unruly and began to tear his clothes, beat his chest, and create a row, you managed to bring some outsiders in the Town Hall to cause disturbance at the meeting. Moreover you did not maintain decorum or care to obey the chair. By your aforesaid action you have flagrantly abused your position as a member of the Committee within the meaning of section 16(1)(e) of the Punjab Municipal Act, 1911. I am directed to call upon you to show cause under proviso to Sec. 16(1)(e) *ibid*, why you should not be removed from the membership of the Committee under Section 16(1)(e) *ibid*. You should tender your explanation to the Deputy Commissioner, Kapurthala, with an advance copy to Government together with copy (copies) of document (s), if any, so as to reach them within a period of twenty-one days

from the date of despatch of this letter. In case no explanation is submitted by you within the stipulated period, it will be considered that you have no explanation to offer and Government may proceed ahead to notify your removal."

An exactly similar show-cause notice was served on Om Parkash Agnihotri respondent. In reply Bhagat Ram Patanga respondent in his letter of December 16, 1960, said — "As to what happened in the meeting on the 20th June, 1960, is the subject-matter of a writ petition filed by the petitioner and five other Municipal Commissioners.

It is in the fitness of things that when the matter is pending before the High Court of Punjab no action should be taken by the Government till the matter is decided by the High Court. As will be clear from the facts stated in paras Nos. 5 to 11 of the writ petition, the conduct of the petitioner (respondent Bhagat Ram Patanga) was not at all blameworthy. On the other hand a great injustice was done to the petitioner and other five Municipal Commissioners who have filed the writ, by the Sub-Divisional Officer (Civil) Phagwara who adopted illegal methods for converting the majority of Shri Om Parkash Agnihotri (respondent) into minority. The behaviour of the Sub-Divisional Officer, Phagwara, was high-handed and absolutely unwarranted. The persons who came in the hall where the meeting was being held belonged to the party of the opposite group of Shri Bhagat Ram and they were made to sit in the room of the Executive Officer and had entered the meeting hall at the instance of the opposite party. They started manhandling Shri Om Parkash Agnihotri (respondent) and one of them tore his shirt. The allegation that the petitioner did not maintain the decorum and that he did not obey the chair is totally denied. In fact he did not flout the authority of the chair but unfortunately the attitude of the chair was partial and one-sided. The provisions of Section 16(1)(e) of the Punjab Municipal Act are not at all attracted in the present case. What happened in the meeting has nothing to do with the petitioner's flagrantly abusing his position as a member of the committee." The reply, dated December 17, 1960, of Om Parkash Agnihotri respondent was word for word copy of the explanation rendered by Bhagat Ram Patanga respondent. The incident in the meeting of the Committee took place on June 20, 1960. Bhagat Ram Patanga respondent filed his petition under Article 226 of the Constitution on January 5, 1963. It appears that Bhagat Ram Patanga and five other members of the Committee filed a petition against the

election of Bhag Ram as President of the Phagwara Municipal Committee which was Civil Writ No. 1095 of 1960. That petition appears to have been filed before the show-cause notices were served on the respondents. It was, however, dismissed after the service of those notices on the respondents on the ground that it involved disputed matters of fact.

2. After consideration of the explanation of Bhagat Ram Patanga respondent, the following order was made against him on September 11, 1962 — "Whereas the Governor of Punjab after giving an opportunity to Shri Bhagat Ram Patanga, Member, Municipal Committee, Phagwara of tendering an explanation under the proviso to Section 16 of the Punjab Municipal Act, 1911, is satisfied that the said Shri Bhagat Ram Patanga has flagrantly abused his position as a member of the aforesaid Committee: Now, therefore, in exercise of the powers vested in him under clause (e) of sub-section (1) of Section 16 *ibid*, the Governor of Punjab is pleased to remove the said Shri Bhagat Ram Patanga from the membership of the Municipal Committee, Phagwara, from the date of publication of this notification in the official gazette and is further pleased to disqualify the said Shri Bhagat Ram Patanga for a period of three years from the aforementioned date under sub-section (2) of Section 16 *ibid*."

Exactly similar order was made on the same date with regard to Om Parkash Agnihotri. Each one of the two respondents filed a separate petition challenging the legality and validity of his removal from the membership of the Phagwara Municipal Committee and his disqualification for three years from contesting election to the same Committee. The appellant, the State of Punjab, resisted both the petitions.

3. The petitions of the respondents were heard by Grover J., and by his order under appeal, of September 18, 1963, the learned Judge accepted the petitions quashing the order of the appellant in each case. It was urged before the learned Judge that even if the allegations made against the respondents were to be accepted as correct, which were, however, emphatically denied and according to the counter version of the respondents it were the supporters of Bhagat Ram who had created trouble, and although such a conduct would be most condemnable and reprehensible, it would nevertheless not be covered by the expression 'has flagrantly abused his position as a member of the Committee'. It is on this consideration alone on the basis of which the learned Judge proceeded to come to the conclusion that the conduct of each one of the respondents in the

meeting of the Phagwara Municipal Committee called in connection with the election of its President and Vice-President was not 'flagrant abuse of his position as a member of the Committee' by him, as the learned Judge was of the opinion that it is only in the discharge of his duty as member that if a person is guilty of flagrant abuse of his position that his case would be covered by Section 16(1)(e) of the Act and that 'on the showing of the Government itself the orders made were plainly ultra vires the section even if it be assumed that they were passed bona fide, and that the grounds which led to the making of those orders were neither germane nor relevant to the provisions of Section 16(1)(e) of the Act. Whatever misconduct was attributed to the petitioners (respondents) was not of such a nature as could have the remotest connection with the discharge of their duty as members of the Committee and although lack of decorum and dignity and introducing incitement and unruly element in a solemn meeting of the Committee was much to be deprecated, if true, but that could not justify the removal of the petitioners (respondents) on the ground that they had flagrantly abused their position as members of the Committee." The learned Judge sought support for his conclusion from the observations of Dulat J., in the Full Bench case of Joginder Singh v. State of Punjab, 65 Pun LR 287=(AIR 1963 Punj 280 (FB)) but, on facts, that was a case nothing parallel to the present cases, and the observations of Dulat J. in that case, concurred to by the other learned Judges do not support this conclusion of the learned Judge. So, the learned Judge proceeded to quash the orders of the appellants State Government removing each one of the respondents from the membership of the Phagwara Municipal Committee and disqualifying him from being elected to the same for a period of three years. This was on September 18, 1963.

4. It is against the judgment and order of the learned Single Judge that the appellant State has filed two appeals under Clause 10 of the Letters Patent, No 70 of 1964 against Bhagat Ram Patanga respondent, and No. 71 of 1964 against Om Parkash Agnihotri respondent. These appeals first came for hearing before my learned brother Tuli J., and myself, when on August 7, 1968, we made reference of these two appeals to a larger Bench. The reasons for the same are reproduced as below.

"In Chander Parkash Angrish v. State of Punjab, Civil Writ No 1243 of 1958, decided on August 7, 1959 (Punj), what was alleged against the member of the Municipal Committee was that he had ab-

used the Chairman of the Committee at a meeting of the same. The member was removed from the membership of the Committee under Section 16(1)(e) of the Act with a disqualification of three years from contesting election to the committee on such misbehaviour and unruly conduct. He filed a petition under Article 226 of the Constitution to challenge the validity and legality of his removal and S. B. Capoor J., while dismissing the petition, observed — 'Bye-law 117 of the Model Business Bye-laws provides that the Chairman may name an unruly member for report to Government under Section 16(1)(e) of the Act. The last paragraph of the proceedings of the meeting of the 6th of August 1957 (copy annexure 'A') shows that the petitioner was not allowing the president to proceed with the meeting and he and others were too rowdy to allow respondent 2 to proceed with the next item on the agenda, so that he was obliged to adjourn the meeting. In these circumstances this Court would not in a writ petition under Article 226 of the Constitution of India as laid down in Union of India v. T. R. Verma, AIR 1957 SC 882 at p 884, enter into the disputed questions of fact which cannot satisfactorily be decided without taking evidence.' This case rather speaks against the opinion of Grover J. in his order under appeal. No other case has been brought to our notice during the hearing of the arguments on this matter except Panna Lal v. Secretary to Govt., Haryana, Local Govt. Dept., (1968) 70 Pun LR 244, in which Tek Chand J. considered the meaning of the word 'flagrantly' as used in Section 16(1)(e) of the Act, and the learned Judge observed — "'flagrantly' means glaringly, notoriously, scandalously. Literally flagrant means blazing, burning, flaming, flowing. In respect of an offence or a misconduct, it is used in the sense of glaring, notorious, scandalous, that is to say 'flaming into notice'. The framers of the statutory rules were drawing a distinction between a mere abuse of one's position and a 'flagrant abuse' to which the epithets of 'enormous', 'heinous' or 'glaringly wicked' could be applied. A position is said to be abused when it may be put to a bad use; or for a wrong purpose. In the sense of abusing one's position, the term has meaning varying in shades from irregular and improper use not necessarily with a bad motive, to an intended or deliberate corrupt practice. The statutory rule as worded clearly suggests that abuse of one's position, unless flagrant, would not result in removal of a member of the committee. The word 'flagrantly' before 'abused his position' cannot be overlooked. It indicates a stress being laid upon the nature of abuse of position which must in the cir-

cumstances be glaring, notorious, enormous, scandalous or wicked." If this observation of the learned Judge is taken into consideration, obviously the conduct of both the respondents would rather answer to their having flagrantly abused their position as members of the Committee. They had no business to be in the meeting of the Committee on the particular date but as members of the same. They were participating in the meeting of the Municipal Committee in their capacity as its members. The Committee had met to elect its President and Vice-President. It was in the course of the proceedings to that effect that the respondents so conducted themselves as was not consistent with the conduct on their part as members of the Committee, in other words, they did not conduct themselves in the manner as their position as members of the Committee participating in the election of its President and Vice-President required. Their behaviour was to say the least scandalous. They could only indulge in that behaviour because of their having occupied the position of members of the Committee, otherwise they could not be in the meeting. So they abused their position as members of the Committee to behave in the manner in which they behaved during the course of the proceedings of the Committee for election of its President and Vice-President. I should immediately have been disposed to the view that there is no adequate justification for reaching the conclusion that such behaviour was extraneous or unconnected with the position of the respondents as members of the Committee. I should have been disposed to take an entirely different view from that of the learned Single Judge and would not have interfered in their petitions against the orders of the appellant. However, if this was the only matter for consideration, it was sufficient for the disposal of the present appeals, but another matter has been raised by the learned counsel for the respondents, which matter cannot be disposed of by this Bench.

The reason for that is that the point raised by the learned counsel for the respondents seems to find support from a Division Bench decision of this Court in *Sahela Ram v. State of Punjab*, Civil Writ No. 2189 of 1963 (Punj) given by Grover and Pandit J.J., on May 26, 1967. In that case the State Government had made an order under Section 15 of the Punjab Agricultural Produce Markets Act, 1961, removing a certain member of a Market Committee from its membership, and the learned Judges struck down the order on the grounds that it was a quasi-judicial order, that such order must give reasons for the decision arrived at

in it, and that no reasons had been recorded by the State Government in the order impugned in that case. Of course no reasons have been given by the appellant in the orders under consideration in these appeals. The learned Judges had proceeded to this approach following, firstly, *Sahela Ram v. State of Punjab*, ILR (1967) 1 Punj & Har 260 = (AIR 1968 Punj 127 (FB)) in which a Full Bench of this Court held that an order removing a member of a Market Committee under Section 15 of the Punjab Agricultural Produce Markets Act, 1961—which Section is parallel to Section 16 of the Act,—is a quasi-judicial order; and secondly, two decisions of their Lordships of the Supreme Court reported as *Madhya Pradesh Industries Ltd. v. Union of India*, AIR 1966 SC 671, and *Bhagat Raja v. Union of India*, AIR 1967 SC 1606. But the last-mentioned two cases were under the Mines and Minerals (Regulation and Development) Act, 1957, and cases under that Act affect other persons as also properties of very considerable value, and then their Lordships observed that the rejection of a revision application by the Central Government under the provisions of that Act must give reasons because an appeal under Article 136 of the Constitution could come before the Supreme Court. It is obvious that where the power is appellate or revisional, then (a) the original authority must give reasons for its order to enable the appellate or the revisional authority to review such order according to law, and (b) the appellate and the revisional authority must give reasons for its order so that the parties before it may know on what basis its review of the order of the original authority has proceeded. So that it appears that, on facts, apparently the two Supreme Court cases do not seem to bear analogy to a case under Sec. 16 (1)(e) of the Punjab Municipal Act. There is no appeal provided from the order of the State Government under that provision. It has been urged by the learned counsel for the appellant that this is a new argument raised in these appeals under clause 10 of the Letters Patent for the first time by the respondents and they should not be permitted to do so, but it is pointed out that when the learned Judges of the Division Bench in Civil Writ No. 2189 of 1963 (Punj) on May 26, 1967, proceeded to interfere with the order of the State Government in that case, they also did so when the petitioner in that case had not taken that as a ground of attack against the impugned order in the petition itself. We are of the opinion that the question whether an order of the State Government under Section 16 of the Punjab Municipal Act is or is not to be struck down because it

does not give reasons for its making by the State Government, even though no other flaw can be pointed out in it, is rather important question which is not only likely to arise in cases under this particular Act, but may well arise under other statutes having similar provisions such as Section 15 of the Punjab Agricultural Produce Markets Act, 1961, and that this question should, therefore, be disposed of by a larger Bench.

It is because we are referring this case on the last mentioned question to a larger Bench, therefore, we leave the first question also for consideration of the same Bench, for it is also a matter of importance as to what exactly is the meaning and scope of clause (e) of sub-section (1) of Section 16 of the Act and whether misbehaviour or misconduct during the meeting of a Municipal Committee is something extraneous and irrelevant to the position of a member of it, or whether it is something which can be said to be abuse of a flagrant nature of his position as such member."

5. The two appeals then came before a Bench consisting of my learned brothers R. S. Sarkaria and B. R. Tuli, JJ., and myself on February 20, 1969. In the reference order of that date we affirmed the conclusion reached by the Division Bench that 'the conduct of each one of the respondents amounts to flagrant abuse of his position as a member of the Phagwara Municipal Committee', and we said that there was no need of further reference of this part of the case to a still larger Bench. The Full Bench case reported as ILR (1967) 1 Punj & Har 260 = (AIR 1963 Punj 127 FB) was considered, and it was pointed out that it has been held in that case that an order under a similar provision as in the Punjab Agricultural Produce Markets Act, 1961, Section 15, is a quasi-judicial order, and in the judgment, when discussing the nature of the order under that provision, support was sought from judgments of various learned Judges of this Court under Section 16(1)(e) of the Act, in which judgments the learned Judges were disposed to the view that an order under the last-mentioned provision is of a quasi-judicial nature. Having referred to Sahela Ram's case, ILR (1967) 1 Punj & Har 260 = (AIR 1963 Punj 127 FB) we proceeded to make reference of these two appeals to a larger Bench of five Judges on two considerations — (a) that 'not every order preceded by a quasi-judicial proceeding is necessarily a quasi-judicial order', and (b) that 'the statutory procedure in the proviso to Section 16(1) of the Act having been literally and completely complied with, was there anything more left to be done by the appel-

lant for taking action according to Section 16(1)(e) of the Act? In regard to the first consideration I had in mind B. Johnson & Co (Builders), Ltd v. Minister of Health, (1947) 2 All ER 395, which seems to find support also from Union of India v H C Goel, AIR 1964 SC 364. In regard to the second consideration I had in mind the proviso to sub-section (1) of Section 16 of the Act, which provides complete procedure for the removal of a member of a Municipality and gives the details of the nature of hearing to which he is entitled before an adverse order is made against him, and this remark in Halsbury's Laws of England, Third Edition, Volume 11, page 61, —

'The tribunal is not (unless so required by statute) obliged to set out in its adjudication the reasons which led it to its decision, but if it does state them the superior Court will consider the question whether they are right in law, and if they are wrong in law, will quash the decision.' In so far as section 16(1) of the Act is concerned, the statute does not require that the State Government while proceeding under that provision should give reasons for its decision.

In these appeals three questions arise, (a) whether the decisions and orders of the appellant removing each one of the two respondents under Section 16(1)(e) of the Act from the membership of the Phagwara Municipal Committee are quasi-judicial, (b) if the answer to the above question is in the affirmative, whether the appellant was required by law to state reasons for its decisions, and (c) if the answer to the second question is in the affirmative, whether the appellant has in fact set out any reason for its decisions against the respondents, removing them from the membership of the Phagwara Municipal Committee and imposing a disqualification for three years on each to contest an election to that municipality?

6. The first two questions may be taken together. In Sahela Ram's case, ILR (1967) 1 Punj & Har 260 = (AIR 1963 Punj 127 FB) the matter was reviewed at quite a length and the cases on the subject decided in this Court, and the relevant decisions of the Supreme Court to the date of the decision in that case, were considered, and it was held by the Full Bench that an order removing a member of a Market Committee, whose removal is in exactly the same manner as that of a member of a Municipal Committee under Section 16(1)(e) of the Act, is a judicial or a quasi-judicial order as the authority removing such a member, in doing so, acts judicially. After that decision now only three cases decided by their Lordships of the Supreme Court

need be considered. The first of those cases is *Bachhittar Singh v. State of Punjab*, AIR 1963 SC 395. In that case *Bachhittar Singh* appellant had been dismissed from service after enquiry and the case was considered having regard to the provisions of Article 311(2) of the Constitution, and their Lordships at page 397 made this observation, relevant for the present purpose,—

"Departmental proceedings taken against a Government servant are not divisible in the sense in which the High Court understands them to be. There is just one continuous proceeding though there are two stages in it. The first is coming to a conclusion on the evidence as to whether the charges alleged against the Government servant are established or not and the second is reached only if it is found that they are so established. That stage deals with the action to be taken against the Government servant concerned. The High Court accepts that the first stage is a judicial proceeding — and indeed it must be so because charges have to be framed, notice has to be given and the person concerned has to be given an opportunity of being heard. Even so far as the second stage is concerned Article 311(2) of the Constitution requires a notice to be given to the person concerned as also an opportunity of being heard. Therefore this stage of the proceeding is no less judicial than the earlier one. Consequently any action decided to be taken against a Government servant found guilty of misconduct is a judicial order and as such it cannot be varied at the will of the authority who is empowered to impose the punishment. Indeed, the very object with which notice is required to be given on the question of punishment is to ensure that it will be such as would be justified upon the charges established and upon the other attendant circumstances of the case. It is thus wholly erroneous to characterise the taking of action against a person found guilty of any charge at a departmental enquiry as an administrative order."

The second case is that of *H. C. Goel*, AIR 1964 SC 364, which was also a case of dismissal of a Government servant from service and at page 369 of the report their Lordships observed —

"In dealing with writ petitions filed by public servants who have been dismissed, or otherwise dealt with so as to attract Article 311(2), the High Court under Article 226 has jurisdiction to enquire whether the conclusion of the Government on which the impugned order of dismissal rests is not supported by any evidence at all. It is true that the order of dismissal which may be passed against

a Government servant found guilty of misconduct, can be described as an administrative order; nevertheless, the proceedings held against such a public servant under the statutory rules to determine whether he is guilty of the charges framed against him are in the nature of quasi-judicial proceedings and there can be little doubt that a writ of certiorari, for instance, can be claimed by a public servant if he is able to satisfy the High Court that the ultimate conclusion of the Government in the said proceedings, which is the basis of his dismissal is based on no evidence. In fact, in fairness to the learned Attorney-General, we ought to add that he did not seriously dispute this position in law." The last case is AIR 1967 SC 1606, which though a case under the Mines and Minerals (Regulation and Development) Act, 1957, but these observations of their Lordships at pages 1613-1614, made after a full review of the previous decisions of the Supreme Court on the subject, are relevant for the present purpose — "Take the case where the Central Government sets aside the order of the State Government without giving any reasons as in *Harinagar Sugar Mills'* case, AIR 1961 SC 1669. The party who loses before the Central Government cannot know why he had lost it and would be in great difficulty in pressing his appeal to the Supreme Court and this Court would have to do the best it could in circumstances which are not conducive to the proper disposal of the appeal. Equally, in a case where the Central Government merely affirms the order of the State Government, it should make it clear in the order itself as to why it is affirming the same. It is not suggested that the Central Government should write out a judgment as Courts of law are wont to do. But we find no merit in the contention that an authority which is called upon to determine and adjudicate upon the rights of parties subject only to a right of appeal to this Court should not be expected to give an outline of the process of reasoning by which they find themselves in agreement with the decision of the State Government."

The conclusions that are available from the observations of their Lordships in these three cases may, for the purpose of the present appeals, be stated to be (a) that the order of removal of a Municipal Commissioner under Section 16(1)(e) of the Act is a quasi-judicial order proceeding as it does on quasi-judicial proceedings of the nature as provided in the proviso to that provision, and (b) that the State Government while removing a Municipal Commissioner under Section 16(1) may be expected to give an outline of the process of reasoning by which they reached their decision. No doubt

Bhagat Raja's case, AIR 1967 SC 1606 was a case of a revision to the Central Government and no appeal or revision from the State Government's order under Section 16(1) of the Act, removing a Municipal Commissioner and imposing disqualification on him to contest election to a Municipality for a stated period, lies at all, but the broad approach by their Lordships to such questions has to be applied to cases like these as well. So the answer to questions (a) and (b) above has to be in the affirmative.

7. In so far as the last question is concerned, the incident took place on June 20, 1960, when the meeting of the Phagwara Municipality was conducted by the Sub-Divisional Officer (Civil) for the purpose of electing its President and Vice-President. The versions of both sides, the appellant and the respondents, have already been reproduced above. The learned counsel for the appellant has produced before us the executive file relating to the cases with regard to the two respondents. The Sub-Divisional Officer (Civil) of Phagwara apparently reported the incident to his Deputy Commissioner at Kapurthala who in his turn apprised the Commissioner of Jullundur Division of the same. The letter of the Commissioner of Jullundur Division is dated September 21, 1960, addressed to the Secretary to Punjab Government in the Local Government Department. He enclosed with his letter copy of the memorandum on the incident by the Deputy Commissioner of Kapurthala and then proceeded to say — "It appears that these members (respondents) were in the wrong and misbehaved in the course of the meeting held on the 20th June, 1960. From their conduct, there is a possibility of the repetition of such misbehaviour on their part when meetings of the Municipal Committee, Phagwara, are convened by the President elected and the interests of the Committee are likely to suffer." He then supported the recommendation of the Deputy Commissioner for removal of both the respondents from membership of the Phagwara Municipality. The respondents had filed a writ petition seeking that the proceedings of the meeting of the Phagwara Municipal Committee of June, 20, 1960, be quashed and that petition was dismissed by Mahajan, J. on November 23, 1961. The executive file shows that the Government waited for the decision of this Court in that petition. The matter was then taken up by the Minister-in-charge Om Parkash Agnihotri respondent had also been elected a member of the Punjab Legislative Assembly and the note of the Minister-in-charge of March 17, 1962, shows that he wanted to discuss this matter with that respondent and said in the note that the

respondent, Om Parkash Agnihotri be informed to see him on March 26 or 27, 1962.

The file further shows that a letter, dated March 22 and 23, 1962, was issued to Om Parkash Agnihotri, respondent, by the Secretary to the Home Minister asking him to see the Minister-in-charge on April 3, 1962. The file does not show that Om Parkash Agnihotri, respondent, ever met the Minister. The Minister then noted that he wanted to see the judgment of the High Court and further wanted to know what would be the effect of an order of removal with regard to Om Parkash Agnihotri, respondent, and imposition of disqualification on him to contest election to the Municipal Committee, on his status as member of the Punjab Legislative Assembly. The judgment of the High Court was then procured and shown to the Minister. Office then noted that the status of Om Parkash Agnihotri respondent, as member of the Legislative Assembly would not be affected by action according to Section 16(1) of the Act against him, but suggested that the advice of the Legal Remembrancer be obtained. The Assistant Legal Remembrancer endorsed the opinion in the office-note that the removal of Om Parkash Agnihotri, respondent, from the membership of the Phagwara Municipality would not entail any disqualification for his continuing as member of the Punjab Legislative Assembly. This was on June 12, 1962. On that, on June 19, 1962, the office put up a detailed note. In that note the incident of June 20, 1960, as narrated by the Sub-Divisional Officer (Civil), was given in sufficient detail. It was then said that the respondents denied the incident. Reference was also made to the opinion of the Assistant Legal Remembrancer and to the judgment of this Court and the last paragraph of the note read—

"This case is, therefore, submitted to officers for obtaining orders of Home Minister whether Sarvshri Om Parkash Agnihotri and Bhagat Ram Patanga, may be removed from the membership of Municipal Committee Phagwara and further disqualified for elections for a period of three years."

On this note, on July 12, 1962, the Home Minister made this note — "Chief Minister may like to see and guide. It affects an M. L. A." The Chief Minister on August 12, 1962, made this note — "Action should be taken as recommended by the Deputy Commissioner and the Commissioner. An M. L. A. who is a chosen representative of the people is expected to behave in a better way." The Home Minister then on September 6, 1962 approved the office suggestion in its note

of June 19, 1962, the operative part of which has already been reproduced above. One thing is clear from looking into this executive file that both the Home Minister, the Minister-in-charge, and the Chief Minister, applied their minds to the case against both the respondents. The Home Minister first looked into the judgment of this Court, then sought the advice of the Legal Remembrancer, and thereafter the guidance of the Chief Minister. The Chief Minister could not have made the note that he actually made unless he had waded through the file and given careful attention to it. So the fact of the matter is that both the Ministers applied their minds to the case against the two respondents.

The argument on the side of the respondents that the State Government did not apply its mind while making the orders against the respondents but merely proceeded on the recommendations of the Deputy Commissioner and the Commissioner is thus not true in substance. The office-note of June 19, 1962 which was accepted in the end by the Home Minister, clearly shows that the version of the incident given by the Sub-Divisional Officer (Civil) of Phagwara was accepted as true and not the denial entered by the respondents or a different version of the incident given by the respondents, in other words, their version was not believed. In these matters the executive files do not contain judgments in such cases in the manner in which the same are prepared and written in Courts of law, but the executive file in the present cases leaves not the least doubt, as in the words of their Lordships in Bhagat Raja's case, AIR 1967 SC 1606 that an outline of the process of reasoning by which the Home Minister reached his decisions with regard to the respondents is to be found in this executive file. Here is a case in which the incident is not denied by anybody, but two versions of it were before the Home Minister. One was the version as coming from a responsible officer, the Sub-Divisional Officer (Civil) Phagwara, who presided over the meeting of the Phagwara Municipal Committee of June 20, 1960, and the other was the version of the incident rendered by the respondents in their explanations to the show-cause notices served on them pursuant to the proviso to Section 16(1) of the Act. It was only a question of believing or disbelieving one or the other version and no more. There appears the broad outline of the manner in which the State Government in the cases of the respondents reached its decisions. So here is a case in which in fact the reasoning on the part of the appellant, the State Government, in these cases appears in the executive file according to the dic-

tum of their Lordships in Bhagat Raja's case, AIR 1967 SC 1606 when the appellant took decisions with regard to the two respondents for their removal as also for imposing disqualification on them. Apparently, on the facts of these cases, the answer to the third question is in the affirmative. However, the learned counsel for the respondents has referred to Civil Writ No. 2189 of 1963 (Punjab), which, after the decision of the Full Bench already referred to above, came for disposal before a Division Bench consisting of Grover and Pandit JJ., on May 26, 1967. In that case there were certain charges of misconduct against Sahela Ram while he was chairman of the Market Committee, and the learned Judges proceeding on the final notification removing him from the membership of the Market Committee came to the conclusion that the final notification contained no reasons for the action taken against Sahela Ram by the State Government. But the judgment of the learned Judges delivered on May 26, 1967, does not show that the learned Judges were shown the executive file on which decision was taken by the State Government with regard to the action that was taken against him. The learned Judges merely proceeded on the wording of the notification removing Sahela Ram from the membership of the Market Committee of Hissar. So that the present are somewhat different cases, in which cases I should have been disposed to the opinion that the final notification in regard to each respondent, when read along with the reasons given for his removal and imposition of disqualification on him and the explanation rendered by him, provides sufficient reason for the State Government rejecting the version of each respondent, accepting that of the Sub-Divisional Officer (Civil) of Phagwara. So the judgment of the Division Bench in Sahela Ram's case, Civil Writ No. 2189 of 1963, D/- 26-5-1967 (Punjab) is of no assistance to the respondents in the present appeals.

8. The three questions, as posed above, having been answered in the manner just stated and the cases being for final disposal before this Bench, the conclusion is then clear that these appeals of the appellant succeed. Accordingly, the two appeals are accepted, the order of the learned Single Judge is reversed, and the writ petitions of the respondents are dismissed with costs, counsel's fee being Rs. 100 in each appeal.

Writ petitions dismissed.

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(V 57 C 3)

FULL BENCH

MEHAR SINGH C.J., RANJIT SINGH SARKARIA AND H. R. SODHI, JJ.

Fatehgarh Sahib Bus Service (Pvt.) Ltd., Appellant v. State Transport Commissioner, Punjab and others, Respondents.

Letters Patent Appeal No. 164 of 1968, D/- 20-3-1969, decided by Full Bench on order of reference made by Division Bench on 25-9-1968.

Motor Vehicles Act (1939), S. 64(f) — "Having opposed the grant of permit" — Grant of temporary permit — Failure to oppose for want of notice — Right to appeal, not open.

The only person who can appeal under clause (f) of Section 64 is the person who having opposed the grant of a permit is aggrieved by the order granting a permit. (Para 5)

Thus a permit holder, who could not oppose the grant of temporary permit for want of information or notice that the grant of such permit was going to be under consideration of the State Transport Commissioner, has no right of appeal against the order granting temporary permit and therefore, his writ petition for quashing the grant of permit in favour of respondents is not incompetent on the ground that he has not taken recourse to alternative remedies available under the Act. No doubt the petitioner had been denied the opportunity to oppose the grant of temporary permits to respondents but on the words of clause (f) of Section 64 of the Act it is not that he was denied the opportunity of opposing the grant of the temporary permits to those respondents that gives it a right of appeal, but it is matter of 'having opposed the grant of a permit' that does so. 1964 MPLJ 280 Rel. on.

(Paras 5, 6)

As the matter of grievance against the grant of a permit is subject of a right of appeal under Cl. (f) of S. 64 expressly, there can be no question of prescribing any such order for the purposes of appeal under Cl. (i). Obviously clause (i) of the section has no application to the case and the petitioner could not have filed an appeal to the State Government against the impugned order under sub-rule (7) of Rule 437 of the 1940 Rules, read with clause (i) of section 64 of the Act.

(Para 4)

Cases Referred: Chronological Paras (1964) 1964 MPLJ 280=ILR (1964) Madh Pra 346, M. P. Transport Co. Pvt. Ltd., Raipur v. R. T. A. Raipur

(1958) AIR 1958 Raj 176 (V 45)= ILR (1958) 8 Raj 624, Bhanwarial v. Appellate Tribunal of State Transport Authority

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J. S. Wasu and Inderjit Sayal with him Baldev Kapoor, for Appellant; H. L. Sibal, Advocate-General (Punjab) and D. S. Nehra, for Respondent No. 3; R. C. Seithia and M. L. Sharma, for Respondents Nos. 1 & 2.

MEHAR SINGH, C. J. :— The appellant-company, the Fatehgarh Bus Service (Private) Limited, Sirhind, in Patiala District, carries on the business of passenger transport, holding four permits for carriage of passengers, operating with twelve return trips on Ahmedgarh-Bassi route via Rara and Chawa. On December 8, 1967, respondent 1, the State Transport Commissioner, Punjab granted one temporary passenger carriage transport permit, with two daily return trips, to each of the two respondents, 2 and 3, respectively the Punjab Roadways, Chandigarh, and the Pepsu Road Transport Corporation, Patiala, for the Ludhiana-Rara route via Chawa. The route of the temporary permits of respondents 2 and 3 overlaps by about nine miles the route with the appellant-company.

2. On January 10, 1968, the appellant-company made a petition under Articles 226 and 227 of the Constitution to have the order, dated December 8, 1967, Annexure 'A' to the petition, of respondent 1 granting temporary permits to respondents 2 and 3 quashed on various grounds including the ground that the temporary permits were granted to respondents 2 and 3 by respondent 1 without any notice or information in that respect to the appellant-company. The respondents resisted the petition, and, while not denying that the route of the temporary permits to respondents 2 and 3 partly overlaps the route of the appellant-company, in the return on behalf of respondent 3 a preliminary objection was taken that the petition was not maintainable because the appellant-company had not recourse to alternative remedies of appeal and revision available under the provisions of the Motor Vehicles Act, 1939 (Act 4 of 1939). Hereinafter to be referred as 'the Act'.

2-A. In Punjab the State Legislature has added Section 44-A in the Act and that section reads—

"44-A. The State Government may appoint a State Transport Commissioner and one or more Deputy State Transport Commissioners and notwithstanding anything contained in this Act, may, by notification, authorise such Commissioner and Deputy State Transport Commissioner or any officer subordinate to them, to exercise and discharge, in lieu of any other authority prescribed by or under

this Act, such powers and functions as may be specified in the notification."

The Punjab State Government has by Notification No. S. O. 3/C. A. 4/39/S. 44A/66, of November 30, 1966, conferred powers and functions of the Regional Transport Authority on the State Transport Commissioner under Section 44-A of the Act "in relation to grant of stage carriage permits in the implementation of the 50: 50 scheme as approved by Government vide Notification No. 6438-6HT-59/12538, dated 1st July, 1959." In Section 64 of the Act has been made provision for appeals and the section reads —

"64. Any person—

(a) aggrieved by the refusal of the State or a Regional Transport Authority to grant a permit, or by any condition attached to a permit granted to him, or

(b) aggrieved by the revocation or suspension of the permit or by any variation of the conditions thereof, or

(c) aggrieved by the refusal to transfer the permit to the person succeeding on the death of the holder of a permit, or

(d) aggrieved by the refusal of the State or a Regional Transport Authority to countersign a permit, or by any condition attached to such counter-signature or

(e) aggrieved by the refusal of renewal of a permit, or

(f) being a local authority or police authority or an association which, or a person providing transport facilities who, having opposed the grant of a permit, is aggrieved by the grant thereof or by any condition attached thereto, or

(g) aggrieved by the refusal to grant permission under sub-section (1) or sub-section (2) of Section 59, or

(h) aggrieved by a reduction under sub-section (1-A) of Section 60 in the number of vehicles or routes or area covered by a permit, or

(i) aggrieved by any other order which may be prescribed, may, within the prescribed time and in the prescribed manner, appeal to the prescribed authority who shall give such person and the original authority an opportunity of being heard."

Section 68 of the Act gives a State Government power to make rules and sub-section (2), clause (i), concerns the power to make rules in regard to "the authorities to whom, the time within which and the manner in which appeals may be made." In exercise of this power, the Punjab Motor Vehicles Rules, 1940, hereafter to be quoted as 'the 1940 Rules', have been made in which Rule 4.37 deals with the subject of appeals as envisaged by Section 68(2)(i) of the Act. This rule was amended on August 26, 1967, by the State Government Notification No. G. S. R. 69/C. A. 4/39/S. 68/Amd.

(32)/67. In this rule, as amended, sub-rules (1), (7) and (8) are material for the present purpose, as the amendments of 1968 do not concern this case, and the same read —

"4.37. (1) Except as otherwise provided in sub-rule (7) the authority to decide an appeal (hereinafter referred to as the appellate authority) under clauses (a), (b), (c), (d), (e), (f), (g), (h) and (i) of Section 64 shall be the Financial Commissioner, Revenue, Punjab.

(7) The appellate authority against the orders of the State Transport Commissioner, Deputy State Transport Commissioner or any other officer subordinate to them, authorised by the State Government under section 44-A to exercise and discharge in lieu of any other authority such power and functions as may have been specified, shall be —

(a) the Financial Commissioner, Revenue, Punjab, in cases where the Corporation as defined in clause (b) of Section 2 of the Road Transport Corporation Act, 1950, is a party to the appeal; and

(b) Secretary to Government, Transport Department, Punjab, in cases other than those mentioned in clause (a) above.

(8) A person desiring to prefer an appeal against an order of the State Transport Commissioner or Deputy State Transport Commissioner or any officer subordinate to them in respect of any order of the kind referred to in sub-rule (1) shall within thirty days of the receipt of the order prefer a memorandum (in duplicate) one copy of which shall bear a court-fee stamp of five rupees to the appellate authority setting forth concisely the grounds of objection to the order of the State Transport Commissioner or Deputy State Transport Commissioner or any officer subordinate to them together with a certified copy of that order."

3. The learned Single Judge in his order of March 11, 1968, dismissing the petition of the appellant-company, was of the opinion that Rule 4.37(7) provides for an appeal against the order of the State Transport Commissioner having regard to clause (i) of Section 64 of the Act and so the appellant-company had a right of appeal against the order of respondent 1 granting temporary permits to respondents 2 and 3. It not having had recourse to the remedy available under the provisions of that Act, it was not entitled to the exercise of discretionary powers of this Court under Articles 226 and 227 of the Constitution. So the learned Judge dismissed the petition of the appellant-company, leaving the parties to their own costs, and this is an appeal by the appellant-company against the judgment and order of the learned Judge.

4. In the referring order of September 25, 1968, the question that has been raised is whether under clause (f) of Section 64 of the Act a person who has the right to oppose the grant of a temporary permit, but has not had an opportunity to do so because of no notice of the proceedings for the grant of the same, can be said to be a person 'having opposed the grant of a permit', and, therefore, he has a right of appeal. The reason why there is no reference to clause (i) of Section 64 of the Act is that it was for all practical purposes not urged that the appellant-company had a right of appeal under that clause. The learned Single Judge considered that it had a right of appeal under that clause because sub-rule (7) of Rule 437 of the 1940 Rules provides for appeals against the orders of the State Transport Commissioner to the State Government, but that can only be if the order granting temporary permits to respondents 2 and 3 could be considered an order to which clause (i) of Section 64 of the Act refers. Now, clauses (a) to (h) in that Section provide for specific orders against which appeals can be preferred and among those clauses in clause (f) which deals with a right of appeal in these circumstances — "being a local authority or police authority or an association which, or a person providing transport facilities who, having opposed the grant of a permit, is aggrieved by the grant thereof or by any condition attached thereto." So that in clause (f) there is a specific provision for right of appeal against the grant of a permit by a person aggrieved by such grant and the condition of the right of appeal is of his 'having opposed the grant of a permit'. Clause (i) of this very section then provides for right of appeal to a person 'aggrieved by any other order which may be prescribed'. In section 2(21) of the Act the word 'prescribed' has been defined to mean 'prescribed by rules made under this Act', and the learned Judge was of the opinion that sub-rule (7) of Rule 437 is the rule which has prescribed an appeal against the order of the State Transport Commissioner to the State Government. But then clause (i) of Section 64 comes into play in regard to 'any other order which may be prescribed,' thus making it clear that any other such order which may be prescribed will be an order other than the types of orders covered by clauses (a) to (h) of Section 64 of the Act, and there would be no question of its being an order prescribed for the purposes of appeal under clause (i) of this section. As the matter of grievance against the grant of a permit is subject of a right of appeal under clause (f) of this section expressly, there can be no question of prescribing any

such order for the purposes of appeal under clause (i). Obviously clause (i) of the section has no application to a case like the present and the appellant-company could not have filed an appeal to the State Government against the impugned order of respondent 1 under sub-rule (7) of Rule 437 of the 1940 Rules, read with clause (i) of Section 64 of the Act. It was in this approach that the matter of clause (i) of Section 64 was dropped in arguments when this appeal was heard by me sitting with Sodhi J., and that is why there is no reference to clause (i) of that section in the referring order. It is apparent that the appellant-company had no right of appeal against the order of respondent 1 granting temporary permits to respondents 2 and 3 under sub-rule (7) of Rule 437 of the 1940 Rules taking that under clause (i) of Section 64 of the Act. So, that provision is out of consideration.

5. The only question that remains is whether the appellant-company could have filed an appeal under clause (f) of Section 64 of the Act? If it had opposed the grant of the permit to respondents 2 and 3, it would have had a right of appeal against the order of respondent 1 granting the temporary permits to those two respondents in view of clause (f) of Section 64 of the Act. The admitted fact is that the appellant-company did not oppose the grant of temporary permits to respondents 2 and 3. There is a reason for that, and that is that it could not oppose the grant of those temporary permits as it had no notice or information, and could not possibly have knowledge, that the grant of any such permits was to be under consideration of respondent 1. So factually the appellant-company did not, and indeed, in the circumstances of the case, could not, oppose the grant of those permits to the two respondents. So it has not and indeed could not have fulfilled one condition for a right of appeal in clause (f) of Section 64 of the Act of 'having opposed the grant of a permit'. The question posed in the referring order, as already pointed out, refers to the appellant-company having had a right to oppose and having been denied the opportunity to oppose. No doubt it had been denied the opportunity to oppose the grant of temporary permits to respondents 2 and 3, but on the words of clause (f) of Section 64 of the Act it is not that it was denied the opportunity of opposing the grant of the temporary permits to those respondents that gives it a right of appeal, but it is matter of 'having opposed the grant of a permit' that does so, and here factually the appellant-company did not oppose the grant of the permits to those respondents because it could not do so for want of in-

formation or notice that the grant of such permits was going to be under the consideration of respondent 1. The only person who can appeal under clause (f) of section 64 is the person who having opposed the grant of a permit is aggrieved by the order granting a permit, which, as stated, is not the situation of the appellant-company. So it had no right of appeal even under that clause.

6. In *Bhanwarlal v. Appellate Tribunal of State Transport Authority*, AIR 1958 Raj 176, an argument was urged that the party aggrieved by the grant of permit, though it had opposed its grant but has had no right to do so, had no right of appeal under clause (f) of Section 64 of the Act, and the learned Judges pointed out that it is irrelevant to see in order to determine the application of that clause whether the aggrieved person 'had the right' to oppose the grant of permit, because the clause itself does not say anything of the kind, and all it says is that he should have opposed the grant of a permit. I have already pointed out in the referring order that no other case comes near to saying anything on this aspect of the matter, and the cases are cited in that order. During the hearing of this reference another case has been cited which is directly in point. It is *Madhya Pradesh Transport Co. (Private) Ltd., Raipur v. Regional Transport Authority Raipur*, 1964 MPLJ 280. After reproducing the relevant part of clause (f) of Section 64 of the Act, the learned Judges proceeded to observe—"Under this clause it cannot be enough that a person provides transport facilities. It is further necessary that he should have opposed the grant of a permit in favour of the respondent. The expression 'having opposed the grant of a permit' is a pre-requisite which must be fulfilled and in the absence of which there is no right of appeal. It is a condition precedent to filing an appeal under Section 64(f) of the Act that the appellant must have opposed the grant of a permit, and this must be established factually. In the present case the impugned order was passed behind the back of the petitioner and without any notice to him. He could not, therefore, file a representation or oppose the grant of the permit sought. He had no right of appeal, therefore." The learned Judges have exactly on same facts as in the present case taken the very view as above that even though the appellant-company in the present case could not have opposed the grant of the temporary permits to respondents 2 and 3 for want of notice or information that the grant of such permits was going to be under consideration of respondent 1, it still has not opposed the grant of those permits within the express words of clause (f) of

section 64 of the Act and, therefore, had no right of appeal against the order of respondent 1 granting those permits to respondents 2 and 3.

7. In this approach, the order of the learned Single Judge cannot be sustained and it is not necessary to go into the other questions raised in the petition because those will now be disposed of by a learned Single Judge hearing the petition of the appellant-company. So the order of the learned Single Judge is set aside, and the petition will now be placed before a learned Single Judge for final disposal. In the circumstances of this case, there is no order in regard to costs in this reference.

8. **RANJIT SINGH SARKARIA, J. :—** I agree.

9. **H. R. SODHI, J. :—** I agree.

Order accordingly.

AIR 1970 PUNJAB & HARYANA 21
(V 57 C 4)
JINDRA LAL J.

Data Ram, Petitioner v. Ved Parkash Chopra, Respondent.

Criminal Revn. No. 75-R of 1968, D/-1-5-1969, from order of Addl. S. J. Ambala D/-21-3-1968.

Penal Code (1860), S. 19 — Judge — Definition of — Election of Co-operative Society — Returning Officer scrutinizing nomination papers is not Judge — Criminal P. C. (1898), S. 197 — Punjab Co-operative Societies Rules (1956), R. 25 — Words & Phrases — Judge — Definition.

Any order passed by an officer in proceeding under any law is not a judgment as contemplated by Section 19 of the Penal Code. To give it a different meaning would mean that any officer who is deciding any matter which he is enjoined by law to decide would be a judge as defined in Section 19, Penal Code; and would enjoy all the protection contemplated by S. 197, Criminal P. C.

(Para 9)

A Returning Officer, scrutinizing the nomination papers of the candidates contesting the election of the Managing Committee of a Co-operative Society, is not a "Judge" as defined in Section 19, Penal Code (1860), and hence cannot claim protection under Section 197, Criminal P. C. (1898). Moreover, Section 197, Cr. P. C. cannot also be invoked when by the time the complaint is filed, the Returning Officer has already given his decision and is no longer acting as such. AIR 1961 SC 1395, Foll; AIR 1929 Mad 175, Disting.

(Paras 5, 9, 10)

FM/FM/C390/69/DVT/B

Cases Referred: Chronological Paras
 (1961) AIR 1961 SC 1395 (V 48) =
 1961 (2) Cri LJ 571. Keshavlal
 Mohanlal v. State of Bombay 10
 (1929) AIR 1929 Mad 175 (V 16) =
 30 Cri LJ 365, S. C. Abboy Naidu
 v. Kannappa Chettiar 2, 11
 G. S. Grewal, Advocate and P. S. Mann,
 Advocate, for Petitioner; C. L. Lakhan-
 pal, Advocate, Munishwar Puri Adv. for
 Advocate General, Haryana, for Respon-
 dent.

ORDER:— This case has been reported by the learned Additional Sessions Judge, Ambala, with a recommendation that the order dated 22nd of November, 1967, passed by the Judicial Magistrate First Class, Jagadhri in case No 183/2 of 1967 be quashed and a complaint filed by the present respondent, Shri Ved Parkash Chopra, Advocate, Jagadhri, be dismissed.

2. The facts on which this recommendation has been made have been set out very clearly by the learned Additional Sessions Judge and need not be set out fully. In brief the petitioner, Shri Data Ram, Inspector, Co-operative Societies, Surgacane, Model Town, Yamunanagar, was appointed a Returning Officer by the Registrar, Co-operative Societies, Haryana, to scrutinize the nomination papers in connection with the election of the Managing Committee of the Naharpur Cane Growers' Co-operative Society Limited, Naharpur, to be held under the Punjab Co-operative Societies Act, 1961. The scrutiny was being held on the 23rd of August, 1967, and Madan Lal, one of the candidates, being keen to get the nomination paper of the other candidate Dosti rejected, engaged the respondent, Shri Ved Parkash Chopra, as his counsel. Dosti had produced a witness and the respondent-counsel had started cross-examining him when the petitioner was called out by somebody and on returning to the room where the scrutiny was being held he declined permission to the respondent to participate claiming that there was no provision for a lawyer to represent a candidate. The petitioner is alleged to have told the respondent that he did not know his job and was misleading the petitioner. He also tore away the statement of Doorn Singh which had been reduced into writing. The respondent made a complaint before the learned Magistrate under Sections 166 and 500, Indian Penal Code, against the present petitioner who raised an objection that in view of want of sanction under Section 197, Criminal Procedure Code, and also in view of Section 84 of the Punjab Co-operative Societies Act, the complaint must be dismissed.

The learned Magistrate did not agree with this contention of the petitioner and held that there was no ground for dis-

missing the complaint on the objections raised. The petitioner went up in revision and the only ground on which recommendation is made for the acceptance of this revision is that when the incident took place the petitioner was acting as a Judge within the meaning of Section 19, Indian Penal Code, and a Court could not take cognizance of the complaint in view of Section 197, Criminal Procedure Code. The learned Additional Sessions Judge relied upon S. C. Abboy Naidu v. Kannappa Chettiar, AIR 1929 Mad 175, in support of his view.

3. Section 197, Cr. P. C., inter alia provides for protection to any person who is a 'Judge' within the meaning of S. 19 of the Indian Penal Code when he is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty and it is provided that no Court shall take cognizance of such an offence.

4. Section 19, Indian Penal Code, provides that the word 'Judge' denotes not only every person who is officially designated as a Judge, but also every person, who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive.

5. It is difficult, in view of the definition of the word 'Judge' in S. 19, Indian Penal Code, to hold that the petitioner, when he was scrutinizing the nomination papers, was acting as a Judge.

6. It is possible to hold that in the wider sense of the word, the petitioner might have been acting in legal proceeding, if by legal proceeding is meant performing functions under the authority of some law. It is not, however, possible to hold that the functions which the petitioner was performing at the relevant time were in either civil or criminal proceeding. Nor is it possible to hold that he was to give a definitive judgment in the matter.

6-A. Learned counsel for the respondent-complainant has taken me through the provisions of the Punjab Co-operative Societies Act, 1961, and the Rules made thereunder.

7. Section 26 of the Act lays down that the members of the committee of a co-operative society shall be elected in the manner prescribed and no person shall be elected so unless he is a shareholder of the society. Rule 23 of the Punjab Co-operative Societies Rules, 1963, provides that the members of the committee of a co-operative Society shall be elected in accordance with the rules set out in Appendix 'C'. Rule 25 lays down certain disqualifications for membership of the

committee. Rule 2 of Appendix 'C' provides that no person shall be eligible for election as a member of the committee if he is subject to any disqualification mentioned in rule 25. Rule 3 (5) of Appendix 'C' provides that "the nomination papers shall be scrutinized by the Returning Officer on the date specified for the purpose. The list of the validly nominated candidates for election shall be announced, where necessary zone-wise, four days before the general meeting is held. The Registrar may by general or special order grant exemption from this sub-rule to any co-operative society or any class of co-operative societies."

8. In view of these provisions, it has been urged by the learned counsel for the respondent that there is no procedure prescribed for holding an inquiry, hearing arguments, taking evidence on oath or giving a definitive judgment. All that is required is that the Returning Officer should look at the nomination papers and see that a candidate is not subject to any disqualification mentioned in Rule 25. The words "proceeding" and "judgment" are not defined either in the Indian Penal Code or in the Criminal Procedure Code but Section 2 (9) of the Civil P. C. defines "judgment" as the statement given by the Judge of the grounds of a decree or order.

9. In Stroud's Judicial Dictionary, Third Edition, Vol. 2, 'judgment' is said to be the sentence of the law pronounced by the Court upon the matter contained in the record and the decision must be one obtained in an action. Volume 1 of the same dictionary defines 'action' as meaning a litigation in a Civil Court for the recovery of individual right or redress of individual wrong, inclusive, in its proper legal sense, of suits by the Crown. It would mean, therefore, that any order passed by an officer in proceeding under any law is not a judgment as contemplated by Section 19 of the Indian Penal Code. To give it a different meaning would mean that any officer who is deciding any matter which he is enjoined by law to decide would be a judge as defined in Section 19, Indian Penal Code, and would enjoy all the protection contemplated by Section 197, Cr. P. C. It must, therefore, be held that the petitioner could not be considered to be a judge as defined by Sec. 19, Indian Penal Code, and S. 197, Cr. P. C., would not protect him.

10. It was further urged by the learned counsel for the respondent that a judge is protected under S. 197, Cr. P. C. only as long as he is a judge because after he ceases to be a judge the protection is not available to him. For this proposition he relied upon Keshavlal Mohanlal Shah v. State of Bombay, AIR 1961 SC 1395,

where it was held that no previous sanction under Section 197 Criminal Procedure Code, is necessary for a Court to take cognizance of an offence committed by a magistrate while acting or purporting to act in the discharge of his official duty if he had ceased to be a Magistrate at the time the complaint is made or police report is submitted to the Court, i.e., at the time of the taking of cognizance of the offence committed. It is urged, therefore, that when the complaint was made by the respondent before the Magistrate, the petitioner had already given his decision and was no longer acting as a judge. There appears to be merit also in this last point urged on behalf of the respondent.

11. It remains now to deal with the ruling relied upon by the learned counsel for the petitioner on the basis of which recommendation has been made by the learned Additional Sessions Judge. The learned Judge who decided the case reported in AIR 1929 Mad 175 confining himself to Section 19 of the Indian Penal Code held that legal proceedings are proceedings in which a judgment may or must be given, a judgment being not an arbitrary decision but a decision arrived at judicially. The learned Judge further held that in his opinion 'legal proceeding' means a proceeding regulated or prescribed by law in which a judicial decision may or must be given. It is difficult to see how this decision by a Returning Officer whose duty was to scrutinize nomination papers under the Punjab Co-operative Societies Act, 1961, can be called judgment in a civil proceeding or a judicial decision as commonly understood. Consequently, I decline to accept the recommendation of the learned Additional Sessions Judge and dismiss this revision.

Revision dismissed.

AIR 1970 PUNJAB & HARYANA 23
(V-57 C 5)

FULL BENCH

D. K. MAHAJAN, SHAMSHER
BAHADUR AND R. S. NARULA JJ.

Mam Raj Chhoga and others, Petitioners v. State of Punjab and others, Respondents.

Civil Writs Nos. 1386 and 1508 of 1963, D/- 19-3-1969 decided by Full Bench on Order of Reference made by Division Bench on 12-7-1967.

Tenancy Laws — Punjab Security of Land Tenures Act (10 of 1953), Ss. 10A and 18 — Scope and object — Object of S. 10A is separate and distinguishable from S. 18 and there is no conflict between two sections — Law laid down in

FM/FM/C440/69/KSB/D

1967 Pun LJ 38 (DB) is correct and unexceptionable.

Per Full Bench :— While the provisions of S. 18 are protective for the tenants and enable them to buy the lands which have been in their continuous occupation for six years or more in areas falling outside the reserved or permissible limits of the landowners, Section 10A deals with the accretions of parcels of land which have been added to the holdings of landowners, both by voluntary transfers or by the process of inheritance or gift, which are liable to be taken over for the utilization as surplus area for the settlement of tenants. The land which a landowner cannot acquire except in specific cases beyond the permissible limits is made subject to a charge for the resettlement of ejected tenants. It would be manifest that methods may be adopted to get back the lands which have fallen as surplus areas by collusive decrees or otherwise, and to provide for such a contingency it has been said in clause (c) of section 10A that any judgment, decree or order of a court or other authority obtained "after the commencement of this Act" and tending to diminish the surplus area of a person shall be ignored. The object and purpose of Section 10A is separate and distinguishable from section 18. (Para 10)

There is no conflict at all between sections 10A and 18 of the Act. S. 10A is a rule of guidance, no doubt of overriding importance, laying down that the right of the State Government to utilise surplus areas would remain unaffected. Both Sections 19A and 19B, refer to the authority of the State Government to resettle ejected tenants on surplus areas. Whether the surplus area is formed in consequence of the subsequent accretions of the landowner or is carved from his original holding the right of utilization of the State is the same. (Para 15)

The judgment of the Division Bench in 1967 Pun LJ 38 has laid three propositions of law which are unexceptionable:

(a) the purchase of land under S. 18 of the Act does not amount to a transfer within the meaning of clause (b) of Section 10A, such a process of transfer not being a volitional disposition of the landowner. Whether the landowner opposes the purchase or not, the acquisition of land in consequence of the right bestowed on the tenant under Section 18 cannot be treated as a transfer.

(ii) an order passed by the specified authorities under Section 18 of the Act cannot be regarded as an order of "other authority" mentioned in clause (c) of Section 10A which can be ignored in computation of surplus areas. If the "other authority" referred to in Section 10A(c)

is deemed to include the Assistant Collector or the Collector purporting to act under Section 18 of the Act, the ameliorative provisions of this section would be "nullified and obliterated". What could be ignored in determining surplus areas under clause (c) of Section 10A is "any judgment, decree or order of a court" and the orders passed under Section 18 cannot fall in any of these categories. The subsequent words "or other authority" in clause (c) of Section 10A have to be read ejusdem generis with "judgment, decree or order of a Court."

(iii) even if there is a conflict between sections 10-A and 18 of the Act, the provisions of the latter must prevail.

(Paras 12 to 14)

There is nothing in the observation contained in that judgment to throw doubt on its correctness or validity. The observation occurring on p. 46 of 1967 Punj LJ 38, cannot be construed to lead to an inference that where the purchase of land had been effected in consequence of an order passed by a Collector on the tacit or implied consent of a landowner it should fall within the inhibition contained in clause (c) of Section 10A.

(Paras 16, 19)

Cases Referred: Chronological Paras
(1967) 1967 Pun LJ 38=1967 Cur LJ 168, Amar Singh v. State of Punjab 1, 2, 10, 11, 16, 19, 22 (1966) 68 Pun LR 787=1966 Cur LJ 767, Jot Ram v. A. L. Fletcher 10 (1963) 65 Pun LR 652=ILR (1963) 2 Puri 808, Ganpat v. Jagmal 17

Anand Swaroop with N. L. Dhingra, for Petitioners; A. S. Sarhadi, for Advocate General, Punjab with N. S. Bhatia, for Respondents.

SHAMSHER BAHADUR J. :— When these Civil Writ petitions, Mam Raj and others v. State of Punjab, (Civil Writ No. 1386 of 1963) and Hanuman and others v. State of Punjab, (Civil Writ No. 1508 of 1963) came for hearing before me in the first instance on 28th of March, 1967, a point was raised by the counsel for the respondent State of Punjab that the judgment in the Bench decision of Narula J. with which I concurred, in *Amar Singh v. State of Punjab*, 1967 Pun LJ 38, and on which reliance was placed on behalf of the petitioners, itself contained some observations which tended to cast a shadow on the conclusions reached therein. In my reference order of 28th of March, 1967, I therefore, recommended that these cases should be placed for disposal before a Division Bench at an early date. Subsequently, on 12th of July, 1967, when the petitions came for hearing before the Bench of Mahajan and Narula JJ, they referred the matter for determination by a Full Bench.

2. The Bench decision in Amar Singh's case, 1967 Pun LJ 38 dealt with the scope, relative importance and inter-relationship of Sections 10A and 18 of the Punjab Security of Land Tenures Act, 1953 (hereinafter referred to as the Act).

3. Before discussing the decision in Amar Singh's case, the bearing of which on the present petitions is of undoubted importance, it is well to know of the inter-dependence of the various provisions of the Act so that the perspective of Sections 10-A and 18 of the Act and the contradictions between these, if any, may be understood and appreciated. The Act passed on 15th of April, 1953, was not the first legislation on the subject and the contours of many of the concepts had already taken shape in the two earlier enactments on the subject, namely the Punjab Tenants (Security of Tenure) Act, 1950 (Act No. 22 of 1950) and Punjab Tenants (Security of Tenure) Amendment Act, 1951 (President's Act 5 of 1951). The Act, which at once consolidated and amended the existing law on the subject, was designed "to provide for the security of land tenure and other incidental matters". As is clear from the preamble, the primary object was the protection of tenants whose ejectments recently from holdings held by landowners owning vast tracts of lands, had taken place on a massive scale. In restoring the rights of tenants ejected after 15th of August, 1947, care was taken that landlords with small holdings were not subjected to harassment by the tenants. For this reason, the concepts of "small landowner," "permissible area" and "reservation" were introduced. A small landowner was described as a person whose entire holding in the State of Punjab did not exceed the permissible area which though fixed at 100 standard acres in the Act of 1950 was reduced to 30 standard acres in the Act. A landowner owning larger areas was entitled to reserve the permissible area, and many of the provisions of the Act dealt with the manner and exercise of this right of reservation. The right of the landowner to eject tenants from the reserved or permissible areas was recognized in the Act though under Section 9-A (introduced by Punjab Act 11 of 1955) the tenants liable to ejectment on this score had to be accommodated in surplus areas; a minimum period of ten years' tenancy was fixed under Section 7 in respect of tenants who were in occupation of land outside the reserved areas and the right of the tenants who had been ejected after the 15th August, 1947, for restoration of the tenancies was recognised. Provisions were made for the exercise of the other rights of the tenants, the most important of these being the right to purchase the leased lands under

Section 18 of the Act. Except for slight modifications introduced by Punjab Act 11 of 1955, which are noticed below, the substantial provision is made in sub-section (1) of Section 18 of the Act which is to this effect:—

"18. (1) Notwithstanding anything to the contrary contained in any law, usage or contract, a tenant of a landowner other than a small landowner —

(i) who has been in continuous occupation of the land comprised in his tenancy for a minimum period of six years (originally the period was 12 years), or

(ii) who has been restored to his tenancy under the provisions of this Act and whose periods of continuous occupation of the land comprised in his tenancy immediately before ejectment and immediately after restoration of his tenancy together amount to six years or more (again, the period was 12 years at first), or

(iii) who was ejected from his tenancy after the 14th day of August, 1947 and before the commencement of this Act, and who was in continuous occupation of the land comprised in his tenancy for a period of six years or more immediately before his ejectment (again, the period at first was 12 years),

shall be entitled to purchase from the landowner the land so held by him but not included in the reserved area of the landowner, in the case of a tenant falling within clause (i) or clause (ii) at any time, and in the case of a tenant falling within clause (iii) within a period of one year from the date of commencement of this Act:

Provided

Provided further

(2) A tenant desirous of purchasing land under sub-section (1) shall make an application in writing to an Assistant Collector of First Grade having jurisdiction over the land concerned, and the Assistant Collector, after giving notice to the landowner and to all other persons interested in the land and after making such inquiry as he thinks fit, shall determine (formerly the word was 'fix') the value of the land which shall be the average of the prices obtaining for similar land in the locality during 10 years immediately preceding the date on which the application is made.

(3) The purchase price shall be three-fourths of the value of land as so determined.

(4) (a) The tenant shall be competent to pay the purchase price either in a lump sum or in six-monthly instalments not exceeding ten in the manner prescribed. (b) On the purchase price or the first instalment thereof, as the case may be, being deposited, the tenant shall be deem-

ed to have become the owner of the land, and the Assistant Collector shall where the tenant is not already in possession, and subject to the provisions of the Punjab Tenancy Act (XVI of 1887) put him in possession thereof.

(c) If a default is committed in the payment of any of the instalments, the entire outstanding balance shall, on application by the person entitled to receive it, be recoverable as arrears of land revenue.

(5) If the land is subject to a mortgage at the time of the purchase, the land shall pass to the tenant unencumbered by the mortgage, but the mortgage debt shall be a charge on the purchase money.

(6) If there is no such charge as aforesaid the Assistant Collector shall, subject to any directions which he may receive from any court, pay the purchase money to the landowner.

(7) If there is such a charge, the Assistant Collector shall, subject as aforesaid, apply in the discharge of the mortgage debt so much of the purchase money as is required for that purpose and pay the balance, if any, to the landowner, or retain the purchase money pending the decision of a Civil Court as to the person or persons entitled thereto."

4. I have reproduced these provisions to demonstrate that Section 18 is self-sufficient in respect of the machinery which has been created for the purchase of lands held by tenants. Firstly, only a tenant of a landowner other than the small landowner, has been given the right of purchase; secondly, the right is only in respect of the land which falls outside the reserved or permissible area, and thirdly, the minimum period of tenancy is prescribed, namely six years. Protection is given to small landowners whose holding does not exceed the permissible limit. This permissible limit is equally applicable to tenants who cannot acquire lands under the tenancy which exceed this limit. The Assistant Collector, to whom an application is to be made for purchase, is empowered under the Act to fix the value of the land the payment of which in the manner laid down in the various sub-sections, makes him the owner of the land. Virtually, the order of the Assistant Collector has the effect of a decree passed by a Civil Court for possession and ownership.

5. It is very important for a landowner, other than a small landowner, to have his permissible area clearly defined and reserved. Not only is a provision for voluntary reservation made, but it is also provided by subsequent amendments introduced by Sections 5-B and 5-C that in case of failure to make a reservation, a landowner can select his permissible area

and on his default to do so the Collector himself can make such a selection.

6. In order to evade and circumvent the rights vested in the tenant, resort was taken to large scale alienations and dispositions of properties to trim down the holdings within the permissible limits. A general provision was made in Section 6 of the Act that:—

"For the purposes of determining under this Act the area owned by a landowner, all transfers of land except bona fide sales or mortgages with possession, or transfers resulting from inheritance, made after the 15th August, 1947, and before the commencement of this Act, shall be ignored."

This restriction was extended further by an amendment introduced in Punjab Act No. 14 of 1962, which laid down that:—

"No transfer of land, except a bona fide sale or mortgage with possession or a transfer resulting from inheritance, made after the 15th August, 1947, and before the 2nd February, 1955, shall affect the rights of the tenant on such land under this Act."

7. Another situation had to be met when the tenants from reserved areas were ejected at the instance of landowners. How were they to be resettled? It was provided for the first time by Punjab Act II of 1955 by the insertion of Section 9-A that no tenant shall be liable to ejectment under clause (i) of sub-section (1) of Section 9, which deals with the case of ejectment of tenants from reserved areas, unless "he is accommodated on a surplus area in accordance with the provisions of Section 10-A or otherwise on some other land by the State Government."

8. This brings us to the concept of 'surplus area' which was defined in sub-section (5-A) of Section 2 of the Act inserted for the first time by Punjab Act II of 1955. It means "the area other than the reserved area, and where, no area has been reserved, the area in excess of the permissible area selected under Section 5-B or the area which is deemed to be surplus area under sub-section (1) of Section 5-C, . . . but it will not include a tenant's permissible area."

The creation of 'surplus area' avowedly is for the purpose of resettling tenants, and within its definition are comprised the lands falling outside the reserved, permissible or selected areas of landowners other than the small landowners. Though the term "permissible area" had occurred in the legislation right from the beginning, its meaning and content did not assume a complete share till the amendments made in 1955 and 1962. It was visualised in Section 19-B introduced for the first time by Punjab Act 4.

of 1959 that a landowner or a tenant may acquire lands by inheritance in excess of permissible areas after the commencement of the Act. If any person as an heir acquired by gift, or bequest, such lands and also after 30th July, 1958, by transfer, exchange, lease, agreement or settlement, which, with or without the lands already owned or held by him, exceeds in the aggregate the permissible area, he had to furnish to the Collector a return of all such lands selecting the land not exceeding in the aggregate the permissible area which he desired to retain. Again, on failure of his furnishing such a return, a right was given to the Collector under Sections 5-B and 5-C to have this area determined. Under sub-section (4) of Section 19-B:—

"The excess land of such person shall be at the disposal of the State Government for utilisation as surplus area under clause (a) of Section 10-A or for such other purpose as the State Government may by notification direct."

9. It now becomes necessary to interrelate the other provisions of the Act with Section 10-A, two of its clauses being inserted by Punjab Act 11 of 1955 and clause (c) by Punjab Act 14 of 1962. The crucial importance of Section 10-A was recognised in the statutory provisions themselves. To recall, even the tenants who are liable to ejectment from the reserved or permissible areas cannot be actually ejected till they are accommodated in surplus areas under the provisions of Section 10-A. Again, Section 19-B, which envisages acquisition of land by gift or bequest at any time and after 30th of July, 1958, even by alienations etc., in excess of permissible area, makes them subject to the provisions of Section 10-A and it is specifically said in sub-section (4) of Section 19-B that the accretions in excess of the permissible area, even though lawful "shall be at the disposal of the State Government for utilization as surplus area under clause (a) of Section 10-A". Section 10-A indubitably is the core of the whole Act and whatever areas, both of landlords and tenants, have to be trimmed in excess of the permissible limits, are liable for utilization under Section 10-A.

10. Thus, while the provisions of Section 18 are protective for the tenants and enable them to buy the lands which have been in their continuous occupation for six years or more in areas falling outside the reserved or permissible limits of the landowners, Section 10-A deals with the accretions of parcels of land which have been added to the holdings of landowners, both by voluntary transfers or by the process of inheritance or gift, which are liable to be taken over for the utilization

as surplus area for the settlement of tenants. The land which a landowner cannot acquire except in specific cases beyond the permissible limits is made subject, to a charge for the resettlement of ejected tenants. It would be manifest that methods may be adopted to get back the lands which have fallen as surplus areas by collusive decrees or otherwise, and to provide for such a contingency it has been said in clause (c) of Section 10-A that any judgment, decree or order of a Court or other authority obtained "after the commencement of this Act" and tending to diminish the surplus area of a person shall be ignored. The object and purpose of Section 10-A is separate and distinguishable from Section 18 and this is precisely what has been emphasised in 1967 Pun LJ 38.

11. In Amar Singh's case, 1967 Pun LJ 38, Shrimati Lachhman was a big landowner in the sense that she was not a small landowner and out of the vast area under her ownership, two tracts of land were under the tenancy of Chandu and Siri Chand and in respect of some land a gift had been made in favour of Amar Singh, a son-in-law of the landowner. While proceedings for surplus area were being taken Amar Singh and his brother Indraj applied for purchase of lands under Section 18 of the Act before the Assistant Collector which they claimed had come under their tenancies and were not included in the reserved area of the landowner. These applications were granted by the Collector and subsequently in the computation of the surplus area the orders passed by the Collector under Section 18 were ignored with the result that the lands which had been purchased by Amar Singh and Indraj were treated as surplus areas. In speaking for the Court, Narula J. laid down three propositions of law which appear to us to be unexceptionable.

12. In the first place, it was said that the purchase of land under Section 18 of the Act did not amount to a transfer within the meaning of clause (b) of Section 10-A, such a process of transfer not being a volitional disposition of the landowner. Whether the landowner opposes the purchase or not, the acquisition of land in consequence of the right bestowed on the tenant under Section 18 cannot be treated as a transfer.

13. Secondly, an order passed by the specified authorities under Section 18 of the Act cannot be regarded as an order of "other authority" mentioned in clause (c) of Section 10-A which can be ignored in computation of surplus areas. As rightly observed by Narula J., if the "other authority" referred to in Section 10-A(c) is deemed to include the Assist-

ant Collector or the Collector purporting to act under Section 18 of the Act, the ameliorative provisions of this section would be "nullified and obliterated." What could be ignored in determining surplus areas under clause (c) of section 10-A is "any judgment, decree or order of a Court" and the orders passed under Section 18 cannot fall in any of these categories. The subsequent words "or other authority" in clause (c) of section 10-A have to be read ejusdem generis with "judgment, decree or order of a court."

14. What follows from these two propositions is, and this is the third proposition, that even if there is a conflict between Sections 10-A and 18 of the Act, the provisions of the latter must prevail.

15. We do not think that there is any conflict at all between Sections 10-A and 18 of the Act. To repeat, Section 10-A is a rule of guidance, no doubt of overriding importance, laying down that the right of the State Government to utilise surplus areas would remain unaffected. Both Sections 19-A and 19-B, as already pointed out, refer to the authority of the State Government to resettle ejected tenants on surplus areas. Whether the surplus area is formed in consequence of the subsequent accretions of the landowner or is carved from his original holding the right of utilization by the State is the same.

16. The occurrence of the following sentence at page 46 in Amar Singh's case, 1967 Punj LJ 38 does not in any way affect the integrity or validity of the judgment:—

"Such transfers over which the landowner has no control do not appear to be intended to be covered by these expressions. It is precisely for this purpose that clause (c) has been added to avoid the cloak of a transfer by order of a Court being put on a voluntary disposition of land outside the control of the authorities under the Act. It is only a voluntary transfer or disposition by a landowner by any kind of alienation or demise that would be covered by clause (b)."

This expression of opinion cannot be construed to lead to an inference that where the purchase of land had been effected in consequence of an order passed by a Collector on the tacit or implied consent of a landowner it should fall within the inhibition contained in clause (c) of Section 10-A. The conclusion reached by the Bench in Amar Singh's case, 1967 Pun LJ 38 was based on the authorities to which reference is made in the judgment.

17. In Ganpat v. Jagmal, (1963) 65 Pun LR 632, a Bench decision of Mahajan and Pandit JJ., an argument raised by

the State counsel regarding the construction to be put on Section 18 which enabled the tenant to purchase land out of the surplus area and thereby reduce the available surplus area, was not accepted. Reference was made to Section 7 of the Act which stood deleted by Punjab Act 11 of 1955, to the effect that:—

"... No tenant on land other than the reserved area of a landowner shall be liable to ejectment before the expiry of a period of ten years from the commencement of this Act, or from the commencement of his tenancy, whichever is later."

In repelling the argument of the State Counsel that a tenant must be in possession of land under his tenancy for a period of six years on or before the 15th April, 1953, to entitle him to the benefit of Section 18, Mahajan J. observed that "Section 18 gives the right to a tenant and that right has to be examined at the time when an application under Section 18 is made and cannot be denied on the ground that he was not a tenant for more than six years on 15th April, 1953."

18. In Jot Ram v. A. L. Fletcher, 1966-68 Pun LR 787, Acting Chief Justice Mehar Singh and Grover J. held that after a tenant has complied with the order of purchase made by an appropriate authority under Section 18 of the Act and has made payment in the terms of the order, in accordance with the provisions of Section 18 (4) (b), he is deemed to have become owner of the land and once he had become owner of the same, the death of the landowner after that date cannot divest him of the ownership of the land.

19. The petitioners in both the petitions before us are tenants who have been allowed to purchase the lands of their respective landlords under Section 18 of the Act. The orders of the Assistant Collector in both cases have been ignored in computing the surplus area on the ground that they are hit by clause (c) of Section 10-A of the Act. Mr. Anand Swarup, the learned counsel for the petitioners, places reliance on the authority of the Bench decision of 1967 Pun LJ 38 and we think that his submission is right. We do not see any reason to doubt the validity of the judgment of the Division Bench and there is nothing in the observations contained therein to throw doubt on its correctness or validity.

20. After this expression of view on the question of law, we send back these petitions for disposal by a learned Single Judge in accordance with law. There would be no order as to costs.

21. D. K. MAHAJAN J. :— I entirely agree.

22. **R. S. NARULA, J. :—** This reference to Full Bench appears to have been necessitated because of the contention of the learned counsel for the State to the effect that there is a possible contradiction in the views expressed by me while preparing the Division Bench judgment in Amar Singh's case, 1967 Pun LJ 38. While holding inter alia that any land taken out of a big landowner's holding under Section 18 of the Act is not deemed to have been 'transferred or otherwise disposed of' by the landowner within the meaning of section 10-A(b), I made the following observations which are stated to contain the contradiction:—

"It appears that by 'transfer or other disposition of land' in clause (b) of Section 10-A, is meant only voluntary transfers or dispositions. Such transfers over which the landowner has no control do not appear to be intended to be covered by these expressions. 'It is precisely for this purpose that clause (c) has been added to avoid the cloak of a transfer by order of a Court being put on a voluntary disposition of land outside the control of the authorities under the Act'. It is only a voluntary transfer or disposition by a landowner by any kind of alienation or demise that would be covered by clause (b)."

I have underlined (here in ' ') the sentence in the abovequoted passage which has led to this controversy. I think a duty is cast on me to avail of this opportunity to explain as to what was intended to be conveyed in this sentence so as to remove the impression, if it genuinely exists, in some minds about the force or validity of the law laid down in Amar Singh's case, 1967 Pun LJ 38 having been watered down or diluted in any manner by the controversial sentence. The insinuation which the learned State counsel wants to attribute to the sentence is apparently this. He thinks that I intended to convey that notwithstanding the general law about Section 10-A(b) not applying to a sale under Section 18, a sale under Section 18 should nevertheless be ignored under Section 10-A(b) if the authority determining the surplus area finds that the sale was a collusive one, and, therefore, not genuine. In the context in which the sentence occurs, it would be straining it to a breaking point to spell out any such meaning from it. The scheme of Section 18 shows that the Assistant Collector Grade I is not bound to pass an order for purchase in favour of a tenant merely because the landowner is prepared to consent to the same. This only means that in an appropriate case, the Assistant Collector may after holding necessary enquiry record a finding against

the tenant, on any one of the issues without proving which he cannot succeed, and thereupon reject his application. This would be within and not "outside the control of the authorities under the Act," in the course of the purchase proceedings. Once, however, the Assistant Collector, Grade I, has allowed an application under Section 18 of the Act, and his order is not set aside in appeal or revision, the same becomes final, and remains immune to an attack against its validity on any ground including that of collusion, before the co-ordinate authorities under the Act dealing with the question of determination of surplus area. It is quite possible that the juxtaposition of the sentence in question in the relevant passage in my judgment in Amar Singh's case, 1967 Pun LJ 38 was not very happy, but, as observed by my Lord Shamsher Bahadur J., it cannot be construed to lead to an inference that where the purchase of the land had been effected in consequence of an order passed by the Collector with the consent of a landowner, it should fall within the inhibition contained in clause (c) of Section 10-A. To so construe any observation in my judgment in Amar Singh's case, 1967 Pun LJ 38 would be to completely demolish the decision given therein to the effect that the expression "other authority" in Section 10-A(c) does not include an Assistant Collector Grade I, who might have allowed an application under Section 18. Subject to this clarification of my observations in the judgment of this Court in Amar Singh's case, 1967 Pun LJ 38, I entirely agree with the judgment of the Full Bench prepared in this case by my learned brother Shamsher Bahadur J.

Answered accordingly.

AIR 1970 PUNJAB & HARYANA 29
(V 57 C 6)

R. S. NARULA, J.

Bharat Singh and others, Petitioners v. State of Haryana through the Commissioner for Home Affairs and Secy. to Govt., Haryana, Home Deptt. Chandigarh, and another, Respondents.

Civil Writ No. 602 of 1969, D/- 23-4-1969.

(A) Land Acquisition Act (1894), S. 17 (2)(c) (Punjab) — Clause (c) cannot be read ejusdem generis with clauses (a) and (b)—AIR 1964 Punj 477, held, overruled in view of 1969 Cur LJ 594 (FB) (Punj).

The principle of ejusdem generis does not apply to clause (c) of sub-section (2) of Section 17. Each of the three classes forms a separate class by itself and the different classes of urgency named in

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clauses (a), (b) and (c) of Section 17(2) form an independent genus by themselves and are not mere species of one common genus. AIR 1964 Punj 477, held, overruled in view of 1969 Cur LJ 594 (FB) (Punj). (Para 2)

(B) Land Acquisition Act (1894), S. 17 (4) — Opinion of State Government as to urgency — Cannot be challenged in a Court of law if State Government has applied its mind to question of urgency or action of State Government in invoking urgency provisions is not mala fide — Acquisition of land for purpose of construction of new Jail — Declaration of urgency — Facts showing that existing building was in dilapidated condition, that part of it had already come down, that accommodation was altogether insufficient and that there was no scope for its expansion under existing conditions — Held, that it could not be said that State Government had not applied its mind to question of urgency or that urgency provision had been invoked mala fide — (Civil P. C. (1908), S. 9). (Para 2)

(C) Land Acquisition Act (1894), Ss. 17 (1) and (4), 4(1), 5-A, 6 — Words "after the publication of the notification under S. 4(1)" in S. 17(4)—Refer to notification under S. 6 which can be issued at any time after the notification under S. 4 and not along with it — Declaration under S. 17(4) — Not required to be made only subsequent to issue and publication of initial notification under S. 4(1). AIR 1968 Manipur 45, Dissented from—(Words & Phrases — Words "after the publication of notification under S. 4(1)" in S. 17(4)). (Paras 2 and 3)

Cases Referred: Chronological Paras

- (1969) LPA No. 20 of 1966, D/- 18-4-1969=1969 Cur LJ 594 (FB) (Punj), Printers House (P) Ltd. N. Delhi v. Misri Lal 2
(1968) AIR 1968 Manipur 45 (V 55), Heisnam Chonjon Singh v. Union Territory of Manipur 4
(1967) AIR 1967 SC 1081 (V 54)= 1967-1 SCR 373, Raja Anand-Brahma Shah v. State of U. P. 1, 3
(1966) AIR 1966 Punj 59 (V 53)= 68 Pun LR 1 (FB), Murari Lal Gupta v. State of Punjab 1
(1966) 68 Pun LR 503=1966 Cur LJ 126, Misri Lal v. Punjab State 1
(1964) AIR 1964 Punj 477 (V 51)= 66 Pun LR 857, Murari Lal Gupta v. State of Punjab 1, 2
(1963) AIR 1963 Mys 255 (V 50), Thirumalalah v. State of Mysore 1
(1961) AIR 1961 Ker 116 (V 48)= 1LR (1960) Ker 1130, Madhavi Amma v. Revenue Divisional Officer, Kozhikode 1

Bhal Singh Malik, Advocate, for Petitioners; C. D. Dewan, Advocate-General, for Respondents.

ORDER:— The notification under Section 4 read with Section 17(2)(c) of the Land Acquisition Act (1 of 1894) (hereinafter called the Act) issued by the Governor of Haryana on January 2, 1969, and the notification issued by the same authority on the same day under Section 6 read with Section 17(2) of the Act (collectively marked 'A') have been impugned in this petition under Articles 226 and 227 of the Constitution on the solitary ground that the State Government had no jurisdiction to invoke clause (c) of sub-section (2) of Section 17 of the Act for the public purpose of construction of the newly proposed District Jail, Rohtak as the said purpose cannot be read ejusdem generis with the purposes mentioned in clauses (a) and (b) of sub-section (2) of that section. The abovesaid proposition urged by the petitioners was sought to be supported by the following observations of a Division Bench of this Court (D. K. Mahajan and Shamsheer Bahadur, JJ.) in *Murari Lal Gupta v. State of Punjab*, AIR 1964 Punj 477:—

"The object of acquisition in the instant case is the construction of the shop for storing text books — a purpose which cannot be in parity with the objects specified under clauses (a) and (b) of sub-section (2) of Section 17 on the principle of ejusdem generis. The matter of acquisition may be of importance, but there is nothing to indicate that it is of 'urgent' importance to justify the exclusion of the procedure prescribed under Section 5-A of the Land Acquisition Act. The purpose might well be served by requisitioning some property till the acquisition is made under the normal procedure prescribed in the Act. Mr. Anand Swarup for the petitioner further relies on a decision of S. Velu Pillai, J. in *Madhavi Amma v. Revenue Divisional Officer, Kozhikode*, AIR 1961 Ker 116, where it was held that it is imperative that Government must hold a definite opinion within the meaning of Section 17(4) as to whether it is the provisions of sub-section (1) or of sub-section (2) which are applicable to a given case. It is important to remember that the dispensation of the operation of Section 5-A is a serious matter and according to the view taken by S. Velu Pillai, J. the notification on the face of it must show that the Government really has directed its mind whether acquisition has to be made under sub-section (1) or sub-section (2) of Section 17. Far from so showing, the Government in its written statement is itself not clear whether the land has been regarded as waste or arable under sub-section (1) or it has been acquired for any of the specified purposes mentioned in sub-section (2). Clause (c) of sub-section (2) introduced by the Punjab Amend-

ing. Act no doubt enlarges the scope of acquisition but it has to be read ejusdem generis with clauses (a) and (b) where specific purposes for which acquisition can be made under Section 17 are definitely set out. Clearly, the construction of a depot for sale of text books is not in line with the purposes specified in clauses (a) and (b) of sub-section (2) of Section 17 and it cannot be defended on the specious ground that the Government considers the purpose to be of urgent importance."

Counsel also relied in this connection on a subsequent judgment of Grover, J. in *Misri Lal v. Punjab State*, 1966-68 Pun LR 503. It is, however, unnecessary to deal separately with *Misri Lal's* case, 1966-68 Pun LR 503 as Grover, J. merely felt compelled to follow the Division Bench judgment in *Murari Lal Gupta's* case, AIR 1964 Punj 477 while observing as below:—

"What was stated in that case, AIR 1964 Punj 477 can be most appositely applied to the present case. If clause (c) has to be read ejusdem generis with the clauses which precede it, then there can be no manner of doubt that the acquisition in the present case which is meant for the setting up of a factory for the manufacture of printing machinery cannot be regarded to have anything in common with the purposes in clauses (a) and (b), and, therefore, according to the law laid down by the Bench, the decision on the issues in question must be given in favour of the plaintiff."

Nor is it necessary to refer in any detail to the judgment of a Division Bench of the Mysore High Court in *Thirumalaiah v. State of Mysore*, AIR 1963 Mys 255, on which substantial reliance was placed by the Division Bench of Mahajan and Shamsheer Bahadur, JJ. in *Murari Lal Gupta's* case, particularly because of the law in respect of the jurisdiction of the Court to go into the question of factum of urgency having since been settled authoritatively by their Lordships of the Supreme Court in *Raja Anand Brahma Shah v. State of Uttar Pradesh*, AIR 1967 SC 1081. The Supreme Court has uttered the last word on the subject in *Raja Anand Brahma Shah's* case, AIR 1967 SC 1081 by observing as follows:—

"It is true that the opinion of the State Government which is a condition for the exercise of the power under Section 17 (4) of the Act, is subjective and a Court cannot normally enquire whether there were sufficient grounds or justification of the opinion formed by the State Government under Section 17(4)."

But even though the power of the State Government has been formulated under Section 17(4) of the Act in subjective

terms the expression of opinion of the State Government can be challenged as ultra vires in a Court of law if it could be shown that the State Government never applied its mind to the matter or that the action of the State Government is mala fide."

In view of the abovesaid pronouncement of the Supreme Court, it appears to be wholly unnecessary to refer to the earlier Full Bench judgment of this Court in *Murari Lal Gupta v. State of Punjab*, 68 Pun LR 1=(AIR 1966 Punj 59 FB); on which the learned Advocate-General for the State of Haryana has placed reliance in support of the proposition that the question of urgency is not at all justiciable by a Court.

2. It has been recently held by a Full Bench of this Court (D. K. Mahajan and Shamsheer Bahadur, JJ. and myself) in *Letter's Patent Appeal No. 20 of 1966, Printers House (P) Ltd., New Delhi v. Misri Lal*, decided on April 18, 1969 (Punj. FB) that the principle of ejusdem generis does not apply to clause (c) of sub-section (2) of Section 17 of the Act, and that observations to the contrary in *Murari Lal Gupta's* case AIR 1964 Punj 477 do not lay down the correct law. It has been held by the Full Bench that each of the three classes forms a separate class by itself and the different classes of urgency named in clauses (a), (b) and (c) of Section 17(2) form an independent genus by themselves and are not mere species of one common genus. In this view of the matter, the main argument of the learned counsel for the petitioners fails.

3. This leaves me with only two questions. The first is whether on the facts, admitted or proved, in this case, it can be said that the declaration of urgency in respect of the land required for the construction of a new jail at Rohtak has been made without the State Government applying its mind to the matter or whether the urgency provision has been invoked merely as a colourable transaction. In paragraph 5 of the return of the State, it has been averred that the existing jail building at Rohtak is in a dilapidated condition, that part of it has already come down, that the accommodation is altogether insufficient and there is no scope for its expansion under the existing conditions. It has then been added in clause (a) of paragraph 7 that the notifications were issued by the Government after a careful consideration of the whole matter and that the land is needed urgently as the jail which is necessary to house the offenders sentenced to imprisonment in accordance with law, is directly linked with the law and order of the country, and, therefore, the matter was really of urgent importance, and it

could not brook any delay. As settled by the Supreme Court in Raja Anand Brahma Shah's case, AIR 1967 SC 1081 this Court cannot substitute its own opinion for the subjective opinion of the State Government. On the material placed on the record of this case, I am satisfied that it is impossible to say that the State Government has not applied its mind to the question of urgency or that the urgency provision has been invoked mala fide.

4. The last submission made by the counsel in support of this writ petition is based on certain observations in the judgment of the learned Judicial Commissioner of Manipur in Heisnam Chonjong Singh v Union Territory of Manipur, AIR 1968 Manipur 45. It was observed in that case that three conditions are necessary to be satisfied under sub-sections (1) and (4) of Section 17 of the Act, if the Government wants to proceed under those provisions: (firstly), there must be urgency, (secondly), the land must be waste or arable, and (thirdly) there must be a subsequent publication of the declaration dispensing with the provisions of Section 5-A of the Act, after the preliminary notification under sub-section (1) of Section 4 of the Act is made. Learned counsel submits that out of the three ingredients necessary to vest in the State Government the jurisdiction to invoke Section 17(4), the last one is missing in this case inasmuch as the notifications under Sections 4 and 17 were issued simultaneously though the notification under Section 17(4) could not be issued along with the notification under Section 4, but only subsequent thereto. I am unable to agree with the learned counsel in this behalf. With the greatest respect to the learned Judicial Commissioner of Manipur, I am unable to find any justifications for holding that the declaration under S. 17(4) must be made only subsequent to the issue and publication of the initial notification under Section 4(1). This part of the judgment of the learned Judicial Commissioner is not supported practically by any reasons. Learned counsel for the petitioner submitted that the expression "at any time after the publication of the notification under Section 4" in the following provision contained in sub-section (4) of Section 17 supports the decision of the Judicial Commissioner of Manipur:—

"In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable, the appropriate Government may direct that the provisions of Section 5-A shall not apply, and, if it does so direct, a declaration may be made under Section 6 in respect of the land at any time after the publica-

tion of the notification under Section 4, sub-section (1)."

This argument of Mr. Malik appears to be misconceived. The words "after the publication of the notification under Section 4" refer to the notification under Section 6 which can be issued at any time after the notification under Section 4 and not along with it. It is nobody's case that the notification under Section 6 was issued simultaneously with the notification under S. 4. On the other hand, it is conceded that the Section 6 notification, though of the same date, was issued subsequent to the notification under Section 4. There is, therefore, no force whatever in this submission of Mr. Malik.

5. None of the contentions raised by the learned counsel for the petitioners having succeeded, I do not find my way to allow this petition, and accordingly *dismiss it with costs*

Petition dismissed.

AIR 1970 PUNJAB & HARYANA 32
(V 57 C 7)

SHAMSHER BAHADUR AND
S. S. SANDHAWALIA, JJ.

Lal Singh and others, Petitioners v. State and others, Respondents.

Criminal Misc. No. 959 of 1968, in Criminal Revn. No. 37/R of 1967, D/- 9-10-1968, against order of Jindra Lal J., D/- 10-9-1968

Criminal P. C. (1898), Ss. 561-A, 369, 439, 430 and 424 — Inherent powers of High Court under S. 561-A — Can be exercised for revoking, reviewing or recalling its own decision in criminal revision and rehearing the same. AIR 1962 Andh Pra 479 (FB) & (1964) 1 Mad LJ 362 & AIR 1966 Mad 163 & AIR 1965 Orissa 7, Dissented from.

High Court in its inherent powers is fully empowered to revoke, review, or recall and alter its own earlier decision in a criminal revision and to rehear the same. The circumstances in which these powers can be exercised necessarily would be exceptional ones which would lead the court to review that the exercise of the same is necessary to conform to the three conditions mentioned in Section 561-A of the Code. (Para 16)

There is no bar whatsoever express or implied in the statutory provisions of the Code which would rule out the applicability of the inherent powers of the High Courts under Section 561A qua an order purporting to be passed under Section 439, Criminal Procedure Code. The rule of finality embodied in Ss. 369 and 430 of Criminal P. C. does not, in terms,

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Rajasthan High Court

AIR 1970 RAJASTHAN 1
(V 57 C 1)

D. M. BHANDARI AND V. P.
TYAGI JJ.

Mewar Sugar Mills Ltd. and others, Petitioners v. State of Rajasthan and another, Respondents.

Sales Tax Ref. Nos. 41 of 1967; 5 of 1968 and 24 of 1965, D/- 12-11-1968.

(A) Sales Tax — Rajasthan Sales Tax Act (29 of 1954), S. 2 — “Sale” — Packing materials — Liability to tax — Whether there is agreement to sell packing materials is a question of fact and not law — Value not only criterion.

In order to constitute a sale, it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, the agreement must be supported by money consideration and that as a result of the transaction the property should actually pass in the goods. Unless all these ingredients are present there can be no sale of goods and sales tax cannot be imposed. AIR 1967 SC 602 Ref. (Para 11)

In the case of goods sold in a packed condition, the question whether the value of the materials used for packing the goods is liable to sales tax will depend upon whether there is an agreement, express or implied, to sell the packing materials by the seller to the buyer.

Whether and in what circumstances an implied agreement is to be inferred is essentially a question of fact which is to be determined by the taxing authorities on the facts of each case keeping in view the meaning of the expression “sale” as set out above. The question cannot be resolved by stating any abstract proposition of law. (Paras 15 and 23)

In such an investigation, the question whether the value of the packing materials was significant or not cannot be made the

sole basis for finding that there has been an implied sale of the material.

(Para 32)

(B) Sales Tax — Rajasthan Sales Tax Act (29 of 1954), Section 15 — Question of law — Vires of taxing provision — Not raised before the Board of Revenue — Cannot be urged before the High Court as it does not arise out of the Judgment of the Board — (Civil P. C. (1908) Sections 100-101).

(Para 33)

(C) Constitution of India, Sch. VII, List II, Entry 54 — Sale of goods — Works contract — Materials used need not get transformed — Contract for pressing and packing cotton — Packing is integral part of pressing — Packing materials used not liable for sales tax. AIR 1957 Andh Pra 706 and 1956-7 STC 486 (Andh) and AIR 1957 Madh Pra 40 and AIR 1961 Madh Pra 88 (FB) and 1964-15 STC 598 (Bom) and 1968-21 STC 505 (MP) and 1968-22 STC 22 (MP), Dissented from.

In order that a process connected with works contract may become an integral part of the work undertaken to be performed, it is not necessary that the materials used by the person who has undertaken the performance of that work should be transformed into any other material. AIR 1961 Madh Pra 88 (FB) and AIR 1957 Andh Pra 706, Dissented from.

Having regard to the provisions of the Cotton Ginning and Pressing Factories Act 1925 (as amended by the Rajasthan Amendment Act 10 of 1957) the use of Hessian cloth and iron hoops for packing the pressed cotton is an integral part of the work of pressing of cotton and it cannot be said that there is a sale of such material and that it is a severable part of the contract for pressing cotton. AIR 1957 Madh Pra 40, 1964-15 STC 598 (Bom) and 1956-7 STC 486 (Andh) and 1968-21 STC 505 (MP) and 1968-22 STC 22 (MP), Dissented from.

(Para 51).

The fact that such materials can be sold by the buyers after the cotton has been used does not affect the question. (Para 51)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 343 (V 56) = Civil Appeal No. 1364 of 1966, D/- 27-8-1968, State of Rajasthan v. Karamchand Thappar and Brothers Ltd. 11
- (1968) 1968-21 STC 505 = 1968 MPLJ 582, Nimar Cotton Press Factory v. Commr. of Sales Tax, Madhya Pradesh, Indore 43
- (1968) 1968-22 STC 22 = 1968 MPLJ 665, Vimalchand Prakashchand Sarafa v. Commr. of Sales Tax, Madhya Pradesh 44
- (1968) CWP No. 92 of 1965, D/-18-7-1968 (Raj), Chasuram Manglal of Sambhar v. State of Rajasthan (1967) AIR 1967 SC 602 (V 54) = 1967-19 STC 84, Commissioner of Taxes Assam v. Prabhat Marketing Co. Ltd., Gaubati 11, 12
- (1966) 1966-17 STC 624 (SC), Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh 14
- (1965) AIR 1965 SC 1396 (V 52) = 1965-16 STC 240, Govt. of Andhra Pradesh v. Gunihur Tobaccos Ltd. 12, 17, 18, 43, 44, 50
- (1964) 1964-15 STC 598 (Bom), Babulal Onkarnal and Co. v. State of Bombay 46
- (1961) AIR 1961 SC 1633 (V 48) = 1961-42 ITR 589, Commr. of Income-Tax, Bombay v. Scindia Steam Navigation Co., Ltd. 33
- (1961) AIR 1961 Madh Pra 88 (V 48) = 1961-12 STC 313 (FB), Nimar Cotton Press v. Sales Tax Officer Nimar Circle, Khandwa 42, 43, 51
- (1960) 1960-11 STC 321 (Mad), S. M. Chidambara Nadar Sons and Co. v. State of Madras 17, 44
- (1958) AIR 1958 SC 560 (V 45) = SCR 379 = 1958-9 STC 353, State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd. 11, 40, 42
- (1958) AIR 1958 SC 909 (V 45) = 1958-9 STC 388, Banarsi Das v. State of Madhya Pradesh 42
- (1957) AIR 1957 Andh Pra 708 (V 44) = 1956-7 STC 26, A. S. Krishna and Co. Ltd., Guntur v. State of Andhra 20, 45, 49
- (1957) AIR 1957 Madh Pra 40 (V 44) = 1957-8 STC 286, Jakishan Gopikishan v. Commr. of Sales Tax Madhya Bharat 42
- (1956) 1956-7 STC 486 (Andh), B. V. Hanumantha Rao v. State of Andhra 45
- (1956) AIR 1956 Nag 27 (V 43) = 1954-5 STC 428, Nimar Cotton Press, Khandwa v. Sales Tax Officer, Khandwa 20, 42

- (1954) 1954-5 STC 354 (Mad), Indian Leaf Tobacco Development Co., Ltd. v. State of Madras (now Andhra) 20
- (1953) AIR 1953 Assam 42 (V 40) = 1953-4 STC 129, Mohanlal Jogani Rice and Atta Mills v. State of Assam 20
- M. D. Bhargava (in No. 41/67); Sagarmal Mehta (in No. 5/68) and M. Mridul (in No. 24/65) for Petitioners; M. L. Shrimal, Dy. Government Advocate for the State of Rajasthan.

BHANDARI J.: All these three references under Section 15 of the Rajasthan Sales-Tax Act, 1954 (hereinafter called the Act) raise similar questions of law and are, therefore, disposed of by one judgment.

2. We first of all take up Sales Tax Reference No. 41/67, Mewar Sugar Mills Ltd. v. State of Rajasthan:

3. Messrs. Mewar Sugar Mills Limited (hereinafter called the Sugar Mills) is a public limited company carrying on business of manufacturing and selling sugar. The accounting year of the Sugar Mills begins from 1st August and ends on 31st July. This reference relates to the assessment proceedings for the assessment years 1957-58, 1958-59 and 1959-60. For the first two years the Sugar Mills was assessed by the Sales Tax authorities of the State of Rajasthan both under the provisions of the Act and also under the provisions of the Central Sales Tax Act. For the assessment year 1959-60, it was assessed only under the provisions of the Act. Thus there were five assessment proceedings undertaken with respect to the aforesaid three years.

4. It may be mentioned that sugar was a controlled commodity and under the Sugar and Gur Control Order, 1950 the notification No. SRO 57 dated 29th January 1951 was issued in which it was made obligatory for the mills to supply and deliver sugar in specified packings, the net contents of each packing was to be 2mds. 30 srs. This notification was replaced by another similar notification which we need not mention. Price of sugar was fixed by the Government of Rajasthan from 29th August, 1959 in relation to the weight of the sugar. Prior to 14th December, 1957, the Sugar Mills made sales of sugar and charged price from the purchasers in accordance with the price fixed on the quantity of sugar sold. On or from 14th December, 1957 additional Central Excise duty was levied on sugar and sugar was exempted from State Sales-tax. On and from that date it sold sugar at the price fixed by the State of Rajasthan which was computed on the weight of sugar sold by it. Sugar was sold in the gunny bags but the case of the Sugar Mills is that no price was charged for the gunny bags.

5. The Assistant Commissioner Excise and Taxation, District Udaipur assessed the Sugar Mills for the accounting year 1957-58 and did not charge any sales-tax on the value of the gunny bags supplied by it to

its different customers. Notice under Sec. 10 (2) of the Act was, however, issued to the Sugar Mills and the assessment was reopened on the ground that the assessee had escaped tax on the value of gunny bags in which sugar was delivered. The Sales-tax Officer held that it had paid tax on the sale price of the sugar upto 13th December, 1957, which also included value of gunny bags. But from 14th December, 1957 tax on the sale of sugar was exempted and only the containers remained taxable. On this basis the Sugar Mills was taxed on the value of the gunny bags which he determined at rupee one per bag and assessed tax on it at the rate provided for the Bardana under the Act. For the next two years, namely accounting years 1958-59 and 1959-60 the Sugar Mills was similarly assessed on the value of the gunny bags supplied by it to its various customers. The Mills filed separate appeals for the three years in question to the Deputy Commissioner (Appeals) Excise and Taxation, Jodhpur and the appeals were dismissed. The Mills filed revision applications under Section 14 of the Act to the Board of Revenue, Rajasthan. The single Member of the Board who heard the applications referred all the cases to a Full Bench.

6. Various rulings have been discussed by the Full Bench of the Board of Revenue in its judgment, but there is no clear finding of fact on the question whether under the circumstances of the case, there was any sale of gunny bags by the Mills to its customers or not. After discussing the cases, the Full Bench observed as follows:

"In this case (of) Mewar Sugar Mills there is no doubt that a Sugar Control Order imposed all sorts of obligations for the sale of sugar in specified gunny bags and of certain weight, yet the main contract of the assessee for the sale of sugar consists in supplying of sugar with gunny bags the price of which goods was no doubt included in the turnover of the assessee. No person would supply free of charge a commodity which has some value. There would be an implied agreement in this case that along with sugar, the gunny bags were sold for value to other persons by the assessee.

A case may happen, where an article is sold in ordinary paper bags of practically little value, then it cannot be inferred that the sale of material between the parties was also contemplated. It usually happens when one buys goods in a shop, where they are delivered to customers in ordinary paper wrappers. In such cases it can be presumed that no sale of the packing material has taken place. But looking to the trend of the cases cited by the learned Government Advocate, it has been the consistent view of the various High Courts that in the case of goods delivered in gunny bags, the latter were considered as sold along with the commodity, and the assessee was held liable to the payment of sales tax. The contract of sale in those cases is therefore implied.

We are therefore, of the opinion that the reference made by the learned single Member be answered in the terms, that the delivery of sugar made by the assessee company is with gunny bags and the sale of latter commodity is implied in it, and remand this case back to the learned single member to decide it in accordance with the above answer."

7. After the receipt of the case, the single Member of the Board of Revenue dismissed the revision applications.

8. Five separate applications were preferred by the Mills under Section 15 of the Act. On these applications the Board of Revenue has referred the following question: "Whether in the facts and circumstances of these two cases, where sugar is sold packed in bardana, an implied sale of bardana can be inferred". We understand that by two cases, the Board of Revenue meant all the five cases of two categories—(1) those arising under the Rajasthan Sales Tax Act and (2) those arising under the Central Sales Tax Act.

9. In order to answer this question, we may refer to certain provisions of the Act. "Sale" has been defined under Section 2 of the Sales Tax Act as follows:

"Sale", with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or for deferred payment or for any other valuable consideration, and includes a transfer of goods on the hire purchase or other system of payment by instalment, but does not include a mortgage or hypothecation of, or a charge or pledge on goods "and the word "purchase" or "buy" shall be construed accordingly.

"Sale price" means amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for any thing done by the dealer in respect of the goods at the time or before the delivery thereof other than the cost of freight or delivery or the cost of installation in case where such cost is separately charged and the expression "purchase price shall be construed accordingly."

"Turnover" means the aggregate of the amount of sale prices received or receivable by a dealer in respect of the sale or supply of goods or in respect to the sale or supply of goods in the carrying out of any contract."

10. The charging section under the Act is Section 3 which makes a dealer liable to pay tax on his taxable turnover.

11. The definition of "sale" under the Act is much wider than its ordinary legal connotation. In the well-known case of *State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd.*, 1958-9 STC 353 = (AIR 1958 SC 560), the Supreme Court while discussing the provisions of the Government of India Act, 1935 has taken the view that the

expression "sale of goods" in Entry 48 in List II of Schedule VII is a *nomen juris*, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. The same view has been taken by the Supreme Court with respect to the provisions of the Constitution viz Entry No. 54 in List II of Schedule VII of the Constitution. The Supreme Court has again pointed out that sale of goods in the various Acts of the States regarding the sales-tax must have the same meaning which it had in the Act of 1930. It has also been pointed out in a number of cases that to constitute sale of goods, three essential elements must be fulfilled. On this point, it is sufficient if we quote the following passage from Commissioner of Taxes, Assam v. Prabhat Marketing Co. Ltd., Gauhati, 1967-19 STC 84 = (AIR 1967 SC 602):

"It is well established that in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, the agreement must be supported by money consideration, and that as a result of the transaction the property should actually pass in the goods. Unless all the ingredients are present in the transaction there could be no sale of goods and sales tax cannot be imposed."

While considering the question, what are the characteristics of sale under the Rajasthan Sales Tax Act, the Supreme Court has taken the same view in the State of Rajasthan v. Karamchand Thappar and Brothers Ltd., Civil Appeal No. 1864 of 1966, D/27-8-1968 = (AIR 1969 SC 343) and observed as follows:

"This Court in 1959 SCR 379 = (AIR 1958 SC 560), held that to render turnover from sale of goods liable to tax under the Sales Tax Acts, there must be concurrence of four elements in the sale—(1) parties competent to contract; (2) mutual assent of the parties; (3) thing absolute or general, property in which is transferred from the seller to the buyer; and (4) price in money paid or promised."

12. In the present case, the title to the gunny bags which were the property of the Sugar Mills, no doubt, passed to the various customers. But this by itself has never been treated as constituting sale; the two other elements as referred to in Prabhat Marketing Company's case, 1967-19 STC 84 = (AIR 1967 SC 602), must be further present. This has been pointed out by their Lordships of the Supreme Court in the majority judgment in the Government of Andhra Pradesh v. Cuntur Tobaccos Limited, 1963-16 STC 240 = (AIR 1965 SC 1396), in which it was observed:

"One fundamental fact has to be borne in mind is that from the mere passing of title to goods either as integral part or independent of goods, it cannot be inferred

that the goods were agreed to be sold and the price was liable to sales-tax."

13. It was also held by their Lordships of the Supreme Court that in the case of the containers as well as in the case of the works contract it is for the taxing department to show that a particular transaction amounted to sale.

14. In Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh, 1966-17 STC 624 (SC), the Department sought to assess a manufacturing dealer of cigarettes on the turnover in respect of packing materials consisting of cardboard and deal wood. Their Lordships of the Supreme Court pointed out whether there was an agreement to sell the packing materials was a pure question of fact and that question could not be decided on fictions or surmises. The burden lay on the Commercial Tax Officer to prove that the turnover was liable to tax and he could ask the assessee to produce relevant material. If the assessee did not produce the same, he could draw adverse inferences against the assessee; but he had to decide the crucial question whether the packing materials were the subject of the agreement of sale, express or implied.

15. It is the case of neither party in these cases that there was any express agreement to sell the bags by the Mills to its customers. We have to see whether there were circumstances present in this case showing such an implied agreement. Under what circumstances, an implied agreement is to be inferred is essentially a question of fact which it is for the Taxing authorities to determine on the facts and circumstances of each case. This question cannot be resolved by stating any abstract proposition of law. As pointed out by their Lordships of the Supreme Court a simple question of fact cannot be sidetracked by copious citation—an error in which we regret to point out, the Full Bench of the Revenue Board has fallen.

16. When the circumstances show that particular goods were to be supplied by a dealer packed and the price fixed is inclusive of the packing material, an inference may be readily drawn that packing material was impliedly sold.

17. In S. M. Chidambara Nadar Sons and Company v. State of Madras, 1960-11 STC 321 (Mad), where there was an agreement to purchase cotton to be delivered by the seller to the buyer, it was implicit in the contract that the goods should be delivered as packed. In such a case a contract to pay for and purchase the packing materials was held to be implied. This case was expressly approved by Subba Rao J., in his dissenting judgment in 1965-16 STC 240 = (AIR 1965 SC 1396) (supra).

18. Learned counsel for the Sugar Mills has however argued that in the circumstances of the case, there could be no other conclusion from the material on record except that the gunny bags were never intended

ed to be sold by the Sugar Mills to its various customers. He primarily relied on the fact that in the accounting year 1957-58 when there was no exemption of sugar from sales-tax and even earlier than that the Sugar Mills had been selling sugar and always the taxing authority was taxing it on the price which the sugar brought and not on the value of the gunny bags in which sugar was delivered by the Sugar Mills to its customers. According to the learned counsel, this shows that consistently the Sugar Mills were making a present of a gunny bag to a customer who purchased one bag of sugar. The Sugar Mills never intended to sell the bags and the Department never treated the transfer of a gunny bag from the sugar mills to the customer as a transaction of sale. He has pointed out that the price of sugar was settled not on the basis of one gunny bag of sugar but on the basis of per maund of sugar and that in the bills the Sugar Mills never charged the price of the gunny bags. He has further pointed out that it was only after the notification for exempting sugar from sales-tax was issued that the taxing authorities took into their head to tax the value of the gunny bags, but this should not have been done as the exemption did not alter the character of transactions of sale. He has further contended that unless a price is charged for the transfer of a particular commodity, there can be no sale because the second condition as envisaged in the case of Prabhat Marketing Company is that the agreement must be supported by money consideration. In this connection, he has also relied on the following observation of the Supreme Court in 1965-16 STC 240 = (AIR 1965 SC 1396) (Supra).

"The contract may be for work to be done for remuneration and for supply of materials used in the execution of the works for a price; it may be contract for work in which the use of the materials is accessory or incidental to the execution of the work; or it may be a contract for work and use or supply of materials, though not accessory to the execution of the contract, is voluntary or gratuitous. In the last class there is no sale because though property passes it does not pass for a price."

19. These observations, it is contended, apply with greater emphasis to a case where the contract is simply a contract for supply of goods.

20. Learned counsel on behalf of the Department, however, relied on: Mohanlal Jogani Rice and Atta Mills v. State of Assam, 1953-4 STC 129 = (AIR 1953 Assam 42); Indian Leaf Tobacco Development Co., Ltd. v. State of Madras (now Andhra), 1954-5 STC 354 (Mad); Nimar Cotton Press, Khandwa v. Sales Tax Officer Khandwa, 1954-5 STC 428 = (AIR 1956 Nag 27); A. S. Krishna and Co., Ltd., Guntur v. State of Andhra, (1956) 7 STC 26 = (AIR 1957 Andh Pra 706).

21. It is further contended that the Sugar Mills while calculating the price of sugar included in it the cost of the gunny bags in which it intended to supply sugar to its customers and, therefore, it cannot be said that the price of gunny bags was altogether not intended to be charged by the Mills.

22. These various facts and other ancillary facts may give rise to one inference or other on the question whether the Sugar Mills intended to sell the gunny bags to its customers and the customers intended to purchase them and the Sugar Mills intended to charge any price for the same. But this is essentially a question of fact which the Board of Revenue should have determined in the revision applications filed by the Sugar Mills before it. While referring the case to this Court, the learned Members of the Board have observed that,—

"the learned Government Advocate urged that the determination of the question whether the packing material in comparison with its contents would be significant or insignificant in a particular case would be a question of fact. That did not appear to them to carry conviction, as it would be a matter of inference from facts whether in a particular case packing material would be significant or insignificant in comparison with the value of its contents and thus a question of law had arisen in the case."

It has been repeatedly pointed out that what inferences are to be drawn from facts is always a question of fact to be determined by the taxing authority. It cannot be called a question of law. The Full Bench of the Board of Revenue as well as the single Bench which disposed of the revision applications however fell into error in not determining this question of fact on the material on record but disposed all those cases in the light of certain observations in certain cases which they have cited. This was not the proper approach. Our answer to the question formulated in this reference therefore is:

23. Whether there was a sale of 'bardana' is to be determined by the Board of Revenue on the facts and circumstances of the case keeping in view the meaning of the expression "sale" as clarified by us and after satisfying that all the three elements which constitute sale are present.

24. Now we take up sales tax Reference No. 5/68, Messrs. Jaipur Spinning and Weaving Mills Limited, Jaipur v. The State of Rajasthan. Messrs. Jaipur Spinning and Weaving Mills Limited, Jaipur (hereinafter called the Spinning and Weaving Mills) is a public limited company carrying on business of manufacturing of yarn and selling it. This mill was assessed to tax under the Rajasthan Sales Tax Act for the assessment year 1958-59. Its accounting year is the calendar year. Assessment proceedings were

taken against it under the Rajasthan Sales Tax Act for the year 1958-59 and under the Rajasthan and the Central Sales Tax Act for the assessment year 1960-61. The relevant facts are these:

25. The company sold yarn to its customers fixing the price of yarn per bundle at the rate of per bundle of 10 lbs. The yarn was, however, sold packed in bales containing 40 bundles. It had not charged any sales-tax on the value of the packing material of the bales for the year 1958-59, but it was reassessed under the provisions of Section 12 of the Act and it was taxed on the packing material of the bales which it delivered to its customers. For the year 1960-61, it was assessed for the value of the packing material of the bales supplied to its customers in that year. The assessment orders were passed by the Sales Tax Officer Jaipur which were challenged in appeals preferred by the said mills to the Deputy Commissioner Excise and Sales Tax, Jaipur and the appeals were accepted on the ground that there was no price charged for packing material and, therefore, there was no sale. The Department filed revision applications before the Board of Revenue. The Board of Revenue accepted the revision applications.

26. Mr. B. C. Mukherji, Member of the Board of Revenue observed that the issue of the case before them resolved itself into two questions:

(1) Whether there is an express or implied sale of packing material?

(2) Whether value of the packing material is insignificant?

27. So far as point No. 1 was concerned, he held that the price of the packing material was included in the consolidated charges realised from the customers and so far as point No. 2 was concerned, it was observed that the value of the packing material was about 1% of the total turnover and these figures were by no means insignificant.

28. The other member of the Board Mr. Kacker after relying on the Full Bench ruling in *Mewar Sugar Mills v. State* (already referred to by us) and referring to certain other cases observed that the rule laid down by their Lordships of the Supreme Court was that it cannot always be said that the sale of packing material is implied in the sale of the contents. It will depend upon whether the packing material is of insignificant value in comparison with the value of the contents. If the value is significant even if there is no express agreement for the sale of the packing material, such a sale will be implied and the packing material will be chargeable to sales-tax. Then he further observed that value of the packing material in this case could not be said to be insignificant and also held that the packing material could be easily sold for valuable consideration. Taking this view, he agreed with the judgment of Mr. Mukherji and the revision applications

were allowed by the Board, and the order of the Deputy Commissioner regarding the packing material as not being subject to sales-tax was set aside.

29. Applications were filed by the Spinning and Weaving Mills for making reference to this Court and the following question was referred by the Board of Revenue to this Court:

"Whether on the facts and circumstances of these cases the sale of packing material would be considered as implied sale and be liable to tax where yarn is sold in bundles of cloth?"

30. This question as it is framed, presupposes a sale of the packing material as it mentions "whether the sale of packing material would be considered as implied sale." This is an obvious error in the framing of the question. Instead of remitting the case back to the Board of Revenue to frame a proper question, we have thought it fit to reframe it so as to bring out what was really meant by the Board of Revenue while referring it to this Court. We therefore frame the question in the following form:

Whether on the facts and circumstances of this case, the transfer of packing material when yarn is sold in packed bales should be considered as implied sale and will be liable to tax?

31. It may also be mentioned that cotton yarn is an exempted article under notification dated 14th April, 1955 issued by the Government of Rajasthan under Section 4 (2) of the Act.

32. The line of argument that has been taken up by learned counsel on behalf of the Spinning and Weaving Mills is that two essential elements of sale viz. (1) the agreement between the Spinning and Weaving Mills and its customers for transferring the title to the packing materials and (2) that such agreement must be supported by money consideration were missing in this case and that the burden lay on the department to show that these essential elements were present in the transaction of the sale of yarn by the Spinning and Weaving Mills to its customers. It has been further urged that the price that has been fixed by the Spinning and Weaving Mills has no reference to the packing material and has been fixed at per bundle of 10 lbs of yarn and that no charge is made for the packing material. It has been further argued that the Spinning and Weaving Mills could sell yarn in bundles without packing them and yet would charge the same price as it would charge when selling it packed in bales. The contention is that the packing material was given free to those customers who purchased in large quantity, that is, purchased as many as 40 bundles. All these arguments run on the same lines as in the case of *Sugar Mills*. No doubt, in this case, the Members of the Board of Revenue have picked up one or two circumstances to show that there was implied sale of packing material, but they

failed to give a categorical finding of fact whether in the facts and circumstances of the case all the elements of sale were satisfied.

The main point taken by the Board of Revenue was that the cost of the packing material which was as much as 1% of the total turnover could not be taken as insignificant and, therefore, it could not have been given free by the Spinning and Weaving Mills to its customers. It is, however, contended by the learned counsel on behalf of the Mills that the price of yarn was fixed by the Textile Controller without taking into consideration the cost of the packing material and therefore the question whether the value of packing material was significant or not cannot be made the sole basis for finding that there has been an implied sale of that material. It was contended that to a customer who purchased the products of the Mills in large quantities, a particular mill may supply packing material free of cost because it may think that by supplying packing material free of cost it may attract more customers.

According to learned counsel, there may be cases where there is cut-throat competition between several mills and some mills may therefore supply packing material even of significant value as free. These contentions cannot be said to be totally devoid of force. The duty of the Board of Revenue was to find out from the facts and circumstances of the case whether all the three elements constituting sale were fulfilled or not in the transaction of transfer of packing material by the Spinning and Weaving Mills to its customers. Our answer to this question will also be as in the Sugar Mills case.

33. We have, however, to consider yet another argument addressed in this case by Mr. Mehta. His argument is that in exercise of the powers conferred under sub-sec. (2) of Section 4 of the Act the Government of Rajasthan issued notification dated 11th August, 1959 exempting from tax the sale of 'bardana' old, new or being received as containers except on the first point at the hands of an importer in the series of sales in the State and that the effect of this notification was that only 'bardana' which was imported in the State was liable to sales-tax, but the 'bardana' manufactured or produced in the State would not be so liable and by this process, the State Government had discriminated 'bardana' which was to be imported in the State and that this discrimination was not legal in view of Article 301 of the Constitution. He has relied on the decision of this Court in D. B. Civil Writ Petn. No. 92 of 1965, Ghasiram Mangilal of Sambhar v. State of Rajasthan, decided on 18-7-1968 (Raj). Learned Deputy Government Advocate has argued that under Section 15 of the Act, this question has not been referred to this Court. In reply to this argument, Mr. Mehta has pointed out that the second part

of the question, that is, whether the sale of packing material is liable to tax is comprehensive enough to cover this point. We may, however, point out that under Section 15 of the Act any question of law arising out of the order of the Board of Revenue can be referred to us and not any question which does not arise out of such order. We have, therefore, to examine whether this question arises out of the order of the Board of Revenue passed on the revision application filed by the Department.

This question was not at all raised by the Spinning and Weaving Mills before the Board of Revenue. There is no discussion in the order of the Board of Revenue on this question. As pointed out by their Lordships of the Supreme Court in Commissioner of Income-tax, Bombay v. Scindia Steam Navigation Company Limited, 1961-42 ITR 589 = (AIR 1961 SC 1633), when a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.

Mr. Mehta has, however, pointed out that before the Tribunal the said Mills had sought to exonerate themselves from payment of any tax on the ground that there had not been any sale express or implied. In this Court they should be permitted to show that on account of certain notifications, the article for which tax was being levied could not be taxed as this was only another aspect of the same matter. In the widest sense, every tax payer who is party to any appeal or revision is only attempting to exonerate himself from the payment of tax, but it does not mean that he has not to address specific points for such exoneration. In this case, the specific argument that was addressed before the Board of Revenue was only whether there has been an implicit sale of 'bardana' or not. No other argument was addressed before the Board. All aspects on this point can be argued before this Court, but not any new point which was not argued before the Board of Revenue. It cannot be said that what is being argued before us in exonerating the Spinning and Weaving Mills from its liability for payment of tax is not a new point which does not arise out of the judgment of the Board of Revenue. In our opinion, this point cannot be urged to be taken before us because it has not been referred by the Board of Revenue.

34. As a result of the aforesaid discussion, we answer the question as framed by us in the following manner:

Whether there was an implied sale of 'bardana' is to be determined by the Board of Revenue on the facts and circumstances of the case, keeping in view the meaning of the expression "sale" as clarified by us and after satisfying that all the elements which constitute sale are present.

35. The third case Civil Sales Tax Reference No. 24/65 Sales Tax Officer, Bhilwara v. Mahalaxmi Cotton Ginning and Pressing Factory, Asind arises under the following circumstances :

36. Mahalaxmi Cotton Ginning and Pressing Factory (hereinafter called the Factory) carried on the business of pressing the raw cotton brought to it by its constituents for the period 1-6-1955 to 31st May, 1956. The Assistant Commissioner, Excise and Taxation, Bhilwara, assessed the factory and held it liable to pay sales-tax on a turnover of Rs. 30,005 which, according to the estimate of that officer, was the value of the gunny bags and iron hoops used by the assessee in the conduct of its business. The factory had disputed its liability to pay sales-tax on the ground that the factory did not make sale of the packing material to its constituents. This argument was negatived by the taxing officer. The factory preferred appeal before the Deputy Commissioner, Sales Tax, (Appeals) Jodhpur, which was rejected, but the estimated turnover was reduced to Rupees 24,849. An application for revision against the order of the Deputy Commissioner was filed by the Factory to the Board of Revenue. The Division Bench of the Board quashed the order of assessment by its order dated 17th February, 1964 taking the view that the gunny bags and iron hoops were delivered as a part of the consolidated contract for pressing and baling of cotton. The assessing authority filed an application under Section 15 of the Rajasthan Sales Tax Act (hereinafter called the Act) before the Board of Revenue for referring the following question :

"Whether the iron hoops and hessian cloth used for wrapping the pressed cotton bales by the assessee, the Cotton Ginning and Pressing Factory, is a sale in the Customer and divisible part of the contract and its turnover is taxable under the Rajasthan Sales Tax Act."

37. The Board of Revenue has taken the view that it was the job of the factory to press the cotton into bales and then redeliver the same after pressing it. For this contract, the consolidated charge of Rs. 11 per bale was being charged and it was also clear from the order of the Assistant Commissioner, Bhilwara that he estimated the price of the packing material at Rs. 5 per bale. The Board of Revenue held that it was the essence of the operation of pressing and baling that the hessian cloth and iron hoops were to be necessarily used, otherwise in the absence of such use, the pressed cotton would not remain in that shape and that the petitioner charged a consolidated price for the entire operation and thus two agreements — one for pressing the cotton and another for sale of the packing material — cannot be inferred from the transaction. Taking this view, the Board held that there was no sale of hessian cloth and iron hoops

to the persons who brought their cotton for being pressed.

38. It is contended by learned Deputy Government Advocate on behalf of the Department that pressing and packing were two distinct processes. While the former is only a contract for work, the second is mainly a contract for the sale of material and, therefore, the sales-tax could be levied under the Act on the packing material. We have to examine how far this argument is correct.

39. We have already pointed out that in order to constitute sale there must be:

(1) Agreement between the parties for the purpose of transferring title to the goods,

(2) That the agreement must be supported by money consideration, and

(3) As a result of the transaction, the property should actually pass in the goods.

40. A contract for work is not a contract for sale because there is no agreement between the parties for the purpose of transferring title to the goods. A contract of work may be supported by money consideration and as a result of contract, some material belonging to the person undertaking the job may actually pass from him to the other persons with whom he has entered into agreement to undertake the job. But these two circumstances which are present in this case also would not make the transaction an agreement to sell the material unless there is either express or implied agreement between the parties that the person who had undertaken the job also intended to transfer title to goods to the other party. In the case before us there is no such express agreement. The question is whether we should infer any implied agreement for the sale of packing material. This will depend as to what was the dominant intention of the parties at the time when the job of pressing was undertaken by the Factory. If in doing this job, it was intended that some material will be supplied by the person undertaking the job to the other party for a price, then it may be inferred that there was an implied contract for sale of the material. As has been pointed out by their Lordships of the Supreme Court in 1959 SCR 379 = (AIR 1958 SC 560) (Supra) in these words :

"It is possible that the parties to the contract may enter into distinct and separate contracts, one for the transfer of materials for money consideration and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment."

41. In several cases decided by the High Courts, the view taken is that in the contract for pressing cotton bales, the process of packing cotton may be separated from that

of pressing it and the contract of packing may be considered to be mainly a contract for supply of packing material and some labour. The Madhya Pradesh High Court has consistently taken this view.

42. In Jaikishan Gopikishan v. Commissioner of Sales Tax, Madhya Bharat, 1957-8 STC 286 = (AIR 1957 Madh Pra 40), the definitions of "dealer", "goods" and "sale" as given in the Madhya Bharat Sales Tax Act, 1950 were examined and the view was taken that the combined effect of those definitions was that every person who carried on the business of transferring property in any kind of movable property including articles and commodities used in fitting out, improvement or repairs of movable or immovable property to another for cash or deferred payment or other valuable consideration is liable to pay sales tax on the turnover. It was held that the hessian cloth and hoops supplied by a ginning and pressing factory to its customers in the form of bales covered with hessian cloth and secured by iron hoops was a sale. This case was decided on the definition of Sale in the Madhya Bharat Act. Another case of a cotton pressing factory which arose in Madhya Pradesh High Court was referred to the Full Bench (AIR 1961 Madh Pra 88 (FB)) and that case is 1954-5 STC 428 = (AIR 1956 Nag 27).

In that case it was held that the decision in 1957-8 STC 286 = (AIR 1957 Madh Pra 40) (supra) was in no way contrary to the principles laid down by the Supreme Court in 1959 SCR 379 = (AIR 1958 SC 560) (supra) and Banarsi Das v. State of Madhya Pradesh, 1958-9 STC 388 = (AIR 1958 SC 909). Their Lordships of the Madhya Pradesh High Court examined the case before them in the light of the Supreme Court decision and came to the following conclusion :

"The "pressing part" of the contract was one of execution of work on the cotton. The hessian cloth and iron hoops which were used for packing were not in any way materials "worked into" the cotton, and there was no question of iron hoops and hessian cloth vesting by accession in the owner of the cotton. The packing material remained extraneous. It must be remembered that in the process of pressing cotton, the packing material is not necessary as an incident of pressing. It is not an accessory to the work of pressing. The compressing is not done by the hessian cloth or the iron hoops, but by a machine worked by mechanical or hydraulic power which exerts great and steady pressure on the ginned cotton in a cast and thus compresses it into bales. The packing material is for convenience of transport and to prevent the bales from being "unloosened" during the course of handling. The necessity of packing compressed cotton varies with the factor of transport and the time within which the pressed cotton is to be spun and used for manufacture in the textile mills. If the pressed cotton is to be taken

immediately to an adjoining textile mill and used for manufacture, it may be wholly unnecessary to use any packing material. The necessity would be great if the pressed bales are to be transported over long distances or to overseas. Therefore a contract for pressing cotton and delivery of the compressed cotton in a certain kind of packing is really divisible into two distinct contracts; (i) one of labour and work, namely, the pressing of the cotton, and (ii) the other of packing the compressed cotton which is partly of material and of labour. In the "packing part" of the contract, the substance of the agreement is not the skill and labour but it is the material.

It is thus clear that even in the absence of an express agreement for the sale of packing material as such there would be a sale of the material for in a contract of pressing cotton and delivery of compressed cotton in bales covered with hessian cloth and iron hoops for a consolidated charge of pressing and packing, it is implicit that there would be a sale of the packing material and the parties are impliedly ad idem on the passing of the property in the material qua material and the addition of its price to the pressing charges. If the property in the extraneous packing material vests in the owner of the cotton on payment of a consolidated price and the vesting is not accession, then it can only be under an implied contract of sale of the material.

43. The Madhya Pradesh High Court again considered this matter in the Nimar Cotton Press Factory v. Commissioner of Sales Tax, Madhya Pradesh, Indore, 1968-21 STC 505 (MP). This time the contention raised before the High Court was that in view of the decision of the Supreme Court in 1965-16 STC 240 = (AIR 1965 SC 1396), the decision in Nimar Cotton Press v. Sales Tax Officer, Nimar Circle, Khandwa, 1961-12 STC 313 = (AIR 1961 Madh Pra 88) (FB) was no longer of any binding force. Their Lordships considered 1965-16 STC 240 = (AIR 1965 SC 1396) and observed as follows :—

"From the facts of the said case it would appear that the ratio of the case is that in a works contract, where packing material is used and where there is no specific agreement to transfer the packing material, the test to determine whether there was a sale of the packing material or not is to find out from the circumstances of each case whether the packing material was an integral part, of the works contract or it was extraneous to it; if it was an integral part, no agreement for sale could be inferred; if it was not so, then an implied contract of sale could be inferred from the facts and circumstances of the case."

44. There is yet another case of the Madhya Pradesh High Court in Vimalchand Prakashchand Sarafa v. Commissioner of Sales Tax, Madhya Pradesh, 1968-22 STC 22 (MP) in which a similar question was involved. The view taken was that for supply of

packing material, there was an implied contract for the sale of packing material and that the mere fact that the price of packing material was not fixed makes no difference to the assessment of sales-tax. While referring to other cases, reliance was placed on 1960-11 STC 321 (Mad) (supra) which according to the Madhya Pradesh High Court was approved by the Supreme Court in 1965-16 STC 240 = (AIR 1965 SC 1396).

45. The Andhra Pradesh High Court in *B. V. Hanumantha Rao v. State of Andhra*, 1956-7 STC 486 (Andh) took the view that the packing materials in the shape of gunny cloth and iron hoops used by the assessee carrying on the business of baling and pressing palmyra fibre could be assessed to sales-tax. Subba Rao C. J. (as he then was) took the view that packing materials were goods within the definition of that expression under the Madras General Sales Tax Act. He observed as follows:—

"In the present case, as in that case, the packing materials were "goods" within the definition of the Act. The assessee certainly had property in the goods and it is not disputed that he transferred them to his constituents. But what is said is that he did not sell the goods for consideration. It is said that he did not charge a separate price for the packing material. But, the order of the Andhra Sales Tax Appellate Tribunal clearly shows that he entered into three kinds of transactions, (i) where he charged an inclusive rate of both the gunny coverings and also the pressing process, (ii) where the gunny cloth and the hoops were supplied by the customers and rebate was granted by the assessee, and (iii) where the price of the goods and the cost of labour involved were separately shown.

It is obvious that whatever method was adopted, the assessee charged for the gunny cloth and the hoops and it is impossible to conceive that a businessman like the assessee would not have included in the charges the large amounts he spent for purchasing the gunny cloth and iron hoops. We, therefore, following the judgment in 1956-7 STC 26 = (AIR 1957 Andh Pra 706) hold that the transactions in question were "sales" within the meaning of the Act and, therefore, were liable to sales tax."

In 1956-7 STC 26 = (AIR 1957 Andh Pra 706) which was relied by the learned Chief Justice, the assessee Company relied in their plant raw tobacco given to them by their customers. After redrying the tobacco, the assessee packed it with the necessary packing materials purchased by them and then delivered it to the customers. The assessee collected from each customer a consolidated charge for redrying as well as packing. They were assessed to sales-tax. After quoting certain English and Indian cases, Subba Rao C. J. took the view that in the case of tobacco given for drying purposes, the owner may supply the material or

the assessee may supply the material himself and the material did not become the part of drying process and was clearly separable from the process. Reference was made to the definition of goods in the Madras General Sales Tax Act and it was observed as follows:—

"Unless we can hold that the materials, after being packed, have been transformed into some other commodity not covered by the definition of goods, it is not possible to hold that there was no sale of that material. Though the learned counsel for the petitioner argued that packing material was an integral part of the drying process, he did not go to the extent of contending that the material lost its character as movable property."

46. The Bombay High Court in *Babulal Onkarnal and Co. v. The State of Bombay* 1964-15 STC 598 (Bom) has also taken the view that in the transaction entered into by a company carrying on business of ginning and pressing cotton in the factory owned by them with their customers for the ginning and pressing of their cotton, there was involved as a severable part of the transaction, sale of hessian and iron hoops used in the execution of the contract and therefore the applicants were dealers under the Bombay Sales Tax Act.

47. These cases are direct authorities on the point that the contracts of pressing and packing are severable and packing does not form integral part of the contract of pressing.

48. In some cases, it is also said that the material does not become part of the thing packed, that is, cotton by the process of packing and for this reason, the packing material is liable to sales-tax for exemption.

49. In *Krishna and Co.*, 1956-7 STC 26 = (AIR 1957 Andh Pra 706), the view was expressed that unless the packing material had been transformed to some other commodity not covered by the definition of the goods, it was not possible to hold that there was no sale of that material.

50. These cases have been decided by eminent Judges and we must hesitate to take a different view, but with utmost respect, we may say that in taking the view that packing is not a part of pressing cotton, the learned Judges have been unduly stringent. If a particular job entrusted for performance to any person cannot be completed without the process of packing, then, in our opinion, the process of packing also becomes integral part of the performance of that job. In this connection, we may quote the following observations of Shah J. in 1965-16 STC 240 = (AIR 1965 SC 1396), (supra):

"The fact that in the execution of a contract for work some materials are used and property in the goods so used passes to the other party, the contractor undertaking to do the work will not necessarily be deemed on that account to sell the materials. A contract for work in the execution of which goods are used may take one of three forms.

The contract may be for work to be done for remuneration and for supply of materials used in the execution of the works for a price; it may be a contract for work in which the use of materials is accessory or incidental to the execution of the work; or it may be a contract for work and use or supply of materials though not accessory to the execution of the contract is voluntary or gratuitous. In the last class there is no sale because though property passes it does not pass for a price. Whether a contract is of the first or the second class must depend upon the circumstances. If it is of the first, it is composite contract for work and sale of goods; where it is of the second category, it is a contract for execution of work not involving sale of goods'.

51. In the light of these observations, we have to examine therefore whether the use of packing materials in the circumstances of this case by the factory was not accessory or incidental to the execution of the work of pressing cotton. That packing is a necessary part can be gathered from the provisions of the Cotton Ginning and Pressing Factories Act, 1925 which regulates cotton ginning and cotton pressing factories. We will make reference to this Act as amended by the Cotton Ginning and Pressing Factories Act (Rajasthan Amendment Act, 10 of 1957). Without referring to the provisions of this Act in detail, we may point out that under this Act, cotton pressing factory has been defined as a factory in which cotton is pressed into bales and bale means according to Webster's Third International Dictionary, "a large closely pressed package of merchandise bound with cord, wire, or hoops and usually protected by a wrapping (as a burlap)."

Now, in the very nature of things, there can be no bale of pressed cotton unless it is wrapped by some material and hessian being the cheapest of the materials available for such wrapping, it is often used in the process. It may be noted that the owner of every pressing factory is required under the said Act to maintain a register containing a daily record of the number of bales pressed in the factory under Section 3 (2). Under Section 4, the owner of every cotton factory is required to cause every bale pressed in the factory marked in such manner as may be prescribed, before it is moved from the press premises with its serial and with the marks prescribed for the factory and if he fails to do so, he is on conviction liable to be punished with fine which may extend to Rs. 50. Under Section 12, power has been given to the Central Government to make rules prescribing a special mark to be used by each pressing factory for the purpose of making bales in the manner in which bales shall be marked.

These provisions show that in the performance of the work of pressing, a pressing factory is bound to make bales of the cotton pressed by it and mark it in a prescribed

manner otherwise it is likely to incur criminal liability. Can it be said under these circumstances that the work of wrapping the pressed cotton is not an integral part of pressing undertaken by the factory? The answer is obviously no. The work of packing is not only incidental to the work of pressing, but under the statute it is obligatory. Under these circumstances, in our opinion, packing is an integral part of pressing of cotton undertaken by the factory. It cannot refuse to do so. Nor can the constituent of the factory who has brought the cotton to it for pressing claim that the factory should not pack the pressed bale.

The law regulates the method and the manner in which the job of pressing is to be performed and when packing has been made incumbent by law on the part of the factory, it becomes integral part of the job undertaken by it to be performed. In order that a process may become an integral part of the work undertaken to be performed, it is not necessary that the materials used by the person who has undertaken the performance of that work should be transformed in any other material. The Madhya Pradesh High Court in 1961-12 STC 313=(AIR 1961 Madh Pra 88) (FB) has observed that the hessian cloth and iron hoops which were used for packing were not in any way materials "worked into" the cotton, and there was no question of iron hoops and hessian cloth vesting by accession in the owner of the cotton. The packing material remained extraneous.

If the meaning of these words is that they did not form part of the cotton in our opinion it is not necessary that in order that the process of packing of the cotton be deemed to be a part of pressing, it must necessarily be found that the packing material has become part of the cotton inside it. We have already mentioned that the process of packing is incidental to the process of pressing. The view taken by the Revenue Board is also that the use of hessian cloth and iron hoops was necessarily the essence of the operation of pressing in the absence of which the pressed cotton would not remain in that shape. Thus there is a definite finding of the Board of Revenue on this point and this is a finding of fact which we must accept and there is little that can be urged to the contrary. It is urged by the learned Deputy Government Advocate appearing on behalf of the Department that the hessian and the iron hoops are materials which could be sold by the various constituents after the cotton has been used by them, but this does not affect the matter. In that way, every wrapping material whether of significant or insignificant price has some money value however little it may be. In this case, it cannot be said that the material used by the factory for wrapping was of such high value that prima facie it may be presumed that the intention of the factory was to sell it.

52. We are therefore of the view that questions referred to us by the Board of

Revenue should be answered in the negative. In all these three references we order that the parties shall bear their own costs.

Answered accordingly.

AIR 1970 RAJASTHAN 12
(V 57 C 2)

P. N. SHINCHAL J.

Rameshwarlal and others, Petitioners v. The Pareek Commercial Bank Ltd., Respondent.

Company Appns. Nos. 16 to 19 of 1967, D/-18-9-1968.

Banking Companies Act (1949), Ss. 45-B, 45-T — Scope — Objections to attachment of property — *Executing Court is competent to investigate and decide upon objections — Alternative remedy open to objector is to prefer claim in High Court under S. 45-B — Civil P. C. (1908), O. 21, Rr. 58 and 63.*

Order 21, Rule 58 of the Code deals with the investigation of claims and objections to attachment of property in execution proceedings on the ground that such property is not liable to attachment, and it is for the execution Court to investigate that claim or objection "with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit". Where the objections filed by the applicants against a banking company in the execution Court, were expressly labelled as "objections under Order 21, Rule 58 of the Code of Civil Procedure", on the question whether the objections could be investigated and decided by the executing Court.

Held, being defensive proceedings, it was not necessary to obtain the leave of the Court for filing those claims or objections under Section 171 of the Companies Act. The execution Court was therefore quite competent to decide them one way or the other in accordance with the provisions of the Code of Civil Procedure relating to their investigation. The orders disallowing the claims or objections were therefore quite legal: (1962) 1 Mad LJ 251, Rel. on. AIR 1952 Cal 732 Disting.; AIR 1962 Cal 86, Dissent from. (Para 10)

Part III-A of the Act or the rules made thereunder do not contain any provision which could be said to run counter to this view. On the other hand, Section 45-T may be said to strengthen the view. It provides for the enforcement of the orders of the High Court in any civil proceeding as a decree and provides further that the amount found due to a banking company may be recovered as an arrear of land revenue. The Collector has therefore been authorised to proceed to make the recovery as if it were an arrear of land revenue and to exercise all the powers of a civil Court. It could not therefore be the intention that claims or

objections in those proceedings should not be heard by the Collector but should be referred to the High Court. Any other view will defeat the very purpose of securing expeditious realisation of the amount as an arrear of land revenue. (Para 11)

It is not, however, obligatory, for a claimant or objector to apply to the execution Court under Order 21 Rule 58 of the Code of Civil Procedure when he feels aggrieved by the attachment of any property. Two alternative courses will be open to such a claimant or objector. He may either proceed under Order 21, Rule 58 of the Code of Civil Procedure and take a decision from the execution Court, or he may prefer claim in the High Court under Section 45-B of the Act. If the claimant chooses to take resort to the procedure laid down in the Code of Civil Procedure and to prefer claims or objections under Order 21, Rule 58, the provisions of that and the ancillary rules will govern his case so that the orders of the execution Court shall be conclusive subject to the result of the suit, if any, instituted by the aggrieved party under Order 21, Rule 63 of the Code of Civil Procedure. (Para 12)

The normal procedure for the adjudication of a claim under Section 45-B is to make an application where elaborate proceedings by way of a suit are not contemplated, and the procedure for such application is left to the judgment and discretion of the Court. A suit need not therefore be filed unless (i) the Court in its discretion thinks fit to direct that the remedy should be sought by means of a suit, or (ii) the Rules of the High Court provide that the claim of a particular nature should be pursued by a suit. AIR 1955 SC 213, Rel. on. (Para 16)

Cases	Referred;	Chronological	Paras
(1962) AIR 1962 Cal 86 (V 49) =			
66 Cal WN 761, Comrade Bank Ltd. v. Jyoti Bala Dassi			7, 13
(1962) 1962-1 Mad LJ 251 = 74			
Mad LW 698, Malli Salva Iyer v. Madurai Mercantile Bank Ltd.			10, 13
(1955) AIR 1955 SC 213 (V 42) =			
1955 Cri LJ 555, Dharendra Chandra Pal v. Associated Bank of Tripura Ltd.			16
(1952) AIR 1952 Cal 732 (V 39) =			
56 Cal WN 632, Hemanga Coomar Mookerjee v. M. C. Chakravarty			7, 13
B. K. Acharya, for Petitioners; C. D. Mundhra, for Respondent.			

ORDER: There is a great deal of controversy about the maintainability of these four applications. Common questions of law and fact arise in all of them. They have been argued together, and I shall dispose them of by a single judgment as prayed by the learned counsel for the parties.

2. In order to bring out the controversy in bold relief, I may first state those facts regarding applications Nos. 16 and 17 which are no longer in dispute. The Pareek Commercial Bank Limited, respondent No. 1,

hereinafter referred to as the Bank, was ordered to be wound up on July 31, 1952. Vastu Lal Pareek (respondent No. 2) was the Chairman of the Bank and orders were passed by this Court for the realisation of various sums of money from him. The Official Liquidator applied for execution of the Court's orders and the execution petitions were transferred by this Court to the Court of the District Judge of Bikaner on February 4, 1960. The District Judge attached certain properties on February 13, 1960 in execution of the decree, and claims or objections were filed by the present applicants under O. 21, Rule 58 of the Code of Civil Procedure. Rameshwarlal, Ishwarlal, Umesh Chandra and Herendra Kumar, sons of Vastulal Pareek, filed one such claim or objection, while Smt. Moolidevi, the daughter of Vastulal Pareek, filed another claim or objection. The claims or objections were filed on the ground that the attached properties did not belong to Vastulal Pareek, but were the properties of the claimants or objectors. The claims or objections were however dismissed by the execution Court on December 17, 1960. The unsuccessful claimants or objectors then applied for leave of this Court to file suits under O. 21, Rule 63, Civil P. C. on the ground that "complicated questions" were involved in the dispute which could not be adjudicated "without proper enquiry and trial except by way of a regular suit". This Court gave notice to the Official Liquidator and made an order on December 11, 1961, in similar terms, in both the cases as follows:

"Heard learned counsel for the parties. Permission is granted to file a suit under Order 21, Rule 63 of the Code of Civil Procedure. The claim petition has already been filed in the Court of District Judge Bikaner and it has been rejected."

Thereupon two applications, which have now been renumbered as 16 and 17 of 1967, were filed the same day.

3. A dispute however arose about the Court fee payable on the applications. An order was made by this Court on April 19, 1962 for the payment of ad valorem court fee on the ground that the applicants had filed suits under Order 21, Rule 63 of the Code of Civil Procedure which were independent proceedings. Two months' time was allowed to make up the deficiency in the court fee. But an appeal was preferred against that order before a Division Bench. It was dismissed as premature on July 24, 1962 and the applicants were directed to argue before the Company Judge whether their applications were in the nature of claims, and not suits, and were maintainable without the payment of ad valorem court fee. The matter therefore came before the Company Judge again on July 26, 1962. He rejected the claims because the court fee was not paid in time, and observed that if the applicants thought that they had a remedy by way of an application under Sec-

tion 45N (2) of the Banking Companies Act, 1949 (hereinafter referred to as the Act), they were free to move fresh applications thereunder.

4. The applicants again preferred appeals to the Division Bench. It was argued there that the applications were in the nature of claims and not suits. The Division Bench upheld the plea and decided in its judgment dated July 19, 1965 that the applications filed on December 11, 1961 were not complaints, but were claims under S. 45-B of the Act. As the appellants had already paid the required court fee, the order of rejection passed by the Company Judge was set aside in both the cases. The cases were thus "remanded" for disposal according to the law. Review petitions were filed by the Bank against the judgments of the Division Bench. While dismissing those petitions, an order was made by the Division Bench to the following effect,—

"On the consideration of the tenor of the petition, and no more, we came to the conclusion that it could only be regarded as a claim petition and not a suit for purpose of seeing what court-fee was payable. We do not think that our judgment would stand in the way of the petitioner raising the question about the maintainability of a claim petition under Section 45B of the Banking Companies Act in the circumstances on which the appellant non-petitioner relies."

5. It is in these circumstances that the controversy regarding the maintainability of the applications continues to rage even after the lapse of a period of almost 8 years, although there is no dispute about the correctness of the facts set out above.

6. As has been stated, there is no dispute that the orders of this Court for the realisation of the various sums of money from respondent Vastulal Pareek were final and executable. There is also no dispute that the applications for the realisation of those sums of money by execution were rightly sent to the District Judge of Bikaner. In other words, there is no dispute about the jurisdiction of the District Judge to execute the orders by taking the necessary steps for the realisation of the amounts by attachment of the properties of respondent Vastulal Pareek. But there is a serious controversy regarding the maintainability of the claims or objection petitions which were filed under Order 21 Rule 58 of the Code of Civil Procedure in the Court of the District Judge, to which reference has been made above, for while the applicants now contend that they were not maintainable and could not be decided by the District Judge, it has been argued on behalf of the Bank that they were maintainable and were rightly disallowed.

7. In this connection it has been argued by Mr. B. K. Acharya, the learned counsel for the applicants, that any claim or objection to the attachment of the properties at the instance of the present applicants fell

within the purview of Section 45B of the Act and the High Court alone was competent to decide it so that the orders of the execution Court dated December 17, 1960 rejecting the claims or objections under Order 21, Rule 58 of the Code of Civil Procedure were a nullity. The learned counsel has cited Hemanga Coomar Monkherjee v. M. C. Chakravarty, AIR 1952 Cal 732 and Comrade Bank Ltd. v. Jyoti Bala Dass, AIR 1962 Cal 86 in support of his argument.

8. In order to appreciate the controversy it is necessary to refer to Sections 45A and 45B which occur in Part III-A of the Act. According to Section 45A, the provisions of Part III-A and the rules made thereunder override anything inconsistent therewith contained in the Companies Act or the Code of Civil Procedure, or any other law for the time being in force. So if any provision of Code of Civil Procedure is not inconsistent with the provisions of Part III-A of the Act or the rules made thereunder, it shall apply to the proceedings under that Part. The High Court has made Rules under the Act and these are to be found in Chapter XXIX of the High Court Rules. Rule 745 (2) of these Rules reads as follows:

"745 (2). The provisions of the Code of Civil Procedure, the Code of Criminal Procedure and the Rules of the High Court, 1952, unless inconsistent with these rules, shall apply mutatis mutandis to Civil and Criminal Proceedings and appeals under these rules."

There can therefore be no doubt that both by virtue of Section 45A and Rule 745 (2), these provisions of the Code of Civil Procedure which are not inconsistent with the provisions of Part IIIA of the Act apply to proceedings under that part.

9. Section 45-B of the Act deals with the power of the High Court to decide all claims in respect of Banking Companies. Its relevant provisions read as follow,—

"45-B. The High Court shall have exclusive jurisdiction to entertain and decide any claim made by or against a Banking Company which is being wound up, or any other question whatsoever, whether of law or fact, which may relate to or arise in the course of the winding up of a Banking Company, whether such claim or question has arisen or arises or such application has been made or is made before or after the date of the order for the winding up of the Banking Company or before or after the commencement of the Banking Companies (Amendment) Act, 1953."

10. It is not in dispute, as has been stated earlier, that the execution Court (District Judge, Bikaner) was competent to execute the orders of this Court and realise the various sums of money referred to in those orders, from respondent Vastulal Pareek, by attachment and sale of his properties. As is obvious, the execution Court

could do so under the provisions of the Code of Civil Procedure for there is nothing to the contrary in Part IIIA of the Act or the rules made thereunder. Order 21 R. 58 of the Code deals with the investigation of claims and objections to attachment of property in execution proceedings on the ground that such property is not liable to attachment, and it is for the execution Court to investigate that claim or objection "with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit." The objections which were filed by the present applicants in the execution Court, and which were expressly labelled as "objections under Order 21 Rule 58 of the Code of Civil Procedure," were therefore required to be investigated and decided by the execution Court. Being defensive proceedings, it was not necessary to obtain the leave of the Court for filing those claims or objections under Section 171 of the Companies Act. The execution Court was therefore quite competent to decide them one way or the other in accordance with the provisions of the Code of Civil Procedure relating to their investigation. The orders of the District Judge dated December 12, 1962 disallowing the claims or objections were therefore quite legal. I am fortified in this view by the decision in Malli Salva Iyer v. Madurai Mercantile Bank, Ltd. 1962-I Mad LJ 251. In that case also a claim was made for raising the attachment on the ground that the claimants were entitled to possession of the properties in their own right. The claims were resisted by the Official Liquidator, inter alia, on the ground that the petitions filed under Order 21 Rule 58 of the Code of Civil Procedure could not be entertained by the execution Court by reason of S. 45-B of the Act as only the High Court had the jurisdiction to entertain all claims against a bank in liquidation. The objection found favour with the execution Court, but the matter was taken to their Lordships of the Madras High Court. They rejected the contention of the Official Liquidator on the ground that, if accepted, it would "lead to the anomaly that while the attachment is made by one Court, where such Court is not the High Court, the claim petition has to be decided only by the High Court." They therefore held that Order 21 Rule 58 of the Code of Civil Procedure conferred jurisdiction only on the execution Court even though the decision given on such a claim petition was of a summary nature concerning the question of possession and was subject to the result of a suit under Order 21 Rule 63 C. P. C. Their Lordships therefore held that as a Banking Company is able to execute a decree in a subordinate Court either by obtaining transfer of the decree from the High Court or otherwise, it should in principle be held that the claim petition should be entertainable by that Court,

They observed however that if a suit was filed under Order 21 Rule 63 of the Code of Civil Procedure after the disposal of the claim petition, different considerations would arise and Section 45-B of the Act would apply to that case. I am in respectful agreement with this view.

11. In fact, as has been stated Part III-A of the Act or the rules made thereunder do not contain any provisions which could be said to run counter to this view. On the other hand, Section 45-T may be said to strengthen the view I have taken. It provides for the enforcement of the orders of High Court in any Civil Proceeding as a decree and provides further that the amount found due to a banking company may be recovered as an arrear of land revenue. The Collector has therefore been authorised to proceed to make the recovery as if it were an arrear of land revenue and to exercise all the powers of a Civil Court. It could not therefore be the intention that claims or objections in those proceedings should not be heard by the Collector but should be referred to the High Court. Any other view will defeat the very purpose of securing expeditious realisation of the amount as an arrear of land revenue.

12. I should not however be understood to say that it is obligatory for a claimant or objector to apply to the execution Court under Order 21 Rule 58 of the Code of Civil Procedure when he feels aggrieved by the attachment of any property in a case like the present. It appears to me that two alternative courses will be open to such a claimant or objector. He may either proceed under Order 21 Rule 58 of the Code of Civil Procedure and take a decision from the execution court, or he may prefer a claim in the High Court under Section 45-B of the Act. The choice therefore lay with the present claimants or objectors. But if they chose to take resort to the procedure laid down in the Code of Civil Procedure and preferred claims or objections under order 21 rule 63, the provisions of that and the ancillary rules will govern their cases so that the orders of the execution court shall be conclusive subject to the result of the suit, if any, instituted by the aggrieved party under order 21 rule 63 of the Code of Civil Procedure.

13. I have considered the two cases cited by Mr. Acharya. In Hemanga Coomar Mookherjee's case, AIR 1952 Cal 732 the Bank of Commerce Limited filed a claim petition under Order 21 Rule 58 of the Code of Civil Procedure in the execution Court and the proceedings were transferred to the High Court at the instance of the Official Liquidator. It was held that the proceeding under Order 21 Rule 58 of the Code of Civil Procedure was a proceeding arising in the course of the winding up of the Bank within the meaning of Section 11 of the Banking Companies (Amendment) Act. In that case their Lordships were primarily

concerned with that Section. Their judgment therefore bears on its provisions and I do not think it is directly in point for that reason even though there are observations in the judgment to the effect that Ss. 45-A and 45-B deprive all courts except the High Court of jurisdiction in such matters. Besides, their Lordships were not required to consider the Rules similar to those made by this Court under Part III-A of the Act providing for the disposal of Civil Proceedings in accordance with the provisions of the Code of Civil Procedure. It may be mentioned that the decision in Hemanga Coomar Mukherjee's case, AIR 1952 Cal 732 was considered in Malli Silva Iyer's case, 1962-1 Mad LJ 251 and it was observed that there was nothing in it to support the contention that an objection to an attachment effected at the instance of a banking company could not be entertained by the court which effected the attachment. The other case on which reliance has been placed by Mr. Acharya is AIR 1962 Cal 86. In that case it has no doubt been held that an investigation of a claim under Order 21 Rule 58 of Code of Civil Procedure cannot be undertaken by the execution court and that it must be investigated and decided by the High Court in terms of Sections 45-A and 45-B of the Banking Companies Act, but the decision seems to be based upon Hemanga Coomar Mookherjee's case, AIR 1952 Cal 732 and I need not deal with it separately.

14. In the present cases, the claims or objections of the applicants (in cases Nos. 16 and 17) under Order 21 Rule 58 C. P. C. were disallowed by the execution Court on December 17, 1960. It appears that it was for this reason that they expressly applied for and obtained leave of this Court to file suits under order 21 rule 63 of the Code of Civil Procedure.

15. It is however an admitted fact now that the applicants (of cases Nos. 16 and 17) did not actually institute suits under order 21 rule 63 of the Code of Civil Procedure for which they obtained the leave of this Court. As has been stated, they filed the present applications on December 11, 1961 and at one time they were treated as suits under Rule 63. But the applicants later on insisted that this was not so and that the applications were in the nature of claims, other than suits, under Section 45-B of the Act. The Division Bench has upheld this contention in its judgment dated July 19, 1965. It is therefore quite apparent that the applicants in the two cases have not filed suits under Order 21 Rule 63 of the Code of Civil Procedure. This had the effect of making the Orders of the execution court dated December 17, 1960 conclusive by virtue of the provisions of Order 21 Rule 63 and it is not possible to re-agitate the matter by preferring a claim under Section 45-B of the Act for that reason.

16. There is one more reason why applications Nos. 16 and 17 must be rejected. The scope and nature of the proceedings under Section 45-B of the Act have been examined and defined by their Lordships of the Supreme Court in *Dhirendra Chandra Pal v. Associated Bank of Tripura Ltd.*, AIR 1955 SC 213. Their Lordships have considered the provisions of Sections 45-A and 45-B with due regard to the policy and the scheme of the Amending Act by which they were incorporated for the speedy winding up of Banks, and have made the following important observation,—

"It appears to us that, consistently with this policy and with the scheme of the Amending Act, where the liquidator has to approach the Court under Section 45-B for relief in respect of matters legitimately falling within the scope thereof, elaborate proceedings by way of a suit involving time and expense, to the detriment of the ultimate interests of the company under liquidation, were not contemplated. In the absence of any specific provision in this behalf in the Act itself and in the absence of any Rules framed by the High Court concerned under Section 45-G, the procedure must be taken to be one left to the judgment and discretion of the Court, having regard to the nature of the claim and of the question therein involved."

Their Lordships then went on to make the following further observation which also bears on the present controversy,—

"The question is not whether Section 45-B permitted summary proceedings but the question is whether the Section prescribed definitely a particular method of proceeding and whether consistently with the policy of the Act it was not to be presumed that a speedy and cheap remedy was to be available to the Liquidator, unless the Court in its discretion thought fit to direct or the Rules of the High Court provided that a claim of a particular nature had to be pursued by a suit.

It is to be remembered that Section 45-B is not confined to claims for recovery of money or recovery of property, moveable or immoveable but comprehends all sorts of claims which relate to or arise in the course of winding up. Obviously the normal proceeding that the Section contemplated must be taken to be a summary proceeding by way of application."

It would thus appear that the normal procedure for the adjudication of a claim under Section 45-B is to make an application where elaborate proceedings by way of a suit are not contemplated, and the procedure for such application is left to the judgment and discretion of the Court. A suit need not therefore be filed unless (i) the Court in its discretion thinks fit to direct that the remedy should be sought by means of a suit, or (ii) the Rules of the High Court

provide that the claim of a particular nature should be pursued by a suit.

17. In the instant case, the Court had given a direction in its discretion on December 11, 1961 that the remedy should be pursued by a suit. In doing so, the Court gave a very good reason for it stated that leave to file the suit under Order 21 Rule 63 was granted because "the claim Petition has already been filed in the Court of District Judge of Bikaner and it has been rejected." In the face of such a clear direction of the Court, the applicants had no option but to seek their remedy by a suit. Moreover, Rule 745 (2) of the High Court Rules, to which reference has been made above, clearly provides that the provisions of the Code of Civil Procedure shall apply *mutatis mutandis* to the civil proceedings under the rules contained in Chapter XXIX unless they were inconsistent with them. *Since there was no such inconsistency, this provision of the rule also had the effect of attracting the application of Rules 58-63 of Order 21 of the Code of Civil Procedure.* It would thus appear that under the Rules also, it was necessary for the applicants to seek their further remedy (against the decisions of the execution Court dated December 17, 1960) in the two cases by means of suit under O. 21, R. 63 of the Code of Civil Procedure and not by mere applications.

18. It has of course been argued, at this late stage, that the two claims may now be treated as suits; but this is an argument of despair. As has been stated, the applicants themselves took the firm stand before the Division Bench that they had not instituted any suits and that they had merely filed applications in the nature of claims, and they cannot be allowed to resile from that stand. In fact the judgment of the Division Bench dated July 19, 1965 is binding in these two cases and it has clearly been decided there that the applications filed by the applicants on December 11, 1961 were not plaints. This is quite a sufficient answer to the belated attempt to retrieve the harm voluntarily caused by the applicants to their cases.

19. In these facts and circumstances I am constrained to hold that applications Nos. 16 and 17 are not maintainable and should be dismissed with costs.

20. Application No. 19 has been filed by Smt. Mooli Devi, daughter of Vastul Pareek, and it is admitted before me that it relates to the attachment of the same property which was the subject-matter of the proceedings under Order 21, Rule 58 which resulted in the order of rejection dated December 17, 1960. As that order became conclusive for the reasons mentioned earlier, it would operate as a bar against the maintainability of application No. 19 on the general principles of *res judicata*.

THE All India Reporter

1970

Tripura J. C.'s Court

AIR 1970 TRIPURA 1 (V 57 C 1)
C. JAGANNADHACHARYULU, J. C.

State of Tripura, Appellant v. Shri
Ashu Ranjan Saha, Respondent.

Criminal Appeal No. 13 of 1965, D/-
13-11-1968, against Judgment of Special J.,
Agartala in Spl. Court Case No. 1 of 1965.

(A) Evidence Act (1872), S. 5 — Parti-
san witness — Police Officer should not
be disbelieved simply because he figures
as witness, provided his evidence is reli-
able and credible. AIR 1967 Delhi 26 &
AIR 1967 Delhi 51 & AIR 1967 Raj 10
Rel. on.

(Para 15)

(B) Prevention of Corruption Act (1947),
S. 4 (1) — Seizure of money from pocket
of accused — Accused not proved to have
accepted money as illicit gratification —
Presumption under S. 4 (1) cannot be
raised.

(Para 18)

(C) Prevention of Corruption Act
(1947), S. 4 (1) — Presumption under —
Rebuttal of, need not be by direct evi-
dence — Circumstances showing that
prosecution version is not correct — Pre-
sumption is sufficiently rebutted. AIR
1966 SC 1762, Rel. on.

(Para 18)

(D) Prevention of Corruption Act (1947),
S. 6 (1) (c) — Bengal Municipal Act (15
of 1932) (as applicable to Tripura), Ss. 66,
67 — Supersession of municipality —
Appointment of Sanitary Inspector by
Administrator and empowering him to
act as Food Inspector — Prosecution of
Food Inspector for accepting bribe —
Administrator is competent to give sanc-
tion under S. 6 (1) (c) — (General Clauses
Act (1897), S. 15) — (Criminal P. C. (1858),
S. 39).

The Administrator of a superseded
municipality appointed a person as Sani-
tary Inspector and empowered him to act

as Food Inspector. He was prosecuted
for accepting bribe.

Held, that the Administrator was com-
petent to give sanction under S. 6 (1) (c)
of the 1947 Act. (Para 21)

Under Section 251, General Clauses
Act, Sanitary Inspectors could be appoint-
ed by virtue of their office and it was
not necessary that their appointment
should be made by their names. The
mere delegation of powers to the Sani-
tary Inspector to be exercised as Food
Inspector does not take away the power
of the Administrator to dismiss him. AIR
1960 Andh Pra 282, Rel. on.

(Paras 20, 21)

It could not be said that under S. 67
of Bengal Municipal Act, the Administra-
tor could not appoint Sanitary Inspector.
Since the Administrator was appointed
by the Chief Commissioner on superses-
sion of municipality he could appoint any
person as Sanitary Inspector under S. 66.
The provisions of Sections 66 and 67 are
mutually exclusive. Consequently, the
sanction given by him was legal.

(Para 21)

Cases Referred: Chronological Paras
(1967) AIR 1967 Delhi 26 (V 54) =

1967 Cri LJ 744, Ram Sarup
Charan Singh v. The State 15

(1967) AIR 1967 Delhi 51 (V 54) =
1967 Cri LJ 1138, Kesho Parshad
v. State 15

(1967) AIR 1967 Raj 10 (V 54) =
1967 Cri LJ 121, Ganpat Singh
v. The State 15

(1966) AIR 1966 SC 1762 (V 53) =
1966 Cri LJ 1357, V. D. Jhingan
v. State of Uttar Pradesh 18

(1964) AIR 1964 SC 575 (V 51) =
1964 (1) Cri LJ 437, Dhanvantrai
Balwantrai v. State of Maharash-
tra 18

(1960) AIR 1960 Andh Pra 282
(V 47) = 1960 Cri LJ 569, Public

Prosecutor (AP) v. N. Srirambha-
draya
(1958) AIR 1958 SC 124 (V 45)=
1958 Cri LJ 265, Jaswant Singh
v. State of Punjab
(1955) AIR 1955 SC 70 (V 42)=
1955 Cri LJ 249, Mahesh Prasad
v. State of U. P.
(1955) AIR 1955 SC 585 (V 42)=
1955 Cri LJ 1300, Bansidhar
Mohanty v. State of Orissa
(1954) AIR 1954 SC 322 (V 41)=
1954 Cri LJ 910, Shiv Bahadur
Singh v. State of Vindhya Pra-
des
(1954) AIR 1954 SC 621 (V 41) =
1954 Cri LJ 1645, Bhagat Ram
v. State of Punjab
(1953) AIR 1953 SC 122 (V 40) =
1953 Cri LJ 662, Wilayatkhani v.
State of U. P.
(1948) AIR 1948 PC 82 (V 35)=
49 Cri LJ 261, Gokulchand
Dwarkanadas v. The King

M C Chakraborty, for Appellant; H.
Dutta, for Respondent

JUDGMENT: This is an appeal filed
by the State of Tripura against the judg-
ment and acquittal of one Shri Ashu
Ranjan Saha, Food Inspector working in
Agartala Municipality, of the offences
under section 161 I. P. C. and S. 5 (2)
of the Prevention of Corruption Act (Act
2 of 1947) by Shri T. K. Pal, M.A., B.L.,
Special Judge, Agartala in the Special
Court case no. 1 of 1965.

2. The case of the prosecution, as
brought out in the evidence, is that the
respondent, who is working as Food Ins-
pector in Agartala Municipality, visited
the grocery shop of the complainant
P. W. 4 Sachindra Chandra Datta in Bat-
tala Bazar at about 10 or 11 A. M. on
11-4-1964. The respondent seized 8 tins
of mustard oil, weighing 17 to 18 seers.
2 maunds of turmeric and 5 seers of
coconut oil from his shop, under the
provisions of the Food Adulteration Act
(Act 37 of 1954). After giving notice
Ext P-7 dated 11-5-1964 of his intention
to take sample, the respondent took sam-
ple of 2 chhataks of mustard oil out of
the seized oil. He paid the price for the
same and gave Ext P-8 receipt for the
sample to P. W. 4 (Sachindra Chandra
Datta). P. W. 4 (Sachindra Chandra
Datta) protested that his commodities
were not adulterated. The respondent,
however, allowed the seized articles to be
kept in the custody of P. W. 4 (Sachin-
dra Chandra Datta).

3. On 17-6-1964, the respondent again
visited the shop of P. W. 4 (Sachindra
Chandra Datta) and asked him to give
him a sample of turmeric seized by him.
The respondent purchased a sample of
the turmeric and gave P. W. 4 (Sachin-

dra Chandra Datta) Ext. P-9 receipt
dated 17-9-1964. P. W. 4 (Sachindra
Chandra Datta) again told the respondent
that he was unable to sell the seized
articles and that he had no money to
purchase more of the articles from the
wholesalers and requested him to release
the articles. The respondent asked P. W. 4
(Sachindra Chandra Datta) to see him in
the office of Agartala Municipality.

4. On 18-6-1964, P. W. 4 (Sachindra
Chandra Datta) went to the office in
Agartala Municipality. Then P. W. 15
(Birendra Chandra Banik) met P. W. 4
(Sachindra Chandra Datta) in the office
and on enquiry learnt that P. W. 4
(Sachindra Chandra Datta) had come to
the office of the Municipality in connec-
tion with the seizure of his commodities
by the respondent. P. W. 4 (Sachindra
Chandra Datta) met the respondent in his
room in the office and requested him to
release his commodities. The respondent
demanded payment of bribe of Rs 300/-
and promised to release all the com-
modities and not to take any action
against P. W. 4 (Sachindra Chandra
Datta). But the latter pleaded that he
was a poor man and could not afford
such a huge money. Ultimately, the bar-
gain was struck at Rs. 250/-. P. W. 4
(Sachindra Chandra Datta) promised to
pay the amount in 4 or 5 days' time.
After coming home, P. W. 4 (Sachindra
Chandra Datta) narrated what had hap-
pened to his brother P. W. 6 (Nani Gopal
Datta). P. W. 4 (Sachindra Chandra
Datta) also made up his mind that, as
the respondent was demanding payment
of bribe, he would pay it and at the
same time see that the respondent was
arrested by the police.

5. At about dusk on 22-6-1964, P. W. 4
(Sachindra Chandra Datta) came to a
place to the west of Battala Choumohani
with P. W. 5 (Sunil Chandra Banik),
another grocer of Battala Bazar. P. W. 4
(Sachindra Chandra Datta) saw the re-
spondent who called him. P. W. 5 (Sunil
Chandra Banik) went away. The re-
spondent demanded the bribe amount of
Rs. 250/- as agreed to on 18-6-1964. But,
P. W. 4 (Sachindra Chandra Datta) plead-
ed that he had no money with him and
that he would pay it on the next day.
On his enquiry as to where he should
pay the money, the respondent told him
that he would be near a fruit stall at
Kaman Choumohani after dusk and that
he should pay the amount there. P. W. 4
(Sachindra Chandra Datta) went back to
his shop and told his brother P. W. 6
(Nani Gopal Datta) what had happened.

6. On 23-6-1964, P. W. 4 (Sachindra
Chandra Datta) wrote Ext. P-1/1 petition
addressed to P. W. 3, Shri N. R. Bose,
S. P., Tripura to take action against the
respondent for demanding payment of

bribe.' P. W. 8 the S. P. questioned P. W. 4 (Sachindra Chandra Datta) and assured him that he would take the necessary action. P. W. 4 (Sachindra Chandra Datta) went back to his shop. P. W. 8 the S. P. made an endorsement on Ext. P-1/1 in favour of P. W. 1 Monoranjan Bhattacharjee, Dy. S. P., Special Branch, Tripura, directing him to examine P. W. 4 (Sachindra Chandra Datta) and to work out the information. At about 4 P.M., P. W. 1 the Dy. S. P. called P. W. 4 (Sachindra Chandra Datta) through P. W. 2 (Swadesh Ranjan Paul), S. I. Special Branch to his office at Ronaldsay Road. After arrival of P. W. 4 (Sachindra Chandra Datta), P. W. 1 the Dy. S. P. interrogated him and recorded his statement Ext. P-10/3. P. W. 4 (Sachindra Chandra Datta) showed him 25 ten-rupee currency notes Exts. M-1 to M-25, which he proposed to hand over to the respondent as bribe money. P. W. 1 Dy. S. P. noted the numbers of the currency notes on the statement of P. W. 4 (Sachindra Chandra Datta) recorded by him.

Thereafter, accompanied by P. W. 11 (Ramanuj Bhattacharjee) Circle Inspector, P. W. 2 (Swadesh Ranjan Paul) S. I., P. W. 3 (Kamal Das Gupta), S. I. and P. W. 4 (Sachindra Chandra Datta), P. W. 1 Dy. S. P. went to the office of P. W. 7, the then S. D. M. Shri Premananda Nath. He submitted Exts. P-1/1 and P-10/3 with Ext. P-2 requisition for issuing a search warrant against the respondent. P. W. 7 the S. D. M. compared the numbers of the currency notes Exts. M-1 to M-25 with those mentioned in the statement and issued Ext. P-3 search warrant in favour of P. W. 1 Dy. S. P. for searching the person of the respondent.

7. P. W. 1 Dy. S. P. went to the Kotwali police station along with P. Ws. 2 (Swadesh Ranjan Paul), 3 (Kamal Das Gupta) and 11 (Ramanuj Bhattacharjee) police officers and P. W. 4 (Sachindra Chandra Datta) the complainant. P. W. 4 (Sachindra Chandra Datta) went away to Kaman Choumohani under the direction of P. W. 1 the Dy. S. P. A little later, P. W. 1 Dy. S. P. went to Kaman Choumohani along with the police officers P. Ws. 2 (Swadesh Ranjan Paul), 3 (Kamal Das Gupta) and 11 (Ramanuj Bhattacharjee) and also with P. W. 9 (Nirmal Kumar Majumder) officer-in-charge of Kotwali police station and P. W. 12 (Upendra Chandra Paul) a non-official witness. After some time, the respondent was seen coming from the southern side along the Central road in a rickshaw. The rickshaw stopped at a spot near the place where P. W. 4 (Sachindra Chandra Datta) stood and the respondent alighted from it. P. W. 4 (Sach-

indra Chandra Datta) and the respondent proceeded together towards the northern side. After they came in front of a fruit stall to the north of Kaman Choumohani, the respondent asked P. W. 4 (Sachindra Chandra Datta) to pay him the money.

Then, P. W. 4 (Sachindra Chandra Datta) handed over Exts. M-1 to M-25 in one bundle, which the respondent put inside the breast pocket of his shirt. P. W. 4 (Sachindra Chandra Datta) quickly went away. The respondent moved forward to a betel stall. Just then, P. W. 11 (Ramanuj Bhattacharjee) the Circle Inspector also came to the stall keeper and asked him to give him a pan. P. W. 10 (Sachindra Kumar Paul) the stall holder gave them pan. P. W. 1 the Dy. S. P. came, followed by the other police officers and asked the respondent his name and profession. The respondent told him that his name was Ashu Ranjan Saha and that he was employed as Food Inspector in Agartala Municipality. P. W. 1 the Dy. S. P. then showed him Ext. P-3 search warrant and asked him to come to Agartala Pharmacy, which was to the west of the pan stall. P. Ws. 1 and 11 Dy. S. P. and Circle Inspector escorted the respondent to Agartala Pharmacy, where P. W. 14 (Sukhendu Bikash Paul) proprietor of the Pharmacy was also present. After the other witnesses also came, P. W. 1 Dy. S. P. showed the respondent Ext. P-3 and after P. W. 1's body was searched by the respondent, P. W. 1 Dy. S. P. asked the respondent to produce the money which he had with him.

The respondent produced Exts. M-1 to M-25, the numbers on which tallied with those mentioned in Ext. P-3. P. W. 1 Dy. S. P. prepared Ext. P-4 search list in duplicate and got it attested by all the witnesses and obtained the signature of the respondent on Ext. P-4. P. W. 1 Dy. S. P. handed over a copy of Ext. P-4 to the respondent and arrested him and took him away to the Kotwali police station. He lodged Ext. P-5 F. I. R. with the Officer-in-Charge of Kotwali police station. The case was registered in Kotwali P. S. as case no. 37 (6) 64 under section 161 I. P. C. and section 5 (2) of the Prevention of Corruption Act against the respondent.

8. P. W. 1 the Dy. S. P. took up the investigation and examined P. W. 13 (Rabindra Kumar Ghosh) Administrator of Agartala Municipality and seized certain documents under Ext. P-6.

9. Under the orders of P. W. 8, S. P. the investigation was taken over by P. W. 17 (Santi Ranjan Bardhan) Dy. S. P. in charge of Home Guards from P. W. 1 Dy. S. P. on 14-7-1964. P. W. 17 (Santi

Ranjan Bardhan) the Dy. S. P. completed the investigation and filed the charge-sheet.

10. The learned Special Judge framed two charges against the respondent one under section 161 I. P. C. and another under S. 5 (2) of the Prevention of Corruption Act, 1947 to which the respondent pleaded that he was not guilty. His defence was that in the dusk of 23-6-1964 he had been to Kaman Choumohani for checking adulteration and sale of unwholesome milk, that when he was passing along the road, P. W. 4 (Sachindra Chandra Datta) told him that he had a letter for the respondent and thrust an envelope into the breast pocket of the respondent and ran away, that, as the respondent had suspicion, he called P. W. 4 (Sachindra Chandra Datta) loudly saying what it was that he had put inside his pocket calling it a letter, that a large crowd gathered, that he did not demand or take any bribe and that on account of malice, P. W. 4 (Sachindra Chandra Datta) and the police officers conspired against him.

11. The learned Special Judge thoroughly discussed the evidence and held that the charges against the respondent were not made out. He further held that there was no valid sanction for the prosecution of the respondent. He, therefore, acquitted the respondent. Hence the appeal by the State Government.

12. The points which are argued and which arise for determination are:

- (i) whether the charges under S. 161 I. P. C. and under section 5 (2) of the Prevention of Corruption Act, 1947 were brought home against the respondent and whether he is guilty of the same and
- (ii) whether there was a valid sanction for the prosecution of the respondent.

13. POINT (I)

It is well settled that, though in the case of an appeal against judgment of acquittal the High Court is entitled to review the evidence, yet proper weight should be given to the following matters:

- (i) the views of the trial Court as to the credibility of witnesses.
- (ii) the presumption of innocence, which is strengthened by the acquittal.
- (iii) the right of the accused to the benefit of the doubt and
- (iv) the reluctance of the appellate court to disturb a finding arrived at by the trial Judge after seeing the witnesses. Vide *Wilayat Khan v. State of U.P.*, AIR 1953 SC 122, *Shiv Bahadur Singh v. State of Vindhya Pradesh*, 1954 Cr LJ 910 = (AIR 1954 SC 322) and *Bansidhar Mohanty v. State of Orissa*, 1955 Cr LJ 1300 = (AIR 1955 SC 585).

13-A. The evidence let in by the prosecution to prove the guilt of the respon-

dent can be analysed under four heads. The first category of evidence relates to that which was alleged to have happened on 18-6-1964 in the room of the respondent in the office of the Municipality in Agartala. There is no dispute that the respondent seized 8 tins of mustard oil weighing 17 to 18 seers, 2 maunds of turmeric and 5 seers of coconut oil on 11-5-1964 from the grocery shop of P. W. 4 (Sachindra Chandra Datta) the complainant and purchased a sample of mustard oil as can be seen from Exts. P-7 and P-8 and that he kept the seized articles in the custody of P. W. 4 (Sachindra Chandra Datta). There is also no dispute that on 17-6-1964 the respondent again visited the shop of P. W. 4 (Sachindra Chandra Datta) and seized sample of turmeric as can be seen from Ext. P-9. P. Ws. 4 (Sachindra Chandra Datta) and 6 (Nani Gopal Datta) speak to the seizure, and the respondent admits the same. But, according to the prosecution, on 17-6-1964, when P. W. 4 (Sachindra Chandra Datta) requested the respondent to release the seized commodities, the respondent asked P. W. 4 (Sachindra Chandra Datta) the complainant to see him in his room in the office of Agartala Municipality, that accordingly, on 17-6-1964 P. W. 4 (Sachindra Chandra Datta) went to the office, that in the office he met P. W. 15 (Birendra Chandra Banik) and told him that he had come to the office in connection with the seized articles, that later on he saw the respondent in his room and that in the room the bargain was struck for payment of bribe money of Rupees 250/-, which the respondent promised to pay after some days.

The prosecution thus alleges that the bargain took place in the room of the respondent in the office of the Municipality in Agartala on 17-6-1964. To prove the bargain there is only the evidence of P. W. 4 (Sachindra Chandra Datta). It is correct to state that in such matters it is unnatural that a bargain for payment of bribe would take place in the presence of witnesses. But, there are very material circumstances, which throw doubt on the evidence of P. W. 4 (Sachindra Chandra Datta). Firstly, he never mentioned in Ext. P-1/1 the petition filed by him before P. W. 8 S. P. that there was such a bargain on 17-6-1964. Secondly, the evidence of P. W. 8 S. P., who questioned P. W. 4 (Sachindra Chandra Datta) at about 8 A. M. on 24-6-1964 also does not show that he was informed that there was any such bargain between the respondent and P. W. 4 (Sachindra Chandra Datta) on 18-6-1964. Thirdly, even when P. W. 1 Dy. S. P., S. B. recorded Ext. P-10/3 statement of P. W. 4 (Sachindra Chandra Datta) before the trap the

latter never told him that there was a bargain between him and the respondent in the room of the respondent in the office in Agartala Municipality on 18-6-1964. Thus, the consistent absence of this material allegation in Exts. P-1/1 and P-10/3 and before P. W. 8 S. P. clearly shows that this was an afterthought.

Again, even the evidence of P. W. 15 (Birendra Chandra Banik) that he met P. W. 4 (Sachindra Chandra Datta) in the Agartala Municipal office on 18-6-1964 is also doubtful. For, not only is the name of P. W. 15 (Birendra Chandra Banik) not found in Exts. P-1/1 and P-10/3 but also the evidence of P. W. 15 (Birendra Chandra Banik) shows that it cannot be relied upon. P. W. 17 (Santi Ranjan Bardhan) the Investigating Officer examined him on 31-7-1964, though he took over the charge of investigation on 14-7-1964 according to his evidence. Besides, P. W. 17 (Santi Ranjan Bardhan) recorded the statement under section 161 Cr. P. C., that P. W. 15 (Birendra Chandra Banik) met P. W. 4 (Sachindra Chandra Datta) in the Municipal office on 18-7-1964 and not on 18-6-1964. P. W. 15 (Birendra Chandra Banik) denied having stated before P. W. 17 (Santi Ranjan Bardhan) that he met P. W. 4 (Sachindra Chandra Datta) in the Municipal office on 18-7-1964. According to P. W. 17 (Santi Ranjan Bardhan) he wrongly mentioned the date of 18-6-1964 as 18-7-1964. At any rate, it is not the case of the prosecution that P. W. 15 (Birendra Chandra Banik) was also present along with P. W. 4 (Sachindra Chandra Datta) when the bargain for payment of bribe was struck.

In view of the fact that the evidence of P. W. 4 (Sachindra Chandra Datta) is contradicted by Exts. P-1/1 and P-10/3 no reliance can be placed on the evidence of P. Ws. 4 (Sachindra Chandra Datta) and 15 (Birendra Chandra Banik).

14. The second category of evidence relates to the case of the prosecution that on 23-6-1964 P. W. 4 (Sachindra Chandra Datta) the complainant and P. W. 5 (Sunil Chandra Banik) of Battala Bazar were going to Battala Choumohani, that there the respondent called P. W. 4 (Sachindra Chandra Datta), that P. W. 4 (Sachindra Chandra Datta) went to meet him, while P. W. 5 (Sunil Chandra Banik) went away and that the respondent asked P. W. 4 (Sachindra Chandra Datta) about the payment of the bribe money agreed upon on 18-6-1964, that P. W. 4 (Sachindra Chandra Datta) told him that he did not have the money and promised to pay it on the next day and that the respondent fixed the venue at a fruit stall near Kaman Choumohani as the place where he should pay the bribe money. Here again, there is only the evidence of P. W. 4 (Sachindra Chandra

Datta) to prove the talks, alleged to have taken place between him and the respondent. Of course, the general evidence of his brother P. W. 6 (Nani Gopal Datta) to whom P. W. 4 (Sachindra Chandra Datta) was alleged to have narrated the story is of no weight because P. W. 6 (Nani Gopal Datta) is not an eye-witness. It is pertinent to note that P. W. 4 (Sachindra Chandra Datta) did not mention this important aspect of the case in Ext. P-1/1. Nor did he mention this to P. W. 8 the S. P. on 24-6-1964. Nor was this disclosed by him to P. W. 1 the Dy. S. P. in Ext. P-10/3 statement recorded by P. W. 1 Dy. S. P.

So, here again the consistent absence of such an important and material aspect of the prosecution version in Exts. P-1/1 and P-10/3 and before P. W. 8 the S. P. throws suspicion over the case of the prosecution. The evidence of P. W. 5 (Sunil Chandra Banik) is not of much avail except to show that at dusk time on 22-6-1964 he saw the respondent and that P. W. 4 (Sachindra Chandra Datta) went and talked with him. But, even P. W. 5 (Sunil Chandra Banik) is not an independent witness. He was examined by P. W. 17 (Santi Ranjan Bardhan) on 16-7-1964. It was suggested to P. W. 5 (Sunil Chandra Banik) that the respondent seized coloured rice from the shop of his brother Gopal Banik, that the same was destroyed under the orders of the S. D. M. and that, therefore, P. W. 5 (Sunil Chandra Banik) was inimically disposed towards the respondent. P. W. 5 (Sunil Chandra Banik) denied that any such thing had happened to his knowledge. But, P. W. 13 (Rabindra Kumar Ghosh) the Administrator of Agartala Municipality admitted in his cross-examination that the respondent seized coloured rice from the said shop and that the same was destroyed. Though P. W. 5 (Sunil Chandra Banik) stated that he and his brother were living separately, he admitted that both of them jointly purchased one house.

So, his denial only shows that he is not a witness of truth. As such, even this aspect of the case of the prosecution has not been proved beyond reasonable doubt.

15. The third aspect of the case is that after P. W. 4 (Sachindra Chandra Datta) the complainant went to Kaman Choumohani the other witnesses namely, P. Ws. 1 (Dy. S. P.), 2 (S. I.), 3 (S. I.), 9 (S. I.), 11 (C. I.) and 12 (Upendra Chandra Paul), a resident of Nandannagar took their stand by spreading themselves in Kaman Choumohani, that within a short time the respondent came in a rickshaw, that he got down from the rickshaw at the place where P. W. 4 (Sachindra Chandra Datta) was standing, that P. W. 4 (Sachindra Datta) and the respondent

proceeded towards a fruit stall, that the respondent asked P. W. 4 (Sachindra Chandra Datta) to pay him the bribe, that P. W. 4 (Sachindra Chandra Datta) handed over Exts. M-1 to M-25 in one bundle, that the respondent put the bundle in the breast pocket of his shirt and that the respondent asked him to meet him on the next day. All these witnesses stated that they saw P. W. 4 (Sachindra Chandra Datta) handing over Exts. M-1 to M-25 to the respondent and the respondent putting the bundle in his pocket.

As rightly pointed out by the learned trial Judge except the interested testimony of P. W. 4 (Sachindra Chandra Datta) there is no other evidence to show that the respondent asked P. W. 4 (Sachindra Chandra Datta) in front of the fruit stall to pay him the bribe money, and that after payment of the money the respondent asked P. W. 4 (Sachindra Chandra Datta) to meet him on the next day. The learned Special Judge points out that P. Ws. 2, 3, 9 and 11 are all police officers who were specially called by P. W. 1 the Dy. S. P. to assist him, that they were all nothing but partisan witnesses and that their evidence cannot be relied upon without independent corroboration. He relied on 1954 Cr. LJ 910 = (AIR 1954 SC 322). But, it is not correct to state that a police officer should be disbelieved simply because he figures as a witness provided his evidence is reliable and credible. *Ram Sarup Charan Singh v. The State*, 1967 Cr. LJ 744 = (AIR 1967 Delhi 26), *Kesho Parshad v. State*, 1967 Cr. LJ 1138 = (AIR 1967 Delhi 51) and *Ganpat Singh v. The State*, 1967 Cr. LJ 121 = (AIR 1967 Raj 10). The learned Special Judge discussed their evidence to scrutinize whether their evidence is believable and pointed out a number of discrepancies in their evidence. Besides the discrepancies pointed out by him, there are other circumstances in their evidence which show that they were only too enthusiastic to support the prosecution version.

While P. W. 3, the S. I. (Kamal Das Gupta) stated that he witnessed the entire transaction, including the search proceedings, yet he deposed in the cross-examination that he did not attest Ext. P-4 the seizure list prepared by P. W. 1, Dy. S. P. when Exts. M1 to M25 were seized by P. W. 1 Dy. S. P. P. W. 9 (Nirmal Kumar Majumder) asserted that he was an eye-witness to the payment of the bribe money by P. W. 4 (Sachindra Chandra Datta) to the respondent. But in the cross-examination he stated that he did not mention in the general diary maintained by him in Kotwali P. S. that he had seen the payment of the bribe by P. W. 4 (Sachindra Chandra Datta) to the respondent and that the respondent pro-

duced Exts. M1 to M25 from the breast pocket of his shirt in the course of the search proceedings. P. W. 1 the Dy. S. P. stated that in his case diary he mentioned the name of P. W. 11 the C. I. only as the police officer who accompanied him to Kamanchoumohani. So, this casts doubt over the evidence of the other police official witnesses. Regarding P. W. 13 (Rabindra Kumar Ghosh) who is the only non-police official witness, as rightly observed by the trial Judge, the circumstances under which he was present were shrouded in mystery.

According to him, he had gone to the Kotwali police station on that day and waited for two hours to meet a relation of his namely, Harendra Paul. But, he did not state why he asked Harendra Paul to meet him at the Kotwali police station. Strangely enough, he deposed that he did not meet Harendra Paul since then. Then according to him, he accompanied the police officers from the Kotwali police station without knowing where they were going. According to the respondent, this witness P. W. 14 (Sukhendu Bikash Paul) is a police informant. The circumstances which further belie and improbabilise their evidence and the prosecution case will be presently referred to.

16. The fourth category of evidence relates to the search proceedings. It is the case of the prosecution that after P. W. 1 the Dy. S. P. confronted the respondent with Ext. P-3 search warrant and took him to the neighbouring Agar-tala Pharmacy, on search Exts. M-1 to M-25 were removed by the respondent from his breast pocket and that P. W. 1 the Dy. S. P. seized the same under Ext. P-4 search list. Besides the police witnesses and P. W. 12 (Upendra Chandra Paul) already referred to, P. W. 14 (Sukhendu Bikash Paul) the proprietor of the Pharmacy also deposed to the seizure of Exts. M-1 to M-25 from the respondent. P. W. 14 (Sukhendu Bikash Paul) contradicted the other witnesses by stating that the currency notes were in three separate parts and that they were lying with certain papers when they were removed from the pocket of the respondent. He was treated as hostile and cross-examined by the prosecution.

17. But, there are the following circumstances which throw doubt over the evidence of P. Ws. 1 to 4 (Dy. S. P., Swadesh Ranjan Paul, Kamal Das Gupta and Sachindra Chandra Datta), 9 (Nirmal Kumar Majumder), 11 (Ramanuj Bhattacharjee) and 12 (Upendra Chandra Paul) who deposed that they saw P. W. 4 (Sachindra Chandra Datta) handing over Exts. M1 to M25 to the respondent and that they further saw the respondent putting the bundle into his breast pocket.

(i) It is their consistent evidence that immediately after P. W. 4 (Sachindra Chandra Datta) handed over Exts. M1 to M25 to the respondent, he quickly moved away and that within about one minute the police officers swooped on him. If really there was regular bargain between the respondent and P. W. 4 (Sachindra Datta) for the payment of the bribe money and if the respondent voluntarily accepted the same, then there was no need for P. W. 4 (Sachindra Chandra Datta) to quickly move away immediately after he was alleged to have handed over Exts. M1 to M25 to the respondent. He would have waited for some time to see whether the trap succeeded or not. His conduct in running away immediately after he was alleged to have handed over the money to the respondent was not explained by the prosecution and, as rightly pointed out by the learned trial Judge, P. W. 4 (Sachindra Chandra Datta) must have run away in apprehension of being confronted by the respondent with his case that P. W. 4 (Sachindra Chandra Datta) inserted the money in his pocket under a false pretext.

(ii) Secondly, none of the eye-witnesses was examined by P. W. 17 (Santi Ranjan Bardhan) until after 14-7-1964, although the occurrence took place on 23-6-1964. Though according to P. W. 1 Dy. S. P., he filed a memo on 2-7-1964 before P. W. 8 S. P. requesting him to make over the charge of investigation to some other police officer, that paper was not filed into the Court. On the other hand, P. W. 17 (Santi Ranjan Bardhan) simply stated that he took over charge on 14-7-1964 from P. W. 1 Monoranjan Bhattacharjee. Dy. S. P. Until 14-7-1964 P. W. 1 Monoranjan Bhattacharjee, Dy. S. P. must be held to have been in charge of the investigation and he examined only one witness by that date. So, the non-examination of the eye-witnesses was certainly fraught with mischievous possibilities and they might have taken advantage of the delay to make uniform statements before P. W. 17 (Santi Ranjan Bardhan) after mutual consultation. More so is the possibility in view of the evidence of P. W. 1 the Dy. S. P. that his case diary disclosed that only one police officer viz. P. W. 11 the C. I. accompanied him to lay the trap.

(iii) Thirdly, it is improbable that the respondent would have fixed a public place near a fruit stall in a crowded locality like Kaman Choumohani as the venue for the payment of the bribe money to him.

(iv) Fourthly, while according to P. W. 14 (Sukhendu Bikash Paul) the money was in three separate bundles, the other witnesses stated that the currency notes were in a single bundle. According to P. W. 14 (Sukhendu Bikash Paul) there

were also some papers along with the bundles. The prosecution produced Ext. P-11 envelope in which Exts. M-1 to M-25 were said to have been preserved by P. W. 16 (Chitta Ranjan Bhattacharjee), A. S. I. in the police station. According to him, he entered the seized money in the Malkhana register Ext. P-18 as per Ext. P-18/1 and preserved the money in Ext. P-11. Also, he further stated that he received five papers on 1-8-1964 and put them in Ext. P-12 envelope after making an entry as per Ext. P-18/2. Thus, he explained away the presence of Exts. P-11 and P-12 envelopes. But, in the cross-examination he stated that he did not mention anywhere that he kept the currency notes in an envelope, that Ext. P-11 envelope was not supplied by the Government and that it is a private one. According to P. W. 9 (Nirmal Kumar Majumdar) S.I. of Police the articles in the Malkhana were preserved in envelopes purchased by the office, unless the same had been supplied by the P. W. D. and whenever envelopes were purchased an account in respect thereof had to be maintained. The prosecution did not produce any account to show that the envelopes in question were purchased by P. W. 16 (Chitta Ranjan Bhattacharjee). At any rate, the evidence of P. W. 14 (Sukhendu Bikash Paul) that the three bundles were mixed with papers shows that the version of the respondent that P. W. 4 (Sachindra Chandra Datta) inserted something in his pocket stating that he had a letter for him appears to be probable.

(v) Fifthly, almost immediately after the occurrence took place, the respondent came forward with his version that P. W. 4 (Sachindra Chandra Datta) played mischief. P. W. 14 (Sukhendu Bikash Paul) admitted in his cross-examination that after the search was over, the respondent stated that somebody had put something inside his pocket. So, the respondent came forward with his case within a few minutes after the occurrence took place. Again, P. W. 11 the Circle Inspector admitted that, when P. W. 1 the Dy. S. P. showed the search warrant to the respondent in Agartala Pharmacy, the respondent muttered that somebody had put something into his pocket. Even P. W. 1 the Dy. S. P. admitted in his cross-examination that at about 11 P. M. when he interrogated the respondent, the latter stated that when he was taking betel from the betel shop, P. W. 4 (Sachindra Chandra Datta) told him that he had a letter for the respondent and introduced the letter into his breast pocket and left the place very quickly, but that he had put money into his pocket and that the respondent raised hue and cry. So, even though the res-

pondent did not examine any person from the crowd, it is clear that the respondent set up his case immediately after the incident took place, and this is a strong reason for thinking that his defence was very likely to have been true. Vide *Bhagat Ram v. State of Punjab*, 1954 Cr. L. J. 1645 = (AIR 1954 SC 621).

(vi) The sixth circumstance is that P. W. 13 (Rabindra Kumar Ghosh) admitted in his cross-examination that after the respondent was appointed as Food Inspector, the income of the Municipality from the fees from licenses granted to the dealers in rice increased to some extent. So, it is evident that the respondent must have been discharging duties strictly and must have therefore incurred the displeasure of the grocery shopkeepers.

(vii) Last, but not the least, the evidence of P. W. 13 (Rabindra Kumar Ghosh) shows that the respondent intimated to him about the seizure of the commodities made by him and about the samples taken by him both on 11-5-1964 and 17-6-1964 according to the rules and the Prevention of Food Adulteration Act. Ext. D-4 shows that the respondent sent the samples to the Public Analyst for analysis. P. W. 13 further stated that the respondent had no power to release any article seized by him for the purpose of taking samples for chemical examination except with the permission of the Administrator or the Magistrate. In such a case, it is highly improbable that the respondent would have demanded payment of bribe promising to release the seized articles.

18. The learned Counsel for the appellant contended that the fact that Exts. M-1 to M-25 were seized from the pocket of the respondent raises a presumption under Section 4 (1) of the Prevention of Corruption Act and that the burden lay upon the respondent to prove that the money was not bribe money. He relied on *Dhanyvantrai Balwantrai Desai v. State of Maharashtra*, (1964) 1 Cr. L.J. 437 = (AIR 1964 SC 575) in support of his contention. In that case it was held that in order to raise the presumption under Section 4 (1) of the said Act, the prosecution has to prove that the accused person received a gratification other than legal remuneration and that, when it is so proved, the presumption is raised. In the present case, there is no proof that the respondent accepted Exts. M-1 to M-25 as illicit gratification. But, the respondent's contention that the money was put into his pocket by P. W. 4 (Sachindra Chandra Datta) under a false pretext is more probable than the case of the prosecution. So, no such presumption can be raised. But, even if such a

presumption arises, it is sufficiently rebutted. The rebuttal need not be by direct evidence. If there are circumstances which show that the prosecution version is not correct, then the presumption is sufficiently rebutted. Vide *V. D. Jhingan v. State of Uttar Pradesh*, 1966 Cr. L.J. 1357 = (AIR 1966 SC 1762).

It was held that the burden of proof lying upon the accused under section 4 (1) of the Act will be discharged, if he establishes his case by a preponderance of probability as is done by a party in civil proceedings and that it is not necessary that he should establish his case by the test of proof beyond reasonable doubt.

19. Thus, the case of the prosecution is highly doubtful and was rightly rejected by the lower Court. I find point (1) in the negative.

POINT (II):

20. The evidence of P. W. 13 (Rabindra Kumar Ghosh) the Administrator of Agartala Municipality is that the Agartala Municipality was superseded with effect from 25-4-1955, that the Chief Commissioner, Tripura assumed all the powers of the Chairman and the Commissioners of the Municipality, that the supersession was made according to the Tripura Municipal Act (Bengal Act XV of 1932) that since 15-8-1961 the Bengal Municipal Act is in force in Tripura in the place of Tripura Municipal Act (Act 2 of 1949 T. E.) and that the Chief Commissioner appointed the District Magistrate, Tripura as the Administrator of Agartala Municipality. He further stated that the respondent was appointed as Sanitary Inspector on 6-2-1963 in Agartala Municipality, that P. W. 13 (Rabindra Kumar Ghosh) himself appointed him with the approval of Shri L. B. Thanga, the then Administrator of Agartala Municipality, that the Chief Commissioner empowered him by Ext. D-8 notification in the official gazette to exercise the powers of Food Inspector under the Prevention of Food Adulteration Act, 1954 within the local municipal area of Agartala and that, therefore, after perusing the papers, he gave sanction Ext. P-13 under section 6 (1) (c) of the Prevention of Corruption Act, 1947 to prosecute the respondent.

The trial Judge held that as the Chief Commissioner appointed the respondent as Food Inspector under Ext. D-8 notification, the sanction should have been given by the Chief Commissioner and not by P. W. 13 (Rabindra Kumar Ghosh). Under section 292 of the repealed Tripura Municipal Act the Minister concerned had the power to supersede Municipal Commissioners in case of their incompetency, default or abuse of powers. Section 293 of the said Act laid down a number of consequences which followed the order of supersession and empowered the

Minister to exercise the powers of the Chairman and the Councillors of the Municipality. The corresponding sections are sections 553 and 554 in the Bengal Municipal Act, 1932. Under section 553 the State Government has the right to supersede the Commissioners under the circumstances mentioned therein. Section 554 lays down that all the powers and duties of the Chairman and the Commissioners may be exercised by such person as the State Government may direct.

In the present case, the Chief Commissioner representing the Union Territory of Agartala appointed the District Magistrate, Tripura as the Administrator of Agartala Municipality. So, the latter was competent to exercise all the powers of the Chairman and the Councillors of the superseded Municipality. Under S. 66 of the Bengal Municipal Act the Administrator appointed by the Chief Commissioner had the power to appoint the respondent as Sanitary Inspector. Under section 9 of the Prevention of Food Adulteration Act the Central Government or the local Government can appoint a Food Inspector by notification in the official gazette if the qualifications of the Food Inspector as laid down in rule 8 of the Prevention of Food Adulteration Rules, 1955 are satisfied. This is only in the nature of delegation of power to a Sanitary Inspector. Under section 15 of the General Clauses Act Sanitary Inspectors would be deemed to be a class of officers generally by their official title in the sense in which it was used in section 39 of the Cr. P. C. As such, Sanitary Inspectors can be appointed by virtue of their office and it is not necessary that their appointments should be made by their names. Vide note 8 at page 49 of Prevention of Food Adulteration Act and Rules by H. B. Shrivastava, 1965 edition and also Public Prosecutor (AP) v. N. Srirambhadrappa, 1960 Cr LJ 569 = (AIR 1960 Andh Pra 282). So, the respondent was appointed as Food Inspector by virtue of his office as Sanitary Inspector and as such P. W. 13 (Rabindra Kumar Ghosh) could be said to be competent to give the sanction.

21. The learned Counsel for the respondent contended that under section 67 of the Bengal Municipal Act the State Government may require the Commissioners of any Municipality to appoint an executive officer, a Secretary, an Engineer, a Health Officer and one or more Sanitary Inspectors, that under sub-section (5) of section 67 they can be removed subject to confirmation by the Government, but that under S. 544 of the said Act, the State Government can delegate to the District Magistrate any of the powers vested in the State

Government except those under Ss. 6, 8, 13, 15, 17, 67, 135 second proviso, 285, 548, 549, 550, 552 and 553 of the Act, that thus the State Government has no power to delegate its authority under S. 67 of the Act to the Commissioners and that, therefore, P. W. 13 (Rabindra Kumar Ghosh) had no power to appoint the respondent as Sanitary Inspector. Section 67 of the Act empowers the State Government (if it so desires) to call upon the Commissioners of any Municipality to appoint the officers mentioned therein.

But, the Chairman of the Municipality and P. W. 13 (Rabindra Kumar Ghosh) who stepped into his shoes could validly appoint the respondent as Sanitary Inspector under section 66 of the Act. The provisions of Sections 66 and 67 of the Act are mutually exclusive. The mere delegation of powers to the respondent to be exercised as Food Inspector does not take away the power of the respondent to dismiss him. As can be seen from Mahesh Prasad v. State of Uttar Pradesh, AIR 1955 SC 70 it is enough that the removing authority is of the same rank or grade as the authority who has appointed the public servant. So, I do not think that the sanction Ext. P-13 given by P. W. 13 (Rabindra Kumar Ghosh) is illegal.

22. The trial Judge again held that P. W. 13 (Rabindra Kumar Ghosh) did not peruse all the documents and give his sanction and that, therefore, Ext. P-13 is not a valid sanction. In Gokulchand Dwarkadas v. The King, AIR 1948 PC 82 and Jaswant Singh v. State of Punjab AIR 1958 SC 124 it was held that the papers must be studied properly by the competent authority before the sanction is granted. The evidence of P. W. 13 (Rabindra Kumar Ghosh) in the cross-examination shows that all the statements recorded by P. W. 17 (Santi Ranjan Bardhan) were placed before him, that he perused all the relevant records and that he gave the sanction. There is no reason for disbelieving him.

23. At any rate, the question of validity of sanction need not be pursued at length in view of my finding that the prosecution did not make out its case against the respondent. I find point (II) in the affirmative.

24. In the result, the appeal fails and is accordingly dismissed.

Appeal dismissed.

AIR 1970 TRIPURA 10 (V 57 C 2)

C. JAGANNADHACHARYULU, J. C.

Lalit Mohan Deb and others, Petitioners v Union of India through the Secy. to the Govt. of India, Ministry of Home Affairs, New Delhi, and others, Respondents

Writ Petn. No. 3 of 1967, D/- 11-11-1968

(A) Constitution of India, Arts. 14, 16, 309—Tripura Employees' (Revision of Pay and Allowances) Rules, 1963 Sch. I, Serial No. 7 — Selection of Assistants on seniority-cum-merit basis to selection grade, after qualifying examination — Rules not laying down principles of selection — Selection made on basis of executive instructions — Not violative of Arts. 14 and 16 — (Tripura Employees' (Revision of Pay and Allowances) Rules, 1963, Sch. I, Serial No. 7).

While Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. Article 14 condemns discrimination not only by a substantive law but also by a law of procedure, AIR 1953 SC 538 Relied on.

(Para 14)

Clauses (1) and (2) of Article 16 give effect to the equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Art. 15 (1) of the Constitution of India. The three provisions form part of the same constitutional code of guarantees and supplement one another. Article 16 (2) prohibits discrimination and thus assures the effective enforcement of the fundamental right of equality of opportunity guaranteed by Article 16 (1). AIR 1962 SC 36 Relied on.

(Para 14)

Persons doing the same kind of work are not bound to get the same scales of pay and in one cadre there can be different scales of pay. The abstract doctrine of equal pay for equal work has nothing to do with Article 14 of the Constitution. AIR 1968 SC 349 and AIR 1962

SC 1139 and AIR 1963 SC 913 Relied on.

(Para 17)

Article 16 is only an instance of the application of the general rule of equality laid down in Article 14 and it should be construed as such. (Para 17)

There is no denial of equality of opportunity unless the person, who complains of discrimination, is equally situated with the person or persons who are alleged to have been favoured. Article 16 (1) does not bar a reasonable classification of employees or reasonable tests for their selection. The provisions of Art. 14 or Article 16 do not exclude the laying down of selective tests, nor do they preclude the Government from laying down qualifications for the post in question. Such qualifications need not be only technical, but they can also be general qualifications relating to the suitability of the candidate for public service as such. (Para 17)

The reservation of 25% of the Assistants in the Civil Secretariat of Tripura State under the category of "selection grade" posts with higher pay is in pursuance of the recommendation of Pay Committee is not liable to be struck down as contravening the provisions of Arts. 14 and 16 of the Constitution of India, when selection is made on the basis of merit cum seniority, after qualifying examination, even though there is no indication in the Tripura Employees' (Revision of Pay and Allowances) Rules, 1963, made under Art 309, to show how the selection would be made.

In effect the "selection grade" Assistants stand on a par with the category of "Upper Division Assistants" in West Bengal, while the remaining Assistants stand on a par with Lower Division Assistants in West Bengal.

(Para 16)

No employee has any right to promotion as a matter of right and the Government can determine the suitability of a person for promotion. Case law Ref.

(Para 16)

The Government can appoint a Committee like the departmental promotion committee for obtaining its views about the candidates who are eligible to be promoted. AIR 1965 Ker 233 Ref.

(Para 16)

In matters of appointment and promotion no rules regarding the same need be shown before the Government exercises its executive powers. The rules usually take a long time to make, various authorities have to be consulted and it cannot be the intention to halt the working of the public departments till the rules were framed. It cannot be said that till the statutory rules governing promotion to the selection grade posts were framed, the Government cannot

Issue administrative instructions regarding the principles to be followed and if the cases of all the eligible candidates were considered before appointment to such posts, there would be no violation of Articles 14 and 16 of the Constitution. AIR 1967 SC 1910 and AIR 1966 SC 1942 Relied on. (Para 16)

The Government however, would have been well advised if they separated 25% posts out of 101 posts of the Assistants and designated them as "Upper Division Assistants" carrying higher scale of pay. The Government should have made a separate classification in serial no. 7 in schedule I of Tripura Employees' (Revision of Pay and Allowances) Rules of 1963 by separating Upper Division Assistants from Lower Division Assistants and mentioning the number of their posts and their separate scales of pay instead of creating a confusion by adding "25% of the posts" with a separate scale of pay. But, this is not violative of the provisions of Articles 14 and 15 of the Constitution of India. The Government of the Union Territory has the executive power to lay down separately the principles for the selection of the Assistants for the selection grade posts. So, that portion of classification as "25% of the posts" in serial no. 7 in schedule I of the Tripura Employees' (Revision of Pay and Allowances) Rules of 1963 cannot be struck down on the ground that the said rules themselves do not indicate the method in which the "25% of the posts" should be filled up. (Para 13)

(B) Constitution of India, Art. 226 — Matter not pleaded in writ petition — Question need not be decided, though a plea raised in the affidavit-in-rejoinder for the first time may also be considered. AIR 1964 All 356 and AIR 1965 SC 1578 and AIR 1964 SC 72 Ref. (Para 22)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 346 (V 55) = 15
- (1968) 1 SCR 349, State of Mysore v. S. R. Jayaram
- (1968) AIR 1968 SC 349 (V 55) = 17
- (1968) 1 SCR 407, State of Mysore v. Narasinga Rao
- (1968) AIR 1968 SC 1053 (V 55) = 19
- (1968) 3 SCR 489, State of Madhya Pradesh v. Ranojirao Shinde
- (1968) AIR 1968 Andh Pra 129 (V 55) = 1967-1 Andh LT 317, Koteswararao v. State of Andhra Pradesh
- (1968) AIR 1968 Cal 35 (V 55) = 16
- (1969) 1 Lab LJ 45, Arun Kumar Bhattacharjee v. State of West Bengal
- (1968) AIR 1968 Punj 337 (V 55) = 15
- 69 Pun LR 960, Punjab State v. Lekh Raj Bowry
- (1967) AIR 1967 SC 691 (V 54) = 15
- (1967) 1 SCR 15, Jalan Trading

- Co. Private Ltd. v. Mill Mazdoor Sabha 19
- (1967) AIR 1967 SC 829 (V 54) = 15
- (1967) 1 SCR 1012, Hari Chand v. Mizo District Council
- (1967) AIR 1967 SC 1110 (V 54) = 19
- (1967) 1 SCR 602, Gulabbhai Vallabbhai v. Union of India
- (1967) AIR 1967 SC 1889 (V 54) = 15
- Writ Petn. No. 154 of 1966 D/- 14-8-1967, Roshal Lal Tandon v. Union of India
- (1967) AIR 1967 SC 1910 (V 54) = 16
- (1968) 1 SCR 111, Sant Ram Sharma v. State of Rajasthan
- (1966) AIR 1966 SC 1942 (V 53) = 16
- (1966) 3 SCR 682, B. N. Nagarajan v. State of Mysore
- (1965) AIR 1965 SC 1293 (V 52) = 15
- (1965) 1 SCR 360, Channabasavaih v. State of Mysore
- (1965) AIR 1965 SC 1578 (V 52) = 20
- (1965) 3 SCR 17, Sri Subramania Desika Gnanasambanda Pandara Sannidi v. State of Madras
- (1965) AIR 1965 Ker 233 (V 52) = 16
- 1965 Ker LT 370, K. N. Thankam v. State of Kerala
- (1964) AIR 1964 SC 72 (V 51) = 20
- (1965) 1 SCA 259, Partap Singh v. State of Punjab
- (1964) AIR 1964 SC 600 (V 51) = 15
- (1964) 5 SCR 683, Moti Ram Deka v. General Manager, North East Frontier Rly.
- (1964) AIR 1964 SC 1515 (V 51) = 15
- (1964) 1 SCWR 580, Krishna-swami Naidu v. State of Madras
- (1964) AIR 1964 All 356 (V 51) = 20
- Vidya Sagar v. Board of Revenue U. P. Lucknow
- (1964) Civil Rule No. 253 (W) of 1962 D/- 28-9-1964 = 15
- (1966) 2 Lab LJ 277 (Cal), Aswini Kumar v. Director of Public Instructions Govt. of West Bengal
- (1963) AIR 1963 SC 268 (V 50) = 15
- (1963) 1 SCR 707, J. Panduranga-rao v. Andhra Pradesh Public Service Commission, Hyderabad
- (1963) AIR 1963 SC 913 (V 50) = 17
- (1963) Supp 2 SCR 169, State of Punjab v. Joginder Singh
- (1963) AIR 1963 Mys 219 (V 50) = 16
- M. A. Moqem v. State of Mysore
- (1962) AIR 1962 SC 36 (V 49) = 14
- (1962) 2 SCR 586, General Manager Southern Rly. v. Rangachari
- (1962) AIR 1962 SC 386 (V 49) = 15
- (1962) 3 SCR 936, Mannalal Jain v. State of Assam
- (1962) AIR 1962 SC 723 (V 49) = 15
- (1962) Supp (1) SCR 829, Karimbil Kunhikoman v. State of Kerala
- (1962) AIR 1962 SC 1139 (V 49) = 17
- (1962) 44 ITR 532, Kishori Mohan-lal v. Union of India

- (1962) AIR 1962 SC 1704 (V 49)=
 (1963) 1 SCR 437, High Court,
 Calcutta v. Amal Kumar 16
 (1961) AIR 1961 Mys 247 (V 48)=
 Rudraradhya v. State of Mysore 16
 (1958) AIR 1958 SC 538 (V 45)=
 1959 SCR 279, Ram Krishna Dal-
 mia v. Justice S. R. Tendolkar 14

S. N. Bose, N. C. Saha, B. C. Dev
 Barma and M. K. Dutta, for Petitioners;
 H. C. Nath, Govt. Advocate, J. K. Roy
 and B. B. Gupta, for Respondents.

ORDER: The petitioners, who are work-
 ing as Assistants in the Civil Secretariat,
 Tripura Administration in Agartala,
 obtained a rule nisi from this court under
 Article 226 of the Constitution of India
 against the respondents 1 to 3 namely,
 (i) Union of India through the Secre-
 tary to the Government of India,
 Ministry of Home Affairs, New Delhi,
 (ii) The Government of Tripura through
 the Chief Secretary, Agartala and
 (iii) The Chief Secretary, Govern-
 ment of Tripura, Agartala and the
 respondents 4 to 20, who are working
 now as Assistants in the Selection Grade
 in the Civil Secretariat, Tripura Admi-
 nistration in Agartala to show cause why
 a Writ of Mandamus should not be issued
 commanding the authorities concern-
 ed namely, the respondents 1 to 3 to
 cancel the revised scale of pay under
 Tripura Employees' (Revision of Pay and
 Allowances) Rules of 1963 providing for
 enhanced scale of pay for 25 per cent of
 the posts of Assistants under Selection
 Grade and also to revise the pay scale
 of the petitioners viz Rs. 150-5-195-EB-
 5-250/- by bringing it in conformity with
 the pay scale of the respondents 4 to 20
 in the Selection Grade at Rs. 225-10-325-
 15-475/-.

2. The respondents showed cause
 against the rule nisi.

3. The petitioners are working as
 Assistants in the Civil Secretariat, Tri-
 pura Administration in Agartala. After
 the integration of the Territory of Tri-
 pura with the Union of India on 15-10-
 1949, reorganisation of the administrative
 set up of Tripura was introduced in 1953
 with retrospective effect from 1-4-1950.
 The Civil Secretariat staff was given the
 scale of pay as under:

Name of post.	Scale of pay.
1. Head Assistants	Rs. 200-10-300/-
2. Assistants	Rs. 80-4-160-5-180/-
3. Clerks.	Rs. 55-3-118-4-130/-

4. The Government of India set up a
 Commission of Enquiry in 1957 on emolu-
 ments and conditions of service of Cen-
 tral Government employees. It also con-
 sidered the principles to be followed in
 fixing up the scales of the Central Gov-
 ernment employees of the Union Terri-

ories. The Tripura Administration Pay
 Committee submitted its report. In para 7
 of the report, Volume I, the Pay Com-
 mittee stated that the scales of pay and
 allowances in Tripura might be revised
 on the basis of those under the West
 Bengal Government and that a further
 revision might be made if and when
 necessary in the light of the recommenda-
 tions of the West Bengal Pay Committee
 and the decisions of the Government of
 that State on the same. In para 10 (v)
 the Pay Committee stated that consider-
 ing that the service cadres in Tripura
 were relatively much smaller, it would
 be necessary to make some special
 arrangements for providing adequate ave-
 nues of promotion and that for that pur-
 pose it suggested that selection grades
 might be sanctioned wherever the num-
 ber of employees in a particular grade or
 scale was fairly large and the chances of
 promotion to the next higher post were
 limited. As can be seen from page 20 of
 the report, the Pay Committee suggest-
 ed introduction of a "selection grade" for
 the Assistants working in the Secretariat.
 It stated that the then pay scale of all
 the Assistants in the Secretariat was
 Rs. 80-4-160-5-180/-, while the pay scale
 under the West Bengal Government was
 Rs. 150-10-370-15-400/- for Upper Division
 Assistants and Rs. 80-4-160-5-180/-
 for Lower Division Assistants, that the
 pay scale in the Secretariat in Tripura
 was extremely low, that the Assistants of
 the Secretariat did not have sufficient
 chances of promotion, that, due to want
 of selection grade, the Assistants of the
 Secretariat were always on the look out
 for better jobs and that experienced
 Assistants were drifting away resulting
 in weakening of the Secretariat establish-
 ment. So, to improve the situation, the
 Pay Committee recommended the intro-
 duction of a "selection grade" for the
 Assistants. It suggested that at least 25
 per cent of the posts of Assistants should
 carry the higher scale of Rs. 150-10-370-
 15-400/- and that the selection grade
 might be given to the Assistants on the
 basis of seniority-cum-merit.

5. In pursuance of the recommenda-
 tion of the Pay Committee, the Govern-
 ment of India decided to revise the pay
 scales of the Tripura employees in ac-
 cordance with those in West Bengal for
 equivalent posts. Vide Ext. A-1 letter of
 the Government of India, Ministry of
 Home Affairs dated 31-1-1961. The Gov-
 ernment of India stated therein that the
 pay scales in Manipur and Tripura should
 conform as far as possible to the pay
 scales obtaining in Assam and West Ben-
 gal respectively for equivalent posts. Ext.
 A-2 shows that in West Bengal Secre-
 tariat there are five categories of
 posts namely, Senior Head Assistants,

Junior Head Assistants, Upper Division Assistants, Lower Division Assistants and Typists. So far as the Assistants are concerned, they are thus in two categories designated as Upper Division Assistants and Lower Division Assistants. The following are their pay scales, as revised from time to time.

Designation.	Pre-1931 scale.	Post-1931 scale.	Revised scale in 1950.	Revised scale in 1961.
Upper Division Assistant.	125-400/-	115-350/-	150-400/-	225-475/-
L. D. Assistant	60-150/- with selection grade 175-200/-	60-130/- with selection grade 150-175/-	80-180/- No selection grade.	150-250/- No selection grade.

6. In pursuance of the decision of the Government of India contained in Ext. A-1 the pay scales of Class III employees

in the Civil Secretariat, Tripura were revised with effect from 1-7-1959 as follows:

Sl. No.	Name of the post-	Existing scale of pay.	Revised scale of pay (w.e.f. 1-7-59),	Remarks.
1.	Head Assistant (16 posts)	Rs. 200-10-300/-	Rs. 150-400-plus special pay of Rs. 60/- p. m.	To be redesignated as Superintendent.
2.	Assistant (101 posts)	Rs. 80-180/-	(i) Rs. 150-10-300/- (for 25% posts) (ii) Rs. 80-180/- (for others).	Selection Grade.
3.	Clerks (75 posts)	Rs. 55-130/-	No Revision.	

7. By a notification dated 4-2-1964 the Government of India promulgated Tripura Employees' (Revision of Pay and Allowances) Rules of 1963 in exercise of the powers conferred by the proviso to Article 309 of the Constitution, which came into force with retrospective effect from 1-4-1961. Pages 13 and 14 of the printed Rules relate to the Secretariat Department. The pay of the Superintendent was revised from Rs. 150-400/- with special pay of Rs. 60/- into Rs. 225-10-315-EB-10-325-15-475/- with special pay of Rs. 60/- per mensem. The pay of Assistants and Accountants was revised from Rs. 80-180/- into Rs. 150-5-195-EB-5-250/- and the pay of the selection grade Assistants for 25% of the posts was revised from Rs. 150-10-300/- into Rs. 225-10-325-15-475/-.

8. The petitioners plead that distinction and discrimination were made by the above revisions among the Assistants by classifying 75% of them as "Assistants" and 25% as "Assistants in selection grade", and by giving the latter higher scale of pay though they perform similar work and are placed in the same cadre, that the revision does not conform to the pay scales obtaining in West Bengal and that the impugned revisions are hit by Articles 14 and 16 of the Constitution of India.

9. The petitioners represented their case in the Staff Committee meetings held on 20-11-1961, 15-2-1962, 20-5-1963,

4-3-1964. Vide Exts. A-3, A-14, A-15, A-16 and A-17. They also made several representations to the higher authorities as can be seen from Ext. A-4 letter of the Under Secretary to the Government of Tripura to the first petitioner and the subsequent notice of demand for justice dated 15-3-1967 (vide Ext. A-5) requesting the Government to revise their pay scale, so that it might be on par with that existing in West Bengal Secretariat. Hence the petition.

10. The respondents 1 to 3 filed counter stating that the letter of the Government of India contained in Ext. A-1 shows that the pay scales in Tripura should be "as far as possible" in accordance with those in West Bengal, that the expression "as far as possible" is of special significance, that the scales of Tripura might vary from those in West Bengal in suitable cases and that the Secretariat Assistants in Tripura were equated with the Lower Division Assistants in West Bengal. The respondents 1 to 3 created a selection grade with higher pay for 25 per cent of the Assistants in the same post to provide better scale for seniors having merit, who may not get a chance of promotion on account of paucity of promotion posts and stagnate on the maximum pay on the scale. The corresponding posts in West Bengal are under the category of West Bengal Assistants. The basis for selection of some of the Assistants to the higher scale is seniority-cum-merit as

envisaged at Pages 7 and 20 of Volume I of the report of the Tripura Administration Pay Committee. The object of introducing the classification is to prevent the weakening of the Secretariat establishment and to improve the situation by retaining the Assistants with higher pay scale and the differentia was sought to be achieved by the statutory rules.

11. The other respondents 4 to 20 did not file any counter.

12. The point, which arises for determination on the basis of the pleadings, is whether reservation of 25% of the Assistants in the Civil Secretariat under the category of "selection grade" posts with higher pay is liable to be struck down as contravening the provisions of Articles 14 and 16 of the Constitution of India.

13. The main contention of the learned Counsel for the petitioners is that the reservation of 25% of the posts among the Assistants under the category of selection grade posts is arbitrary, that there is no indication in the Tripura Employees' (Revision of Pay and Allowances) Rules, 1963 to show how the selection would be made, that discrimination is made among the Assistants of the same cadre by dividing them into two categories, though they perform the same kind of work and duties and that, therefore, the reservation of 25% of the posts has to be struck down as offending against the provisions of Articles 14 and 16 of the Constitution of India.

Before dealing with the various rulings relied on by the learned Counsel for both the sides, it will be useful to mention here itself that the Government of Tripura appointed a departmental promotion committee, which would recommend appointment of the Assistants to the selection grade on the basis of seniority-merit. The Assistants are required to appear in a qualifying test and answer two papers viz (i) in general English including precis writing, noting and drafting and (ii) office procedure, rules and regulations which government servants generally are supposed to be conversant with. The written papers carry 100 marks each. The qualifying marks are one-third of the aggregate. After the written examination is held, those who qualify themselves are required to appear for interview before the departmental promotion committee. Such of the Assistants, who are considered by the Committee to be fit for selection grade, would be put on a panel. Selection grade is given to the Assistants in the order of their seniority. Vide Ext. B-5 copy of the note of the Chief Secretary dated 29-8-1961 and Ext. B-6 memorandum incorporating the principles of selection. According to the res-

pondents, the respondents 4 to 20 and some others, who were not made parties to the writ petition, were appointed in accordance with the memorandum contained in Ext. B-6. So, there are separate executive instructions for preparing a panel of the Assistants in the selection grade with higher pay.

14. Article 14 of the Constitution of India relates to the equality of the citizens before the law. The scope of Article 14 of the Constitution of India was indicated in *Ram Krishna Dalmia v. Justice S R Tendolkar*, AIR 1958 SC 533. At page 547 it is stated that it is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration.

It is also well established by the decisions of the Courts that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.

Article 16 of the Constitution of India relates to the equality of opportunity for all the citizens in matters relating to employment or appointment to any office under the State. The scope of Art. 16 of the Constitution of India was laid down in *General Manager, Southern Railway v. Rangachari*, AIR 1962 SC 36. Clauses (1) and (2) of Article 16 give effect to the equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15 (1) of the Constitution of India. The three provisions form part of the same constitutional code of guarantees and supplement one another. Article 16 (2) prohibits discrimination and thus assures the effective enforcement of the fundamental right of equality of opportunity guaranteed by Article 16 (1).

15. The learned Counsel for the petitioners relied on a number of rulings, where discrimination was held to have been made out.

In *Mannalal Jain v. State of Assam*, AIR 1962 SC 386 the question was whether the State authority could grant a license under Assam Food Grains

(Licensing and Control) Order of 1961 only to a co-operative society and not to others. It was held that Clause (5) (e) of the Order entitling the State authority to grant a license to a co-operative society proceeded on the footing that a monopoly should be created in favour of co-operative societies and that, therefore, there was a discrimination as against a non-co-operative society. It was further held that if the preference had a reasonable relation to the objects of the legislation set out in Section 3 of the Essential Commodities Act, then sub-clause (e) of Clause 5 of the Assam Food Grains (Licensing and Control) Order of 1961 could not be held to be bad on the ground of class legislation, but that the passing of an order under the sub-clause on the footing of creating a monopoly in favour of a co-operative society for a purpose not contemplated by it would amount to discrimination and denial of the guarantee of equal protection of the law.

In *Karimbil Kunhikoman v. State of Kerala*, AIR 1962 SC 723 the question was whether sections 52 and 64 of Kerala Agrarian Relations Act (Act IV of 1961) violated Article 14 of the Constitution. The object of the Act was to work out the purchase price or the market value first for the purpose of determining compensation and then make different cuts from the purchase price or the market value according to the question whether in one case the purchase price or the market value was Rs. 15,000/- and in another case more than that amount. It was held that there was no reason why when two persons were deprived of their property, one richer than the other, they should be paid at different rates when the property, of which they were deprived, was of the same kind and differed only in extent.

In *J. Pandurangarao v. Andhra Pradesh Public Service Commission*, Hyderabad, AIR 1963 SC 268, it was held that in testing the validity of any rules, the Court has to consider the true scope and effect of the impugned rule itself, that the decision of the question would have to be confined to the relevant considerations in respect of the said rule and no more and that it is not an acceptable argument that the impugned rule cannot and need not be considered by itself, but that it must be treated as a part of a bigger scheme of rules. In that case, rule 12 (h) in the rules framed by the Governor of Andhra Pradesh for recruitment to the post of a District Munsiff required that the applicant must be practising as an Advocate of the High Court. It was held that the expression "High Court" in the context meant the Andhra Pradesh High Court and not any High Court in India, that the rule introduced

a classification between one class of Advocates and the rest and that the said classification was irrational inasmuch as there was no nexus between the basis of the said classification and the object intended to be achieved by the relevant scheme of rules. It was, therefore, held that rule 12 (h) was unconstitutional and ultra vires. This decision was cited by the learned Counsel for the petitioners to show that the Rule, which is challenged, must itself show the rationale behind it.

In *Moti Ram Deka v. General Manager, North East Frontier Railway*, AIR 1964 SC 600 there was discrimination in regard to termination of service of railway servants by notice under the Railway Establishment Code without any rational basis between the railway servants and the other public servants. There was no guiding principle for exercising the discretion and the rules were held invalid.

In *Krishnaswami Naidu v. State of Madras*, AIR 1964 SC 1515, section 5 (1) of the Madras Land Reforms (Fixation of Ceiling on Land) Act (Act 58 of 1961) fixed a double standard for the purpose of ceiling, which resulted in discrimination between persons equally circumstanced. It was held that section 5 (1) of the Act was violative of the fundamental right enshrined in Article 14 of the Constitution.

In *Aswini Kumar v. Director of Public Instructions, Government of West Bengal*, Writ Petn. in Civil Rule No. 253 (W) of 1962 decided by the Calcutta High Court on 28-9-1964 (Cal) the petitioners, who were all graduates, were deputed to the same grade and rank of Sub-Inspectors of Schools with the same pay scale along with others, who were M. As. and Honours graduates irrespective of any difference in their individual qualifications. They formed a single unit of employment. Subsequently, the Government of West Bengal introduced different scales of pay with retrospective effect for graduates on one hand and for others holding Master degrees or Honours degrees, whose scale of pay was more than the scale of pay of the graduates. It was held that the subsequent differential treatment on the basis of qualification in the matter of pay as between members of the same unit was violative of Article 16 (1) of the Constitution.

In *C. Channabasavai v. State of Mysore*, AIR 1965 SC 1293 there was a foot-note to sub-rule (3) of Rule 4 of the Mysore Public Service Commission (Functions) Rules, 1957, which read that nothing contained in the rules precluded the Commission from considering the case of any candidate possessing the pres-

cribed qualifications brought to its notice by the Government, even if such a candidate did not apply in response to the advertisement of the Commission. Some of the candidates selected under sub-rule (3) had already appeared at the viva-voce test and some of them obtained very poor marks. It was held that their selection under the sub-rule by virtue of the foot-note could not be justified on the ground that the candidates belonged to the backward classes and some to scheduled castes and that such a dealing with public appointments was likely to create a feeling of distrust in the working of the Public Service Commission.

In *Roshal Lal Tandon v Union of India* (Writ Petn No 154 of 1966 on the file of the Supreme Court disposed of on 14-8 1967 = (AIR 1967 SC 1889) at the time when the petitioner and other direct recruits were appointed to grade 'D' of the posts of trained examiners, there was only one class in grade 'D' formed of direct recruits and the promotees from the grade of artisans. The recruits from both the sources to grade 'D' were integrated into one class. It was held that no discrimination, could, therefore, be made in favour of recruits from one source against the recruits from the other source in the matter of promotion to grade 'C'.

In *Hari Chand v Mizo District Council*, AIR 1967 SC 829 it was held that section 3 of the Lushai Hills District (Trading by non-Tribals) Regulation (2 of 1953) which left to the licensing authority unrestricted power in the matter of granting or refusing license or its renewal to non-tribal traders was violative of Article 19 (1) (g) of the Constitution.

In *K. Koteswararao v. State of Andhra Pradesh*, AIR 1968 Andh Pra 129 prior to 1954 the work of prohibition enforcement was attended to by regular police force in some districts and by separate Prohibition Departments in other districts. In 1956 the Prohibition Department was abolished and the work was entrusted entirely to the Police Department. In 1960 the work was again taken away from the Police Department and was entrusted to a new department called Excise and Prohibition Department. In 1965 the new department was again sought to be reorganised. The Board of Revenue prepared final list of persons to be retained in the new set up. It was held that the delegation of work of preparing final list of officers to be retained in the new set up was bad in law for want of any guidance and that, when something had to be done within the discretion of any authority, it should be done according to the rules of reason and justice and not according to the personal

opinion of the officer concerned or somebody else and that it should not be arbitrary and vague.

In *Punjab State v. Lekh Raj Bowry*, AIR 1968 Punj 337 Vaidyas and Hakims were integrated into a single cadre in the United Punjab in the State Service Class III (Technical) on the same scale of pay with the same duties. After the Punjab Ayurvedic Department Class III (Technical) Service Rules, 1963 were framed by the Governor, they continued to be treated on an equal footing. But, in 1964 the Government notified that the revised scale of pay mentioned therein would be admissible to Vaidyas and Hakims who held 5 years degree and not to those who held 3 or 4 years degree. It was held that some members of the unified cadre could not be treated dissimilarly as against others of the same cadre in the matter of their pay and other relevant conditions of service on the ground that some of them possessed higher or better qualifications.

In *State of Mysore v. S. R. Jayaram*, AIR 1968 SC 346, the last part of R. 9 (2) of the Mysore Recruitment of Gazetted Probationers' Rules of 1959 reserved to the Government the right of appointment to any particular cadre any candidate whom it considered more suitable for such cadre. But, the rules were silent on the question as to how the Government was to find out the suitability of a candidate for a particular cadre. The Rules did not give the Public Service Commission the power to test the suitability of a candidate for a particular cadre or to recommend that he was more suitable for it. Nor was there any provision in the Rules under which the Government could test the suitability of a candidate for any cadre after the result of the examination was published. It was held that the recommendation of the Public Service Commission became an irrelevant material, that the Government could do whatever it liked and therefore, the last part of Rule 9 (2) of the Rules was liable to be struck down as violative of Articles 14 and 16 (1) of the Constitution.

16. Now, it has to be noted that in West Bengal there are two grades among the Assistants as can be seen from Ext. A-2. They are divided into Upper Division Assistants with higher scale of pay and Lower Division Assistants with less scale of pay. In Tripura, no such classification was made among the Assistants. 25% of the total number of posts of Assistants were reserved for what is called as "selection grade" posts with higher scale of pay. So, in effect the "selection grade" Assistants stand on a par with the "Upper Division Assistants".

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